

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----x
ENA JOHNSON, by her next friend Cecelia Johnson;
OLGA SKIBINA, by her next friend Anzhela Litvachkis;
JOHN DELMAR, by his next friend Margaret Delmar;
ROSE SOLIS, by her next friend Maria Patti;
JOSEF ITAMARI; JULIA LEBRON, by her next friend
Jennifer Lebron; RAISA REZNIKOV, by her next friend
Naomi Kosovsky; MATTIE DOW, by her next friend
Audrey Logan; ROBERT SCHWARTZ, by his next
friend DAVID SUNSHINE; YENTA MELMAN, by her
next friend Fanya Mosionzhnik; and HYACINTH
FORBES, by her next friend Casimir Forbes, individually
and on behalf of all persons similarly situated,

Plaintiffs,

-against-

NIRAV R. SHAH, as Commissioner of the New York
State Department of Health; ELIZABETH R. BERLIN,
as Executive Deputy Commissioner of the New York
State Office of Temporary and Disability Assistance;
ROBERT DOAR, as Commissioner of the New York City
Human Resources Administration; and
PERSONAL-TOUCH HOME CARE, INC.; AMERICARE
CERTIFIED SPECIAL SERVICES INC.,

Defendants.
-----x

FILED
IN CLERK'S OFFICE
US DISTRICT COURT E.D.N.Y.

★ **MAY 08 2014** ★

BROOKLYN OFFICE

11-cv-1956 (KAM) (SMG)

**STIPULATION
OF SETTLEMENT
AND ORDER**

WHEREAS, in the above-captioned action, by Second Amended Complaint dated July 25, 2011 ("Second Amended Johnson Complaint"), eleven plaintiffs fully identified in paragraph 1 of this Stipulation of Settlement and Order ("Stipulation"), individually and on behalf of all persons similarly situated ("Johnson plaintiffs"), brought seven causes of action in the above captioned action against a number of defendants including NIRAV R. SHAH, as Commissioner of the New York State Department of Health and ELIZABETH R. BERLIN,¹ as Executive

¹ Kristin M. Proud is the successor to Elizabeth R. Berlin as Commissioner of the New

Deputy Commissioner of the New York State Office of Temporary and Disability Assistance ("State defendants"); and

WHEREAS, on August 30, 2011, State defendants answered the Second Amended Johnson Complaint and denied each allegation of wrongdoing made in the Second Amended Johnson Complaint; and

WHEREAS, in an action entitled Spitzer etc. et al v. Shah, etc. et al, under Docket Number 11 Cv. 3157, by Complaint dated July 1, 2011 ("Spitzer Complaint"), seven plaintiffs fully identified in paragraph 2 of this Stipulation, individually and on behalf of all persons similarly situated (the "Spitzer plaintiffs"), brought seven causes of action identical to those brought by the Johnson plaintiffs against a number of defendants including State defendants; and

WHEREAS, on August 30, 2011, State defendants answered the Spitzer Complaint and denied each allegation of wrongdoing made in the Spitzer Complaint; and

WHEREAS, actions 11 CV. 1956 and 11 CV. 3157 were treated by the court as related cases; and

WHEREAS, by letter dated March 29, 2013, counsel for the Johnson plaintiffs and the Spitzer plaintiffs moved on consent for an order consolidating the identical claims against State defendants made by the Johnson plaintiffs and the Spitzer plaintiffs within 11 CV. 1956; and

WHEREAS, by Docket Order dated April 1, 2013, this Court granted the consent motion to consolidate these related cases; and

WHEREAS, the Johnson plaintiffs, the Spitzer plaintiffs and State defendants enter into this Stipulation to resolve the claims against State defendants raised in this litigation without further proceedings and without alleging or admitting any fault or liability;

York State Office of Temporary and Disability Assistance and is automatically substituted as a party. Fed. R. Civ. P. 25(d)(1).

