



PROVIDER BULLETIN

BT200368

NOVEMBER 12, 2003

**To: All Nursing Facilities**

**Subject: Notice of Proposed Settlement of Class Action Lawsuit**

### Overview

Attached is a notice of proposed settlement of class action in a lawsuit that was filed against the Indiana Family and Social Services Administration (FSSA). The lawsuit is *Flores v. Hamilton*, Cause no. 49 D02-0007-CP-0971; it was filed in Marion Superior Court. As part of the settlement, FSSA has agreed to send notice of the settlement to Medicaid-enrolled nursing facilities, centers for independent living, area agencies on aging, and offices of the Division of Family and Children, so that the notice can be posted in those locations.

We are asking that you post the notice in a location where it will be seen by your residents or consumers. The notice may be removed after it has been posted for ninety days. If residents or consumers have questions about the notice or the lawsuit, they should contact the class counsel, Ken Falk of the Indiana Civil Liberties Union, at the phone number or address in the notice.

Thank you for your cooperation.

## NOTICE OF PROPOSED SETTLEMENT OF CLASS ACTION

**To: All disabled Medicaid recipients who are in nursing homes or who are at risk of going into nursing homes**

This notice is to inform you of the potential settlement of a lawsuit (*Flores v. Hamilton*, Cause No. 49D02-0007-CP-0971, Marion Superior Court) which may be of interest to you. This lawsuit is brought by Everybody Counts, a center for independent living, as well as a class of Medicaid recipients defined as:

All persons with disabilities who are Medical Assistance recipients and who are either in a Medicaid funded nursing facility or who are at imminent risk of such placement and who have either applied for Medicaid funded services in the community through the Aged and Disabled funded home and community based waivers administered by defendants or who would be eligible for such waiver services if they were available. Provided however, that the class shall not include any persons who have applied for ICF/MR funded home and community based programs and/or the Developmentally Disabled funded home and community based waivers or who would be eligible for such programs and/or waiver services if they were available unless such persons elect to participate in the aged and disabled funded home and community based waivers.

I am one of the attorneys who represent the plaintiff class in this case. Before the settlement can be approved class members must be given notice of the settlement in such manner as the Court directs. In addition, the Settlement Agreement gives all class members a chance to comment on it. I have set out below a description of the settlement and how you can comment on it if you wish to.

This lawsuit complained that the state of Indiana has violated applicable law by failing to allowing disabled Medicaid recipients in nursing homes, or who are at imminent risk of going into nursing homes, an opportunity to receive services in the community through the Aged and Disabled Waiver which allows a certain number of persons otherwise eligible for nursing home placement to receive services in the community as opposed to a nursing home, provided that these community services are no more expensive than the nursing home placement. This is not a lawsuit for damages. We are not seeking any money, just that there be more waiver services for the class. The State does not agree that it has violated the law, but has nevertheless agreed to this settlement.

Under the terms of the settlement the State will take reasonable efforts to expand the waiver program and will seek to reduce, and if possible, eliminate the waiting lists for the waiver service. The State will seek to expand this waiver as follows:

- 1000 additional persons by December 31, 2002
- 1000 additional persons by June 30, 2003
- 1000 additional persons by June 30, 2003, who have been diverted away from nursing home placements

These additional waiver placements are contingent on approval by the federal government of an additional 1,400 waiver slots. The State will seek this approval. The additional slots also depend on the willingness of providers to provide waiver services.

The waiver placements will be distributed throughout the State in a way that is equitable. The State will provide sufficient information to allow persons who are at imminent risk of going into nursing homes to learn about the possibility of community-based services through the waiver. The State will continue to maintain a toll-free hotline that provides information about community services. The State will also develop written material concerning these services. The State will take steps to make sure that persons who are regularly involved in referring people for post-hospital care or other long-term care are aware of the possibility of community-based services through the waiver. And, the State will make sure that all nursing home residents who are Medicaid recipients are informed that they have a possible option of receiving services in the community through the waiver. The decision as to whether to receive services in the community or a nursing home is up to the Medicaid recipient. But, the State will make sure that the person is fully informed of all home and community-based long term care services available through Medicaid.

If a person decides that he or she wishes to receive services through the waiver and there is a waiver slot open for them, a comprehensive plan of care will be developed by a Medicaid-enrolled case manager selected by the Medicaid recipient, or his or her representative. This will be done before any services are provided.

The State will have in place a quality assurance plan to make sure that the community services meet acceptable standards.

If an assessment is done and it is concluded that the person is not at imminent risk of nursing home placement and is therefore not appropriate for waiver services, the person will be given written notice of that and will have an opportunity to appeal that determination.

If this agreement is approved by the Court, it will be enforceable as a court order, although it will not be enforceable through contempt. The settlement agreement provides a method for the plaintiffs to notify the State if they believe the State is not complying with the settlement and provides for a way of taking the matter back to the Court if that becomes necessary. Approval of the Settlement Agreement will prevent

individual class members from separately suing the State for the same types of alleged violations, i.e., claims that the State is violating the Americans with Disabilities Act or federal Medicaid law by failing to make aged and disabled waiver services more available.

The agreement also provides that the State will file reports with plaintiffs' counsel every six months. The reports will give counsel sufficient information so that counsel can determine if the agreement is being complied with and if class members are receiving services.

The settlement also states that on December 31, 2005, the case will be dismissed, unless it is extended by agreement of the parties or order of the Court. However, defendants may terminate the settlement before this time if they have, for a six-month period, provided waiver services to all eligible waiver applicants within 120 days of their completion of applications.

Under the settlement agreement the State has also agreed to pay attorneys' fees to plaintiffs' counsel. The attorneys who have worked on this case for the plaintiffs are not charging the plaintiffs' any fees.

As I indicated above, this settlement agreement will not be approved until people have had an opportunity to comment on it. And, it will not be approved unless the Judge finds that it is fair. The Judge will conduct a hearing to make this determination. You may contact me if you wish to find out the date and time of the hearing. You may appear at the time to speak about the settlement, although the Judge does not have to allow everyone an opportunity to speak. Or, if you have comments you can either call me or send them to me in writing at the address below. I will summarize all the comments I have received and will submit them to the Judge. If you want me to use your name and submit your actual comments to the Judge, please put on your letter or e-mail to me, "I authorize you to disclose my name and comments to the Judge." If you do this, I will give the Judge your actual comments. If not, I will just summarize them and will not mention your name.

If you have comments, make sure you get them to me as soon as possible.

Thank you.

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