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California's protection and advocacy system

**SUMMARY OF SETTLEMENT AGREEMENT
IN ADULT DAY HEALTH CARE CASE**

November 17, 2011

Darling et al. v. Douglas et al., C09-07398 SBA

Summary of Agreement

On November 17, 2011, Parties settled a federal class action lawsuit which challenged the elimination of Adult Day Health Care as a Medi-Cal optional benefit. By March 1, 2011, the Settlement Agreement transitions the ADHC program from a Medi-Cal state plan optional benefit into a new service -- Community Based Adult Services or "CBAS" -- which will be provided through under a Medi-Cal 1115 Waiver program. There will be no enrollment cap on the number of individuals who can be served under the CBAS program and services will be provided at no cost to recipients. CBAS will be provided through Medi-Cal managed care plans in most parts of the state. In counties where managed care is not available, and for people who are not eligible for managed care, CBAS will remain a fee-for-service Medi-Cal benefit.

The approximately 35,000 current ADHC participants will be reassessed for CBAS eligibility and transitioned into the new program over the next few months. Current ADHC providers will be given the opportunity to apply to become CBAS providers as well. ADHC participants found to be not eligible for CBAS will receive Enhanced Case Management to assist them to transition to other community-based services.

Notification of the terms of the agreement will be sent out to all Class Members in mid-December. In early 2012, the Court will hold a "Fairness Hearing" which will give Class Members the opportunity to give their input on the terms of the settlement agreement. The Judge must approve a final settlement agreement before ADHC is eliminated.

Attorneys on the Case

Class counsel include Disability Rights California, National Senior Citizens Law Center, the National Health Law Program, AARP Foundation Litigation and the law firm of Morrison & Foerster LLP as pro bono counsel. The United States Department of Justice participated in the lawsuit, by filing an amicus (friend of the court) brief in the appeal, and filing two Statements of Interest.

Background of the Case

In March, 2011, the Legislature voted to eliminate Adult Day Health Care (ADHC) as an optional Medi-Cal benefit (AB 97). ADHC is a Medi-Cal funded community-based program for low-income elderly and disabled adults designed to support individuals who live at home or in licensed residential care facilities to avoid unnecessary hospitalization or placement in nursing homes or other institutions. ADHC centers provide nursing services, personal care services, social services, therapy, case management, medication management, meals and transportation to participants from one to five days per week, depending on their assessed needs.

In June of 2011, seven ADHC participants filed a motion for a Preliminary Injunction in federal court on behalf of themselves and the 35,000 other ADHC participants across the state, to stop the elimination of ADHC unless and until adequate replacement services were in place, asserting that the elimination of the benefit would place them at risk of unnecessary institutionalization.

The action was brought against the Department of Health Care Services (“DHCS”) and its Director, Toby Douglas, and sought declaratory and injunctive relief for violation of the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution; Title XIX of the Social Security Act, (the Medicaid Act), (42 U.S.C. §§ 1396a-1396w-5); Title II of the Americans with Disabilities Act of 1990 (ADA), (42 U.S.C. § 12132); Section 504 of the Rehabilitation Act of 1973 (Section 504), (29 U.S.C. § 794); and California Government Code Section 11139.

The initial ADHC elimination date was scheduled for September 1, which was moved by the State to December 1, with a Court hearing scheduled for

November 17, 2011. The Parties reached settlement prior to the Court hearing.

SETTLEMENT PROVIDES ADHC-LIKE SERVICES UNDER CBAS

The Settlement Agreement transitions ADHC to a new Medi-Cal program called Community Based Adult Services (“CBAS”) provided through a Medi-Cal 1115 Waiver. The elimination date for ADHC is moved to February 29, 2012 to allow time for a seamless transition from ADHC to CBAS on March 1. Important components of the Settlement are set forth below.

What is CBAS?

Community Based Adult Services or “CBAS” will be substantially similar to ADHC services. CBAS is an outpatient, facility based service program that delivers skilled nursing care, social services, therapies, personal care, family/caregiver training and support, meals and transportation to eligible Medi-Cal beneficiaries. CBAS will be available at former ADHC centers that are approved by DHCS as CBAS providers.