NOW, THEREFORE, IT IS HEREBY STIPULATED AND ORDERED:

I. IDENTIFICATION OF SETTling PLAINTIFFS AND STATUS OF CLAIMS OF REMAINING NAMED PLAINTIFFS

1. The names of the Johnson plaintiffs as they appear in the caption are as follows:

ENA JOHNSON, by her next friend CECELIA JOHNSON;
OLGA SKIBINA, by her next friend ANZHELA LITVACHKIS;
JOHN DELMAR, by his next friend MARGARET DELMAR;
ROSE SOLIS, by her next friend MARIA PATTI;
JOSEF ITAMARI;
JULIA LEBRON, by her next friend JENNIFER LEBRON;
RAISA REZNIKOV, by her next friend NAOMI KOSOVSKY;
MATTIE DOW, by her next friend AUDREY LOGAN;
ROBERT SCHWARTZ, by his next friend DAVID SUNSHINE;
YENTA MELMAN, by her next friend FANYA MOSIONZHNIK; and
HYACINTH FORBES, by her next friend CASIMIR FORBES.

2. The names of the Spitzer plaintiffs as they appear in the caption are as follows:

HELEN SPITZER, by her next friend HANNAH LICHTENSTEIN;
MERCEDES MENDEZ, by her next friend GLORIA MENDEZ;
LUDMILA FILIMONOVA, by her next friend GENNADY FILIMONOV;
DORA BOGOMOLNAYA, by her next friend, LEONID NUSINZON;
BELLA LIN, by her next friend MICHAEL KHRAPKO;
NELLI LEVENTON, by her next friend ALEKS ANDR ZEYGERMAN; and
EMY MISSRY, by her next friend PRISCILLA SUTTON.

3. The following Johnson plaintiffs and Spitzer plaintiffs shall be known as the "Settling plaintiffs":

OLGA SKIBINA, by her next friend ANZHELA LITVACHKIS;
JOHN DELMAR, by his next friend MARGARET DELMAR;
JULIA LEBRON, by her next friend JENNIFER LEBRON;
MATTIE DOW, by her next friend AUDREY LOGAN;
LUDMILA FILIMONOVA, by her next friend GENNADY FILIMONOV;
DORA BOGOMOLNAYA, by her next friend, LEONID NUSINZON;
BELLA LIN, by her next friend MICHAEL KHRAPKO; and
NELLI LEVENTON, by her next friend ALEKS ANDR ZEYGERMAN.

4. The claims of all Johnson plaintiffs listed in paragraph 1 of this Stipulation and all Spitzer plaintiffs listed in paragraph 2 of this Stipulation, who are not Settling plaintiffs, against

State defendants are hereby withdrawn without prejudice in their entirety because each said plaintiff either: (1) is deceased; (2) currently receives Medical Assistance ("Medicaid")-funded health care at a residential health care facility; or (3) no longer receives health care funded by the New York Medicaid program.

II. RELIEF TO BE PROVIDED BY STATE DEFENDANTS

5. The provisions of Part II of this Stipulation (paragraphs 5 through 11) and the provisions regarding attorney's fees and costs described in Part VI of this Stipulation fully define the relief to be provided by State defendants as part of this settlement.

6. The New York State Department of Health ("Health") will distribute a document known as a Dear Administrator Letter ("DAL") to every Certified Home Health Agency ("CHHA") in New York State within sixty days of the date this Stipulation is So-Ordered. The DAL will contain language substantially similar to that in the DAL attached as Exhibit A to this Stipulation.

7. For two years from the date this Stipulation is So-Ordered, Health will post a notice in a conspicuous place on its website containing language substantially similar to that contained in the Notice attached as Exhibit B to this Stipulation.

8. Health will direct the New York State Office of Temporary and Disability Assistance ("OTDA"), that, at an administrative hearing ("Fair Hearing") requested by a recipient of CHHA care ("Appellant") to contest the CHHA's reduction or termination in the level of care, the Commissioner of Health may deny jurisdiction pursuant to 18 N.Y.C.R.R. § 358-3.1(f)(2) or § 505.23(d) only when the CHHA's decision to reduce or terminate care is based on a doctor's order and the Appellant does not interpose a subsequent doctor's order that contradicts the level or amount of care contained in the order presented by the CHHA. This directive does not apply

to Fair Hearings in which the CHHA's proposed discontinuance of care is based on a perceived threat to the safety of the home health aide providing home health services to the appellant as described in § 200(b) of 18 N.Y.C.R.R. § 505.23(d), and 10 N.Y.C.R.R. § 763.5(h)(2).

