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| LOCAL COMMISSIONERS MEMORANDUM |
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DSS-4037EL (Rev. 9/89)

Transmittal No: 93 LCM-174

Date: December 14, 1993

Division: Health and Long Term
Care

TO: Local District Commissioners

SUBJECT: Personal Care Rates Stipulation of Settlement

ATTACHMENTS: Stipulation of Settlement: NYS Association of Health Care
Providers, Inc. et al v. Kaladjian and Bulgaro
(Available On-Line)

Background:

On February 24, 1993, as part of the process of developing a uniform methodology for determining rates for the provision of personal care services, the Department of Social Services filed emergency regulations in support of an interim method for the calendar year 1992. Rates for 1992 were based on costs reported for calendar year 1990 and trended forward two years, with administrative and general costs subject to statutory ceilings imposed by the New York State Legislature as part of Chapter 41 of the Laws of 1992. Due to a number of delays resulting primarily from the initiation of a new and unfamiliar cost report, the 1992 rates were not promulgated until February of 1993, retroactive to January of 1992. Based on the interim methodology, approximately two-thirds of the providers experienced an increase in their 1992 rates over 1991, while approximately one-third were to have rates reduced.

As a result of these actions, the Department and the State Division of the Budget were challenged by the New York State Association of Health Care Providers, Inc., et al, on the legality of retroactively adopting a Medicaid reimbursement methodology and retroactively promulgating rates. An injunction also was sought against any net reduction in aggregate Medicaid reimbursement to agencies as a result of the methodology and a challenge was made to the calculation of the "administrative and general expense" caps imposed by Chapter 41 of the Laws of 1992.

A stipulation of settlement was filed in Supreme Court, State of New York, County of Albany, on November 3, 1993. The following is a summary of the terms of the settlement and the effects it will have on local departments of social services. A copy of the full settlement is included as the attachment to this memorandum. This stipulation pertains to all districts outside of New York City for which the Department promulgated, and the Division of the Budget approved, personal care rates for calendar year 1992.

The terms of the settlement and its impact on social services districts are as follows:

1. Department of Social Services Amendments to 18 NYCRR Sections 505.14 (c), (h), and 1993 Rates

Department of Social Services Amendments to 18 NYCRR Sections 505.14 (c) and (h), filed with the Secretary of State on February 24, 1993 on an emergency basis and, more recently, refiled September 13, 1993, have been withdrawn, effective November 17, 1993. The withdrawn regulations authorized this Department to collect cost reports from personal care agencies and promulgate rates for 1992 based on the reported costs.

The withdrawal of these regulations means that personal care rates for 1993 will not be promulgated based on cost reports submitted to this Department by personal care agencies under contract with local social services districts. This action thereby reinstates the prior rate setting process which involved negotiation of personal care rates by local commissioners of social services and providers. However, districts are neither obligated nor precluded from negotiating retroactive rates for the 1993 calendar year if contracts so permit. Any new rates which a local commissioner may wish to establish for 1993 should not exceed a trend factor of 3.2 % above the 1992 rate. Any decreases from 1992 rates do not have to be within a trend factor. Any 1993 rate negotiated above the trend factor must be substantiated for each provider as outlined in the exception criteria in DSS Regulation 505.14 (h)(5)(iv)(a)-(c), and 91 ADM-24, "Personal Care Services: Exceptions to the Mandatory Trend Factor for 1991 Medical Assistance Personal Care Rates".

Rates for 1993 must be submitted on the forms supplied to you in 89 ADM-17, "Personal Care Services : Form for Rate Request and Justification" or 91 ADM-24, and must be submitted by March 31, 1994.

2. Administrative and General Expense Cap

The Administrative and General Expense cap adopted by the Legislature through Chapter 41 of the Laws of 1992 sets forth a sliding scale for the calculation of administrative and general costs and excluded capital costs from the calculation. Rental costs for plant, equipment, vehicles and property interest were not treated as capital costs in the original calculation of the 1992 personal care rates.

As part of the stipulation of settlement, all 1992 rates will be recalculated by the Department to reflect the exclusion of rent and property interest from the Administrative and General cost category.

3. Revisions

Technical amendments to the 1992 rate calculations, identified within 90 days of the initial issuance of those rates, will be reviewed by the Department and the State Division of the Budget. Upon approval of any such amendments, adjusted rates will be issued.

4. Provider's Net Aggregate Reimbursement for 1/1/92 - 2/28/93

After the rates are promulgated based on the recalculations for both the Administrative and General Expense cap and any approved technical revisions as noted above, the Department will determine on an individual county contract-specific basis which provider agencies incurred a net loss or a net gain as a result of the methodology for the period 1/1/92-2/28/93.

Any provider who had an aggregate net loss, i.e., whose total compensation for all personal care services delivered to Medicaid clients in a given county during the fourteen month period as a result of the methodology, was reduced when compared with what it would have been had the 1991 rates remained in effect; such providers will receive a lump sum payment to cover the amount of the loss only. Local commissioners will be notified of the providers with whom they contract that were determined to have experienced an aggregate net loss in revenues between 1991 and 1992, and of the amount to be repaid to each provider as soon as the calculations are finalized. Providers who experienced an aggregate net gain as a result of the 1992 rates will receive no further adjustments.

