

**IN THE UNITED STATE DISTRICT COURT
DISTRICT OF ARIZONA
CASE NO. 00 – CV – 00067**

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| PEG BALL, et al. | * |
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| PLAINTIFFS | * |
| | * |
| v. | * |
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| ANTHONY D. RODGERS, DIRECTOR OF THE ARIZONA HEALTH CARE COST CONTAINMENT SYSTEM, et al. | * |
| | * |
| DEFENDANTS | * |

Settlement Agreement and Release

This Settlement Agreement and Release is entered by and between Plaintiffs Peg Ball, James Cree, a minor person by and through his grandfather and guardian Bennie James, Jeanne Spinka, Vinnetta Graham, Colin Phelan, a minor person by and through his mother Kim Bowman, Judith Hinton, Virginia Haskell, as individuals and as representatives of a class of persons similarly situated, and Defendants, Anthony D. Rodgers, Director of the Arizona Health Care Cost Containment System (AHCCCS), the Arizona Health Care Cost Containment System Administration and the State of Arizona.

RECITALS

Plaintiffs instituted this litigation in the United States District Court for the District of Arizona (District Court or Court), in 2000. The suit alleges AHCCCS's home and community based services (HCBS) program violates portions of the Medicaid Act, the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act (§ 504). A bench trial in 2003 before the District Court resulted in a ruling favoring the Plaintiffs. The Court held that AHCCCS violated the "equal access" Medicaid provision 42 U.S.C. §1396a(30)A, in permitting "gaps" in scheduled services. It entered an injunction requiring AHCCCS to monitor "gaps" in services and to fill those "gaps".

Defendants appealed the District Court's ruling to the Ninth Circuit Court of Appeals, and in 2007, the Ninth Circuit ruled that, based on the Circuit Court's intervening ruling in *Sanchez v. Johnson*, 416 F. 3d 1051 (2005), Plaintiffs had no private

right of action to enforce 42 U.S. C. 1396a(30)A. The Circuit Court left for determination on remand whether Plaintiffs' proof under the ADA, §504 and 42 U.S.C. § 1396n(c)(2)(C) and (d)(2)(C), (freedom of choice), would support the injunction that had been entered.

In 2009, the District Court, relying on evidence produced at trial, concluded that the Defendants had violated 42 U.S.C. §1396n(c)(2)(C) and (d)(2)(C), the "freedom of choice" provisions of the Medicaid Act, the Americans with Disabilities Act, and the Rehabilitation Act. The District Court amended the injunction to remove reference to the equal access provision, 42 U.S. C. §1396a(30)A, but otherwise left its injunction in place. Defendants appealed the District Court's 2009 ruling to the Ninth Circuit Court of Appeals in case number 09-16022. A subsequent appeal of additional District Court orders was filed in case number 10-16187. The issues on appeal were briefed, and oral argument in both cases was conducted in December 2010.

The three judge panel of the Ninth Circuit Court of Appeals withheld its ruling on the issues in the case pending exploration by the parties of a mediated settlement of their differences. Ninth Circuit Mediator Margaret A. Corrigan contacted the parties' representatives, and extensive discussions were facilitated between the representatives. These discussions led to the agreement expressed in this Settlement Agreement and Release. While neither Plaintiffs nor Defendants concede the legal positions of the other side of the dispute, both Plaintiffs and Defendants wish to avoid the expense and inconvenience of continuing the litigation. The parties desire, pursuant to the terms of this Settlement Agreement and Release, to permanently settle and compromise any and all claims which were or might have been asserted in the litigation.