9. The instructions set forth in paragraph 8 of this Stipulation shall not be construed to prohibit the Commissioner of Health from finding that Health has no jurisdiction to conduct the requested Fair Hearing for reasons other than the application of 18 N.Y.C.R.R. § 358-3.1(f)(2) or § 505.23(d).

10. OTDA will instruct its current and future Administrative Law Judges that they must comply with the instructions set forth in paragraph 8 of this Stipulation.

11. Health will not issue decisions after fair hearings inconsistent with the instructions set forth in paragraph 8 of this Stipulation.

III. RESOLUTION OF CLAIMS IN THE COMPLAINTS

12. As of the date this Stipulation is So-Ordered, claims of Settling plaintiffs against State defendants set forth in the Fifth Cause of Action in the above-referenced Second Amended Johnson Complaint and the above-referenced Spitzer Complaint are hereby dismissed with prejudice pursuant to Fed. R. Civ. P. 41(a)(1)(A)(ii) and without payments, attorneys' fees, costs, disbursements, or expenses in excess of the amounts specified in Part VI of this Stipulation. Settling plaintiffs' remedies concerning said withdrawn claims are limited to enforcement of the provisions of this Stipulation.

13. Upon the Court's So-Ordering this Stipulation, the Settling plaintiffs, on behalf of themselves and their respective heirs, executors, administrators, personal representatives, successors and assigns, hereby jointly and severally release and forever discharge, on the merits and with prejudice, State defendants, including without limitations State defendants' past and

present officials, employees, departments, agencies, representatives, directors and agents, their successors and assigns and their respective heirs, executors, administrators, personal representatives, and transferees, (collectively “the releasees”) and each of them, of and from any and all claims, actions, costs, expenses and attorney’s and expert fees, except as provided in Part VI of this Stipulation, whether known or unknown, foreseen or unforeseen, matured or unmatured, accrued or not accrued, direct or indirect, from the beginning of time through the date this Stipulation is So-Ordered that the Settling plaintiffs ever had, now has or have, or can, shall or may hereafter have against the releasees or any of them, either alone or in any combination with others, for, by reason of, involving, concerning, arising from any claim set forth in the Fifth Cause of Action contained within the Second Amended Johnson Complaint and the Spitzer Complaint.

14. The claims of all Settling plaintiffs set forth in the Second, Fourth, Sixth and Seventh Causes of Action of the above-referenced Second Amended Johnson Complaint and the above-referenced Spitzer Complaint are hereby withdrawn without prejudice in their entirety.

IV. JURISDICTION OF THIS COURT

15. The Effective Date of this Stipulation is the date this Court So-Orders this Stipulation.

16. As of the Effective Date of this Stipulation, the jurisdiction of this Court shall terminate for all purposes except that the Court shall maintain continuing jurisdiction over this action for the purpose of enforcing the provisions of this Stipulation, subject to paragraphs 17 and 19 of this Stipulation.

17. The jurisdiction of this Court shall terminate at the conclusion of 24 months following the Effective Date except that if plaintiffs move pursuant to paragraph 19 of this

Stipulation, jurisdiction shall continue until: (a) the motion is decided; (b) if the motion is decided favorably for plaintiffs, until such time as directed by the Court; or (c) such time as may be extended by the parties in a modification of this Stipulation. At the time of termination of jurisdiction, all claims arising under this Stipulation shall be deemed dismissed.

18. During the term of this Stipulation, if Settling plaintiffs' counsel believes that Health has issued a decision after fair hearing which fails to comply with the provisions of paragraphs 8 or 11 of this Stipulation, plaintiffs' counsel shall notify State defendants' counsel in writing of the nature and specifics of the alleged failure to comply. State defendants' counsel will respond to Settling plaintiffs' counsel regarding any such inquiry in a reasonable time. Plaintiffs will not file a motion pursuant to paragraph 19 of this Stipulation based on the allegation that a single decision after fair hearing fails to comply with the provisions of paragraphs 8 or 11 of this Stipulation. Nothing in this Stipulation shall affect the right of an appellant to otherwise challenge any decision after fair hearing as provided by law.