It should be noted that the terms of this stipulation of settlement apply only to 1992 and 1993, as outlined above. The stipulation permits social services districts to negotiate with providers for new rates for the period of January 1, through December 31, 1993. Proposed regulations implementing a Statewide methodology were published in the State Register on October 13, 1993, to become effective January 1, 1994. These regulations will apply to all personal care rates for 1994 and subsequent years.

Department contacts for this memorandum are:

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Sue Kelly
Deputy Commissioner
Division of Health & Long Term Care

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

X

NEW YORK STATE ASSOCIATION OF HEALTH
CARE PROVIDERS, INC., suing on behalf
of all of its member providers of
personal care services under the
Medicaid Program; HOMEMAKERS OF THE
MOHAWK VALLEY, INC.; WELLNESS HOME
CARE, LTD.; A&B HEALTH CARE SERVICES,
INC.; WILLCARE, INC. and COMPREHENSIVE
GERIATRIC SERVICES, INC.,

Index No. 3271-93

STIPULATION
OF SETTLEMENT

Plaintiffs,

-against-

GREGORY M. KALADJIAN, as Acting Commissioner
of Social Services of the State of New York;
and PATRICK BULGARO, as Director of the Budget
of the State of New York,

Defendants.

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This Stipulation is entered into this 1st day of November, 1993, by
and between the attorneys for the respective parties to this
proceeding.

WHEREAS Plaintiffs have initiated this proceeding to challenge the
legality of actions undertaken by Defendants purporting to adopt
retroactively a Medicaid reimbursement methodology for personal care
services for calendar year 1992, and

WHEREAS Plaintiff, New York State Association of Health Care
Providers, Inc. ("HCP"), also seeks an injunction against any net
reduction in aggregate Medicaid reimbursement to any of its member
agencies as a result of the methodology as originally set forth

pursuant to an emergency regulation filed with the Secretary of State on February 24, 1993 (see Exhibit "C" of the Complaint herein) and more recently refiled on an emergency basis on September 13, 1993 (the "1992 Methodology"), and

WHEREAS the other Plaintiffs (each of which is a provider of personal care services under the Medicaid Program) seek the same relief with regard to their own Medicaid reimbursement rates, and

WHEREAS Plaintiffs have also challenged certain aspects of the Defendants' calculation of the so-called "administrative and general expense" caps imposed pursuant to 3 of Chapter 41 of the Laws of 1992, and

WHEREAS the Plaintiffs and Defendants have entered into settlement discussions and are desirous of settling this proceeding and have instructed their respective counsel to enter into this Stipulation of Settlement, now therefore,

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the respective parties to this proceeding, (acting on behalf of their clients, and with their full consent which the undersigned attorneys hereby represent they have obtained) that this proceeding be and the same hereby is settled based upon the following terms and conditions:

1. **Outline of Overall Settlement Objectives**

(a) Providers adversely affected by the 1992 methodology:

Any "provider" (which term shall hereinafter refer to any member of HCP which has provided personal care services under the New York State Medical Assistance Program during 1992 and January and February of 1993, whose aggregate net reimbursement from contracts entered into

with any social services district for calendar year 1991 was or would have been reduced by virtue of the application of the 1992 methodology shall be held harmless for 1992 and January and February of 1993.

(b) Providers benefited by the 1992 methodology:

Any provider whose aggregate net reimbursement from contracts entered into with any social services district for calendar year 1991 was or would be increased by virtue of the application of the 1992 methodology shall have its rate under such contracts maintained or implemented, if not yet implemented, for 1992 and January and February of 1993.

(c) For all rate periods beginning on or after March 1, 1993, all providers' reimbursement will be subject to the rate decreases resulting from the discontinuance or collapsing of the rate codes referred to in paragraph "4" on page 1 of a certain two page letter dated July 16, 1993, addressed to Mr. Cornelius D. Murray, Esq., from Michael D. Cathers, Esq., a copy of which letter is annexed hereto as Exhibit "A".

(d) The means for achieving these overall objectives are more fully set forth in the paragraphs "2" - "3", inclusive, of this Stipulation.

2. **Step 1: Tentative Recalculation of Rates Using 1992**

Methodology

(a) Defendants will first recalculate the rates under providers' contracts for all members of HCP, including the individually named Plaintiffs herein, using the 1992 methodology and applying the administrative and general expense cap retroactively to January 1,

1992. The administrative and general expense cap will be calculated without including "rent" as an administrative and general expense, but with rent, if any, being included as part of the overall costs against which the percentage limitations specified in 3 of Chapter 41 of the Laws of 1992 shall be applied. Finally, the discontinuance or collapsing of all rate codes, which was to be effectuated pursuant to the 1992 methodology, will be applied to all providers.

(b) The Defendants will next process, and factor into the rates under all contracts for all providers, all currently approved rate revisions and all pending approvable rate revisions.