AGREEMENTS

1. The District Court's orders which are incorporated in this agreement as if fully set forth, require the Defendants to provide each individual who qualifies ("qualified individual"), with those critical services for which the individual qualifies without gaps in the delivery of those services. The orders define critical services as underlying personal care services such as bathing, toileting, dressing, feeding, transferring to or from beds or wheelchairs and assistance with other similar daily activities. They define a gap in critical services as the difference between the number of hours of home care worker critical service scheduled in each qualified individual's HCBS care plan and the hours of the scheduled type of critical service that are actually delivered to the qualified individual. The District Court's orders require the Defendants to finalize a system for providing home care services to individuals eligible for Home and Community Based Services (HCBS) under the Arizona Long Term Care System without gaps in critical services.
2. The District Court's orders require the Defendants' contracts with Program Contractors to provide each qualified individual with critical services without gaps in the delivery of those services. They require correction of unforeseeable gaps as

quickly as possible, at least within two hours. They require Program Contractors to have back-up staffing available on-call to substitute for those times when an unforeseeable gap occurs. They forbid reduction of qualified individuals' other scheduled HCBS services because the cost of correcting a gap in critical services may exceed the cost of the service in which the gap occurred. They require contracts with Program Contractors to contain a provision expressly requiring Program Contractors to inform members, verbally and in writing, that they have the right to have any gaps in critical services filled within two hours and the right to have a back-up worker substitute when an unforeseen gap in critical services occurs.

3. The District Court's orders require the Defendants to develop adequate alternative or contingency plans for instances when a critical service is unable to be provided.
4. The District Court's orders require the Defendants to monitor its HCBS program so that any critical services that are not being provided can be detected in enough time to implement the alternative or contingency plan and eliminate the gap in less than two hours. As part of that monitoring requirement, Defendants are required to file annual reports concerning methods for monitoring gaps in critical services throughout the state, and are required to file a report of gaps in critical services on the first of each month. The monthly report is to include Service Logs which have been redacted to protect beneficiaries' privacy.
5. The District Court's orders require the Defendants to implement an expedited grievance process whereby each qualified individual: 1) May call a hotline and speak with a live operator to report any gap in critical services; 2) is provided with a standardized form to complete and mail to report this gap; and 3) Receives a response, via telephone or the mails, acknowledging the gap and providing a detailed explanation as to the reason for the gap and the alternative plan being created to rectify that gap and any possible future gaps. The hotline is a single toll-free telephone number that will allow individuals to report any gap in critical services. The hotline shall be staffed by live operators 24 hours a day, 7 days a week. The number is 1-800-218-7509. Case managers are to inform each member of the number.
6. The foregoing orders are expressed in Dockets Nos. 248,394, and 467, and as so expressed, are incorporated herein by reference. Plaintiffs acknowledge that Defendants have implemented the obligations placed on them by the foregoing orders of the District Court. The "Gap-in-Services Policy" which is part of the AHCCCS Contractor Operations Manual and which is attached to this Agreement as Exhibit 1, together with other changes to contracts, procedures and policies, are intended to ensure AHCCCS and Contractor compliance with the underlying orders.
7. Plaintiffs acknowledge that Defendants have monitored their compliance with the orders and have filed the required reports. Plaintiffs have accepted the methods of producing and agree that Defendants' current practice complies with the Court's order.