19. During the term of this Stipulation, if Settling plaintiffs believe that State defendants have failed to comply with the provisions of this Stipulation, Settling plaintiffs' counsel shall notify State defendants' counsel in writing of the nature and specifics of the alleged failure to comply at least twenty-one days before any motion is made for enforcement of this Stipulation. Unless otherwise resolved, the parties' counsel shall meet within the twenty-one day period following notice to State defendants' counsel in an attempt to resolve the claims. If no resolution is reached within twenty-one days from the date of notice, the Settling plaintiffs may move this Court for an order for all appropriate relief against State defendants for the alleged systemic failure to comply. In the event of any motion for systemic relief based upon State defendants' alleged non-compliance with the substantive requirements of the Stipulation, State defendants

shall be considered to be in compliance therewith unless Settling plaintiffs establish that State defendants' failures or omissions to meet the terms of the Stipulation were not minimal or isolated, but were substantial and sufficiently frequent or widespread as to be systemic.

V. GENERAL PROVISIONS

20. This Stipulation constitutes the entire agreement between the Johnson plaintiffs, the Spitzer plaintiffs, and State defendants and its provisions resolve this action in its entirety against State defendants. For the duration of this Stipulation, State defendants have no additional obligations with respect to the matters settled herein, and Settling plaintiffs shall not impose, nor seek to impose, nor bring any suit that seeks to impose, any additional obligations upon State defendants with respect to the matters settled herein.

21. All parties to this Stipulation have participated in its drafting; consequently, any ambiguity shall not be construed for or against any party.

22. If any date or period of time described in this Stipulation falls or ends on a public holiday or on a weekend, the date or period of time shall be extended to the next business day.

23. In the event of any change in federal law that becomes effective during the term of this Stipulation that State defendants believe requires them to act in any way inconsistent with the provisions of this Stipulation, State defendants' counsel shall notify the Settling plaintiffs' counsel and the parties shall attempt to come to an agreement as to any modification of the Stipulation that is required by the changes in federal law. If, after thirty days from the date that Settling plaintiffs' counsel are notified, the parties have not been able to agree, State defendants shall submit the dispute to the Court pursuant to Federal Rules of Civil Procedure Rule 60(b).

24. Settling plaintiffs' counsel shall protect the confidentiality of all information concerning Settling plaintiffs or others that is provided by State defendants in the course of

complying with the provisions of this Stipulation, and shall not disclose such information except to the extent necessary in any proceeding brought before this Court to enforce any provision of this Stipulation.

25. This Stipulation is final and binding upon the signatory Parties, their successors, and their assigns.

VI. ATTORNEY'S FEES

26. The agreement set out in Part VI of this Stipulation, paragraphs 26 through 35, resolves all claims for attorney's fees, costs and disbursements accruing from the beginning of time through the duration of the Court's jurisdiction as provided in Part IV of this Stipulation, provided however, that Settling plaintiffs reserve their claim(s), if any, for attorney's fees, costs and disbursements which may be accrued or incurred in connection with a motion made during the Court's reservation of jurisdiction seeking an order for appropriate relief against State defendants that is decided in Settling plaintiffs' favor in an amount no greater than fifty thousand dollars (\$50,000.00).

27. Settling plaintiffs are represented in this action by the New York Legal Assistance Group and Patterson Belknap Webb & Tyler LLP (collectively "Settling plaintiffs' counsel").

28. The State of New York shall pay to the New York Legal Assistance Group the sum of four hundred seven thousand five hundred dollars (\$407,500.00), for which an I.R.S. Form 1099 shall be issued, in full and complete satisfaction of any and all claims, allegations, or causes of action for attorneys' fees, costs, disbursements, and expenses of Settling plaintiffs' counsel on behalf of the Settling plaintiffs for representation in the Action or in connection with any other proceeding, administrative, judicial or otherwise, and any other claim or action arising from, based upon, or alleging any of the acts, transactions, occurrences, or omissions asserted in

the Action. The foregoing payment shall be made payable to “New York Legal Assistance Group” and mailed to Jane Greengold Stevens, Esq., the New York Legal Assistance Group, 7 Hanover Square, 18th Floor, New York, New York 10004.