Assessment and Eligibility for CBAS

The process for transition will ensure that current ADHC participants, who are eligible for CBAS, will have a seamless transition from ADHC into CBAS. Current ADHC participants and individuals who wish to receive CBAS services are eligible if they meet Nursing Facility Level of Care A (NF-A), or have a cognitive impairment, including moderate to severe Alzheimer’s Disease or other dementia, a brain injury, chronic mental illness, or are developmentally disabled, and meet certain medical necessity and eligibility criteria for ADHC.

Beginning in December 2011 through February 2012, current ADHC participants will be assessed for eligibility for CBAS by the Department of Health Care services in collaboration with ADHC providers. Individuals will be notified of the results of their evaluations and be given information about how to enroll in CBAS.

Individuals not currently in an ADHC program, but who become eligible during the term of the Settlement Agreement, can also apply for ADHC through DHCS until February 29, 2012. After March 1, 2012 they can apply

for CBAS through their managed care plan. If managed care is not available in their county, or if they are not eligible for managed care, they can apply for CBAS through DHCS.

Class Members Ineligible for CBAS

Individuals who are not eligible for CBAS will be able to get Enhanced Case Management, which includes person-centered planning and complex case management, through either their managed care plan or DHCS' contractor, APS Healthcare Inc., to assist them to transition to other community-based long-term care services when ADHC is eliminated. In addition, individuals not satisfied with the results of their assessment or services provided can file for fair hearing to challenge the decision.

Access to CBAS and Managed Care

Eventually, approximately July 1, 2012, DHCS will convert CBAS from a fee-for-service benefit to a managed care benefit. Current ADHC providers will have the opportunity to apply to become CBAS providers and continue operating their programs if they are approved by DHCS. In counties where a Medi-Cal managed care plan is available, CBAS providers must provide services through a contract with the Plan once CBAS becomes a managed care benefit. Otherwise, the DHCS will continue to provide CBAS by paying fee-for-service.

Individuals who are eligible for CBAS and live in counties with Medi-Cal managed care plans will have to enroll into Medi-Cal managed care to receive CBAS, unless they are already enrolled. For Medicare recipients, enrollment into Medi-Cal managed care **WILL NOT** affect ADHC participant's choice of **Medicare** physicians. For individuals in counties with no Medi-Cal managed care option, they will receive CBAS through regular fee for service Medi-Cal. Individuals who are in County Operated Health Systems (COHS) will receive CBAS through the COHS.

CBAS Provided at No Cost

Medi-Cal recipients will receive CBAS without being charged for the services. Private pay ADHC participants can choose to continue with the program as private pay ADHC participants.

How long will CBAS last?

There is no time limit for this program, nor is there an enrollment cap. Eligible participants can continue to receive CBAS services as long as they are determined to need them. Participants will be reassessed periodically by their managed care plans, approximately every six (6) months.

When Will ADHC End and CBAS Start?

CBAS will begin on March 1, 2012, the day after the ADHC benefit will terminate, which is February 29. However, the services will look essentially the same.

Earlier Preliminary Injunctions in the Case

The Settlement Agreement resolves the entire *Darling v. Douglas* lawsuit, which begun over two years ago. The case was initially filed on August 18, 2009, when several elderly individuals with disabilities filed a class action lawsuit to stop cuts to Adult Day Health Care services enacted by the legislature pursuant to AB 4x-5.¹

Twice, on September 10, 2009 and again on February 24, 2010, Judge Sandra Brown Armstrong granted Plaintiffs' Motions for a Preliminary Injunction, halting cuts which, the Court found, would have likely placed Plaintiffs at risk of institutionalization and caused them irreparable harm under the ADA. The State appealed the February 24 injunction to the Ninth Circuit Court of Appeal, however, the injunction remained in place. The Settlement covers the entire case and settles claims on appeal as well.

More information is available at

<http://www.disabilityrightsca.org/advocacy/Darling-v-Douglas/index.html>
and <http://www.dhcs.ca.gov/services/medi-cal/Pages/ADHC/ADHC.aspx>

¹ The case was filed as *Lillie Brantley et. al v. David Maxwell-Jolly* but upon the passing of Mrs. Brantley, the case name was changed to *Harry Cota et. al v. Maxwell-Jolly*. The case name has changed again to *Esther Darling v. Toby Douglas*, due to the passing of Mr. Cota and Mr. Douglas' replacement of David Maxwell-Jolly as Director of the Department of Health Care Services.

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