8. As part of this resolution, Defendants have agreed to provide to Plaintiffs an additional 24 months of reports; that is, 24 months following anticipated Court approval of the settlement and issuance of an order directing the parties to abide by the terms of this agreement. Unless the Court directs otherwise, filing the reports with the Court will end upon approval of this settlement – the reports will then be sent directly to Plaintiffs' counsel. Defendants will provide Plaintiffs' counsel with a monthly 12 month trend report that DHCM currently produces, in addition to the reports that are currently filed.
9. The parties agree that if the aggregate rate of gaps to authorized services, as shown on the monthly reports, is one-tenth of one percent (.1%) or more for two consecutive months, counsel for Plaintiffs and Defendants will meet and confer within 10 days of Plaintiffs' request to engage in good faith discussions regarding the nature of the noncompliance and efforts to remediate the problem. If the Plaintiffs are not satisfied with the Defendants' analysis and efforts following a "meet and confer", they are authorized under this Resolution to seek judicial intervention. Plaintiffs will have 30 days following the end of the 24 month period to make a request to meet and confer and to seek the District Court's judicial intervention, if warranted, based on the last two months of reports.
10. Attorneys' Fees and Costs: Defendants agree to pay Plaintiffs \$530,000.00 in attorneys' fees and costs, to be paid within 45 days of Court approval of the settlement payable to the Arizona Center for Disability Law and delivered to:
Arizona Center for Disability Law
5025 E. Washington St., Suite 202
Phoenix, AZ 85034
11. Court Approval of Settlement and Dismissal: Plaintiffs and Defendants agree to enter into a stipulation pursuant to Rule 42(b) of the Federal Rules of Appellate Procedure whereby the pending appeals will be dismissed, without prejudice, pending District Court approval of this compromise. Upon such approval, the dismissal of the appeals will become with prejudice under Fed.R.App.P. Rule 42. Failing the District Court's approval of this Agreement, the appeals will be reinstated for such further action as is warranted. Once the Court of Appeals Mandate (to issue pursuant to the dismissal of the appeals) is before the District Court, the parties agree to submit this Settlement Agreement and Release to that Court pursuant to Fed.R.Civ.P. Rule 23(e), and to support the District Court's approval thereof. The Plaintiffs and Defendants agree to effect any notice required by the District Court under Rule 23(e), and to comply with any additional orders deemed necessary by that Court in connection with this resolution.
12. Jurisdiction and Enforcement: Once the District Court approves this settlement agreement, the case in the District Court (No. CV 00-67-TUC-EHC) will be dismissed with prejudice. However, the Court will reserve and retain jurisdiction to hear issues of alleged violations of the terms of this agreement for the time frame

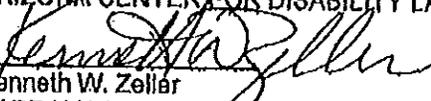
contemplated herein. If there is no judicial enforcement action as authorized hereunder, pending at the end of the 25th month following approval of the settlement (24 months plus the 30 days), the District Court's jurisdiction will end.

13. Release: Upon completion of all matters contemplated by the Settlement Agreement and any court orders in furtherance thereof, the parties fully and forever release and covenant not to sue or otherwise seek legal recourse against each other from any and all claims or liabilities of any kind or nature related to the conduct alleged in the underlying Complaint in this action that may exist at that date and time.

Signed this 29th day of March, 2012

/s/ 
Sarah Kader
J.J. Rico
ARIZONA CENTER FOR DISABILITY LAW

Signed this 29th day of March, 2012

/s/ 
Kenneth W. Zeller
AARP FOUNDATION LITIGATION
Attorneys for Plaintiffs

/s/ 
David L. Niederdepp
Paul E. Steen
RYAN RAPP & UNDERWOOD, PLC
Attorneys for Defendants

Signed this 29th day of March, 2012

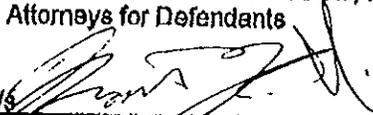
/s/ 
Matthew Devlin
ARIZONA HEALTH CARE COST
CONTAINMENT SYSTEM
Attorney for Defendants

EXHIBIT 1



413 - GAP-IN-SERVICES POLICY

Effective Date: April 1, 2007

Revision Date: July 1, 2010

Staff responsible for policy: DHCM Operations

I. Purpose

This policy applies to all Arizona Long Term Care System (ALTCS) Contractors. This policy establishes guidelines, criteria and timeframes for the responding to and reporting of gaps in critical services for ALTCS Home and Community Based (HCBS) members. This policy is based in part by the Ball vs. Betlach (Biedess) Court decision made in Federal District Court.

II. Definitions

AHCCCSA: means the Arizona Health Care Cost Containment System Administration

Arizona Long Term Care System (ALTCS) Contractor is a contracted managed care organization, that provides long term care, acute care, behavioral health, and case management services to Title XIX eligible elderly, physically or developmentally disabled individuals who are determined to be at risk of an institutional level of care.