29. In the event that the payment of the settlement amount referenced in paragraph 28 of this Stipulation is not made by the one hundred twentieth (120th) day after receipt by the Office of the Attorney General of a “so-ordered” copy of this Stipulation, entered into the record by the Clerk of the Court, together with all other documentation required under paragraphs 30 and 31 of this Stipulation, interest on any part of the amount referenced in paragraph 28 of this Stipulation not paid by the one hundred twentieth (120th) day shall accrue at the statutory rate prescribed by 28 U.S.C. § 1961, commencing on the one hundred twenty-first (121st) day.

30. Payment of the amount referenced in paragraph 28 of this Stipulation is subject to the approval of all appropriate New York State officials in accordance with Section 17 of the New York Public Officers Law. Settling plaintiffs and Settling plaintiffs' counsel agree to execute and deliver all necessary and appropriate vouchers and other documentation requested with respect to obtaining such approval and effectuating payment. In the event that such approval is not obtained, then Part VI of this Stipulation shall be null, void, and of no further force and effect. Should the approval of all appropriate officials of the State of New York not be forthcoming, Settling plaintiffs may move for payment of attorney’s fees after giving State defendants’ counsel thirty days notice of their intent to do so.

31. Payment of the amount set forth in paragraph 28 of this Stipulation shall be subject to the cooperation of the Settling plaintiffs' counsel in executing any documents required by State defendants to process such payments.

32. Settling plaintiffs and Settling plaintiffs' counsel agree that any taxes, and/or any interest or penalties on the taxes, on the payment set forth in paragraph 28 of this Stipulation shall be the sole and complete responsibility of the recipient of the payment, and neither Settling plaintiffs nor Settling plaintiffs' counsel shall have a claim, right or cause of action against the State defendants, the State of New York, (including, but not limited to, any and all agencies, departments, and subdivisions thereof), or any of their officials, employees, or agents, whether in their individual or official capacities, on account of such taxes, interest, or penalties, and agree that they will defend, indemnify and hold harmless State defendants, the State of New York (including, but not limited to, any and all agencies, departments, and subdivisions thereof), and any of their officials, employees, or agents, whether in their individual or official capacities, for the satisfaction of any such taxes, interest, or penalties.

33. Nothing contained in this Stipulation shall be deemed to be an agreement or an admission by State defendants as to the reasonableness of the number of hours spent or the particular hourly rates claimed by the Settling plaintiffs' counsel or that the Settling plaintiffs will be entitled to any attorney's fees, costs or disbursements in connection with this action in the future, and State defendants do not waive any defenses to any application by the Settling plaintiffs therefor.


34. The agreement regarding payment of attorney's fees, costs and disbursements set forth in part VI of this Stipulation is solely for the purpose of settlement of this action and does not reflect the positions of the parties in any other judicial or administrative proceeding. Nothing contained in part VI of this Stipulation shall be deemed, implied or construed to be a policy, custom or procedure of State defendants, the State of New York or any of its agencies.


35. Part VI of this Stipulation contains all of the terms and conditions agreed on by the parties regarding the payment by State defendants of attorney's fees, costs and disbursements for work done in this action. No oral agreement entered into at any time nor any other written agreement entered into prior to the execution of this Stipulation shall be deemed to exist, to bind the parties, or to vary the terms and conditions set forth in this Stipulation.

Dated: New York, New York
April 25, 2014


Patterson Belknap Webb & Tyler LLP
Attorney for Plaintiffs

New York Legal Assistance Group
Attorney for Plaintiffs

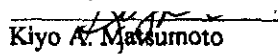
By: 
Daniel S. Ruzumna, Esq.
1133 Avenue of the Americas
New York, New York 10036
(212) 336-2000

By: 
Jane Greengold Stevens, Esq.
7 Hanover Square, 18th Floor
New York, New York 10004
(212) 613-5031

Eric T. Schneiderman, Attorney General
of the State of New York
Attorney for State defendants

By: 
Robert L. Kraft
Assistant Attorney General
120 Broadway 24th Floor
New York, New York 10271
(212) 416-8632

So Ordered:

s/Kiyo A. Matsumoto

Kiyo A. Matsumoto
United States District Judge

Dated: 5/5/14

Exhibit A

(Insert date)

*DAL: HCBS 13-
Subject: Physician Orders and Changes to
Plans of Care*

Dear Administrator:

The purpose of this letter is to remind certified home health agencies ("CHHAs") of regulatory requirements governing the provision of home health services pursuant to physician orders and of patients' rights to be notified of, and involved in, all proposed changes in their care. It also reiterates, and expands upon, prior guidance relating to fair hearings requested by CHHA patients who are Medicaid recipients.