3. Step 2 - Treatment of Providers After Step 1(a) or Step 1(b)

(a) Providers adversely affected after Step 1(a) or Step 1(b):

Any provider that, after completion of Step 1(a) or Step 1(b), would have its aggregate net reimbursement from contracts entered into with any social service district for calendar year 1991 reduced by virtue of the application of the 1992 methodology shall be held harmless for 1992 and January and February of 1993. The Department will hold each such provider harmless by expeditiously paying each provider a lump sum that will fully reimburse each provider for the aggregate net loss it incurred under each contract as a result of the implementation of the 1992 methodology.

(b) Providers benefited after Step 1(a) or Step 1(b):

Any provider that, after the completion of Step (1)(a) or Step (1)(b), would have its aggregate net reimbursement from contracts entered into with any social services district for calendar year 1991 increased by virtue of the application of the 1992 methodology shall

have its rate under such contracts implemented for 1992 and January and February of 1993.

4. Reimbursement between March 1, 1993, and December 31, 1993

(a) Providers adversely affected by the 1992 methodology:

Any provider that, by virtue of the 1992 methodology, would experience an aggregate decrease in reimbursement under any contract for the period January 1, 1992, through February 28, 1993, will be reimbursed under such contracts from March 1, 1993, through December 31, 1993, based upon the rates and codes in effect prior to the change of methodology, except that for all periods on and after March 1, 1993, such providers will be subject to the discontinuance or collapsing of the rate codes as previously described.

(b) Providers benefited by the 1992 methodology:

Any provider that, by virtue of the 1992 methodology, would experience an aggregate increase in reimbursement for the period January 1, 1992, through February 28, 1993, will continue to be reimbursed under such 1992 methodology - which methodology includes the discontinuance or collapsing of the rate codes as previously described - from March 1, 1993, through December 31, 1993.

(c) Notwithstanding Paragraphs 4(a) and 4(b) of this Stipulation, nothing in this Stipulation shall preclude individual providers from entering into new contracts, mutually acceptable to them and social services districts and subject to approval by the Defendants, substituting new rates for calendar year 1993.

5. Implementation and Payment of Rates

All final rates, calculated in accordance with the foregoing steps,

shall be expeditiously calculated and issued to the respective providers by Defendants. Thereafter, all payments based upon such recalculation and issuance, including any retroactive amounts necessary to restore sums (including any interest collected by the State) that were recouped by Defendants from providers whose aggregate net reimbursement under any 1991 contract was decreased based upon the 1992 methodology, shall be expeditiously paid. Failure by the Department to adhere to this expeditious payment requirement shall entitle Plaintiffs to seek immediate judicial relief to enforce the provisions of this Stipulation and to seek such other, further and different relief as the Court may deem just and appropriate.

6. Cessation of Recoupment

The Defendants shall, immediately upon execution of this Stipulation, initiate all steps it deems necessary to cease any further recoupment from those providers which, by virtue of the 1992 methodology, had experienced under any 1991 contract a retroactive reduction in rates that resulted in an aggregate net loss which Defendants had attempted to recover by recouping from current reimbursement otherwise due such providers.

7. New Providers and Budgeted Rates

Any providers whose original rates were based upon a so-called "budgeted rate process" or which received a budgeted rate because of the provision of a new service shall be treated the same as all other providers under this Stipulation.

8. Withdrawal of Emergency Regulations

Defendants agree, upon execution of this Stipulation, to withdraw,

or allow to lapse, the emergency regulations containing the 1992 methodology, as most recently refiled on September 13, 1993, and Defendants shall not seek to apply or further enforce such 1992 methodology except in accordance with the terms of this Stipulation.

9. Directives to Social Services Districts

After execution of this Stipulation, the Department of Social Services will, with reasonable timeliness, notify social services districts of the terms of this Stipulation and direct them to take whatever steps the Department determines are necessary to ensure compliance with its terms.

10. Audits

All providers' rates which, as a result of this Stipulation, are to be based upon costs reported to the Defendants, will be subject to audit and possible recalculation, upward or downward, based upon those audits, in accordance with Department of Social Services' audit regulations and subject to providers' rights to administrative and legal appeals available to them.

11. Stipulation of Discontinuance

Plaintiffs hereby agree to stipulate to discontinue, with prejudice and without costs or attorneys' fees, this proceeding against the Defendants after the rates are recalculated, issued and paid in accordance with the terms of this Stipulation, provided, however, that such discontinuance shall not preclude either party from seeking judicial relief in this proceeding to enforce any of the terms of this Stipulation.

12. Consent to Order

The parties hereby consent to an Order by Supreme Court, Albany

County, containing the terms and conditions of this Stipulation as hereinabove set forth.

IN WITNESS WHEREOF, the parties to this proceeding, through their attorneys, hereby signify their consent to the terms of this Stipulation by the signature of said attorneys this 1st day of November, 1993.

O'CONNELL AND ARONOWITZ

By: _____
Cornelius D. Murray, Esq.
Attorneys for Plaintiffs

HON. ROBERT ABRAMS
Attorney General of the State
of New York

By: _____
Jeffrey Dvorin, Esq.
Assistant Attorney General
Attorney for Defendants

SO ORDERED:

Justice, Supreme Court