Ball vs. Betlach (Biedess) is a Federal class action lawsuit brought against the State of Arizona and AHCCCS in 2000 alleging violations of Federal laws. The Federal District Court has ordered that AHCCCS (via its Contractors) establish a network of contracted provider agencies adequate to ensure that critical services are provided without gaps. Furthermore, the order states that unforeseeable gaps in critical services be resolved within two hours of the gap being reported. This matter is currently under appeal by AHCCCS.

Contractor means a Managed Care Organization providing health care services to acute or long term care members and / or a Prepaid Inpatient Health Plan providing behavioral health services to eligible acute care members and / or CRS related services to eligible acute or long term care members.

Critical Services are Attendant Care, Personal Care, Homemaking and Respite care.

Contingency Plan or Back-up Plan includes information about actions that the member/representative should take to report any gaps in critical services.

Gap in Service is the difference between the number of hours of home care worker critical service scheduled in each individual's HCBS care plan and the hours of the scheduled type of critical service that are actually delivered to the qualified individual.



Gap in Services Log is the form Contractors must complete on a monthly basis which records gaps in services.

Member Service Preference Level indicates how quickly the member chooses to have a service gap filled if the scheduled caregiver of that critical service is not available.

Non-Provision of Service is any time that the number of hours of home care worker critical services are not provided as scheduled.

Non-Provision of Service Log is the form contracted provider agencies must complete monthly on which all non provisions of services must be recorded.

Telephone Survey is a survey conducted by Contractors to all providers agencies contracted to provide services deemed as "Critical Services" verifying each contracted provider agency has availability after normal business hours, including weekends.

III. Policy

A. Non-Provision of Services Log

1. The Non Provision of Service Log (NPS Log) should be completed by the provider agency and/or Contractor:
 - a) when the authorized services are not provided as scheduled
 - b) when scheduled services are no longer available because a replacement caregiver cannot be found
 - c) when a request for DDD nonscheduled respite is made and not met
2. Contractors will determine what fields should be completed by the provider agency and any additional instructions for the completion of the form. Contractors will need to complete any fields that the provider agency does not complete.
3. Reporting timelines will be set by the Contractor.
4. Contractors will review each NPS Log submitted by each provider agency to determine which non-provision of services meet the definition of gap in services as defined in AMPM, Chapter 1600, Case Management, Policy 1620.
5. Contractors will compile all NPS Logs submitted by each provider agency into one complete NPS Log. The complete NPS Log will be submitted to AHCCCS, ALTCS Operations by the 10th business day of the month.
6. See Attachment A for NPS Log Instructions and Form.



B. Gap In Services Log

1. Contractors must submit a completed Gap in Service Log (Gap Log) and Hours Authorized report to AHCCCS, ALTCS Operations for all gaps in critical services as defined by the AMPM Chapter 1600, Policy 1620.
2. Completed reports are to be submitted to ALTCS Operations by close-of-business on the 10th business day of the month following the reporting month – e.g., if report is for critical gaps in service for January, the report must be received by COB on the 10th business day of February.
3. See Attachment B for Gap In Service Log and Authorized Hours Log Instructions and Form.

C. Telephone Survey

1. Each Contractor must conduct Telephone Surveys verifying that each of their contracted provider agencies of critical services has availability after normal business hours, including weekends. A provider agency is determined to be available to address a member's potential gap in critical services if they immediately answer the phone call or return the phone call within 15 minutes.
2. Surveys must be conducted at a minimum of quarterly. A Contractor may request from AHCCCS to conduct Surveys a minimum of semi-annually if they can demonstrate 100% compliance for two consecutive quarters. AHCCCS may at anytime direct a Contractor to conduct Telephone Surveys more frequently than quarterly.
3. Completed Surveys are to be submitted to ALTCS Operations by close of business on the 10th business day of the month following the end of the quarter – e.g., for quarter ending March 31, 2010 Surveys would be due April 14, 2010.
4. See Attachment C for Telephone Survey form and instructions.

IV. References

- Ball vs. Biedess Court Order
- AHCCCS ALTCS Contract, ¶16, Case Management; ¶28, Network Development
- AMPM Chapter 1600, Case Management