Physician involvement in plan of care

Under federal and State regulations, certified home health agencies are required to provide home health services to patients according to a written plan of care that a physician establishes and periodically reviews. If a physician refers a patient to a CHHA under a plan of care that cannot be completed until after an evaluation visit, the CHHA must consult with the physician to approve additions or modifications to the original plan. The total plan of care is reviewed by the attending physician and agency personnel as often as the severity of the patient's condition requires but at least once every 60 days. Agency professional staff must promptly alert the physician to any changes in the patient's condition that suggest a need for the physician to alter the plan of care. (See federal and State regulations at 42 CFR § 484.18 and 10 NYCRR § 763.6, respectively.)

Patient involvement in plan of care

Under federal and State regulations, certified home health agency patients have certain rights, including the right to be informed in advance about the care to be furnished and of any changes to the care to be furnished and the right to participate in the planning of their care. The CHHA must provide the patient with written notice of these rights, and of the patient's other rights, before furnishing care or during the initial evaluation visit before the initiation of treatment. (See federal and State regulations at 42 CFR § 484.10 and 10 NYCRR § 763.2, respectively.)

The CHHA must thus inform the patient, in advance, of the care to be furnished. The CHHA must also inform the patient, in advance, of any changes to the plan of care before the change is made. This includes informing the patient, in advance, of the following:

- the physician who ordered the change in the plan of care;
- that the CHHA provides care as ordered by the patient's physician; and
- that if the patient is dissatisfied with the amount of care to be provided, the patient should discuss the change in care with the physician who may determine, based on the physician's medical opinion, that the change in

care should be rescinded or modified pursuant to a subsequent written order to the CHHA.

Fair hearings for patients who are Medicaid recipients

The Department previously provided CHHAs with guidance regarding Medicaid fair hearing requirements. (See DAL HCBS 11-03, issued April 15, 2011.) This prior guidance remains in effect. In addition, CHHAs are advised that they may be notified of fair hearings that Medicaid recipients have requested to review proposed reductions or discontinuances of home health services. At the hearings, recipients might present evidence of subsequent physician orders that would increase or restore care. The New York State Office of Temporary and Disability Assistance, which schedules and holds fair hearings for Medicaid recipients on behalf of the Department, may hear and decide such cases. CHHAs are encouraged to attend and participate in the fair hearing and are expected to comply with any decision after fair hearing that is issued.

Sincerely,

Mark L. Kissinger, Director
Division of Long Term Care
Office of Health Insurance Programs

Rebecca Fuller Gray, Director
Division of Home and Community Based Services
Office of Health Systems Management

Exhibit B

INFORMATIONAL NOTICE FOR MEDICAID RECIPIENTS

If you receive Medicaid and have been accepted for care by a home care agency known as a certified home health agency (or "CHHA"), this notice contains information you may want to know about how the CHHA should provide care based on your doctor's orders.

The CHHA provides you with home health services, which may include aide services, according to a written plan of care. Your doctor establishes your plan of care and also reviews it from time to time to make sure it still meets your needs. Your doctor must review your plan of care as often as your medical condition requires but at least once every 60 days. The CHHA must promptly alert your doctor if your medical condition changes so that your doctor can decide whether to change your plan of care.

The CHHA must inform you, in advance, about the care you will receive. The CHHA must also inform you, in advance, of any changes to the plan of care before the change is made. This includes telling you, in advance, of the following:

- the doctor who ordered the change in the plan of care;
- that the CHHA provides care as ordered by your doctor; and
- that if you are not happy with the change in your care that your doctor ordered, you should talk about it with your doctor.

If your doctor decides that the CHHA should not make the change in your care that you are unhappy about, your doctor should let the CHHA know about this by writing a new doctor's order. If you have asked for a State fair hearing, you can take this new doctor's order to the fair hearing and show it to the judge. The judge will decide whether the CHHA should provide you with that care.