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Motions, Pleadings and Filings

United States District Court, M.D. Tennessee, Nashville Division.
LINTON, et al.
v.
TENNESSEE COMMISSIONER OF HEALTH AND ENVIRONMENT.
No. 3-87-0941.

July 5, 1990.

JOHN T. NIXON, District Judge:

***1** This cause came on to be heard for a hearing on June 4, 1990, upon this Court's order of April 23, 1990, finding Tennessee's distinct part certification procedures to violate federal law and to occasion disparate impact upon minorities' access to nursing home care. In that order, the state defendant was directed to appear at a hearing to address remedies, and to submit a plan to address the disparate impact issue.

At the conclusion of the hearing, this Court found the state's submission to be reasonably calculated to respond to the Court's April 23rd findings and to contain appropriate measures to mitigate Medicaid provider attrition. This finding is premised upon consideration of the submission; arguments and comments of counsel and those present at the hearing, including plaintiffs' lack of objection; and the record as a whole.

IT IS THEREFORE ORDERED that the state's submission is adopted in its entirety and is incorporated by reference in this final order in the cause. This Court has also approved an agreed order of the parties dismissing the due process and § 504, Rehabilitation Act claims.

I. *Introduction*

By memorandum and order entered on April 23, 1990, this Court determined that Tennessee's policy of allowing Medicaid participating nursing homes to certify less than all available beds for Medicaid participation was contrary to federal law, created a disparate impact upon minority Medicaid patients, and violated federal statutory Medicaid requirements. This Court ordered a hearing to be held on June 4, 1990, to determine an appropriate remedy and further ordered the defendant to submit a plan for Court approval to redress the disparate impact upon minority Medicaid patients' access to qualified nursing home care.

While the state defendant denies that state officials have intentionally administered the Tennessee Medicaid program in a manner that discriminates against minorities, this submission contains plans to redress all aspects of the Court's findings. In view of the findings of unintentional rather than intentional discrimination, the defendant has reviewed and modified facially neutral procedures related to distinct part certification and formulated rules and policies intended to prevent further unintentional disparate impact upon minorities or Medicaid recipients. Counsel for plaintiffs has authorized the defendant to state that this plan is the product of the parties' negotiations and that plaintiffs' counsel concludes the plan is reasonably calculated to respond to the Court's findings and to ensure the Department's future compliance as to the issues of this lawsuit. The parties agree that immediate implementation of the plan is in the best interest of both parties. [FN1]

This submission contains a two part compliance plan, set forth at III and IV; reservation of future modification of the plan, at II; and exhibits containing draft rules and procedures, notices, letters and enforcement strategies. [FN2] See Collective Exhibits A, B, C and D [Editor's Note: Omitted]. It is the intent of the parties to continue to discuss the state's management of implementation and to provide the state flexibility in that process so long as it remains consistent with this plan.

***2** Section III addresses distinct part certification, including prophylactic measures to prevent or mitigate provider attrition. Section IV redresses the finding of disparate impact upon minority Medicaid patients' access to nursing home care.

II. *Reservation of Future Modification of Plan Subsequent Federal or State Law*

The defendant reserves the right to modify the compliance plan as necessary to comply with federal and state law such as implementation of the federal Nursing Home Reform Act of 1987, Omnibus Budget Reconciliation Act of 1987 ("OBRA ' 87"), 42 U.S.C. § 1396r. Some relevant requirements of OBRA '87 will not become effective until October 1, 1990. In addition, specific guidance from the federal Health Care Financing Administration ("HCFA") to assist states in implementing OBRA '87 has not yet been promulgated and is not expected to be promulgated until September, 1990. OBRA '87 made numerous significant changes in requirements for Medicaid nursing facilities. The most significant change directly impacting upon this case is the elimination of distinctions between skilled and intermediate levels of care. After October 1, 1990, a person admitted to a nursing home is classified as a "resident" of the facility rather than being a patient in a skilled or intermediate portion of that facility. The new law permits facilities to retain a "distinct part" option, but "distinct part" is not defined therein. See 42 U.S.C. § 1396r(a).

Controlling law clearly establishes that prospective application of judgments must defer to a later change in the governing law in the case. See, *e.g.*, *Pennsylvania v. Wheeling and Belmont Bridge Company*, 18 How. 421, 15 L.Ed.2d 435 (1855) and *System Federation No. 91, Railroad Employees Department v. Wright*, 364 U.S. 642, 51 L.Ed.2d 349, 81 S.Ct. 368 (1961). Such change in law includes modification of controlling federal regulations, *Class v. Norton*, 507 F.2d 1058, 1062 (2nd Cir.1974); *Williams v. Atkins*, 786 F.2d 457, 461- 62 (1st Cir.1986); *Williams v. Butz*, 843 F.2d 1335 (11th Cir.1988). Regulations under the Medicaid Act have the force and effect of law. See, *e.g.*, *Smith v. Miller*, 665 F.2d 172 (7th Cir.1981); *Planned Parenthood Affiliates v. Rhodes*, 477 F.Supp. 529 (D.C.Ohio 1979); and *Massachusetts General Hospital v. Sargent*, 397 F.Supp. 1056 (D.C.Mass.1975). Thus, the State may seek modification under Rule 60, Fed.R.Civ.P., to the extent necessary to accommodate subsequent law changes.

HCFA Consultation

In accordance with this Court's order, the parties, by joint letter, have apprised the Regional Director of the U.S. Department of Health and Human Services ("H.H.S.") of the instant plan with reference to both the Medicaid and Title VI requirements. See Exhibit C. The defendant reserves the right to seek to modify the plan in light of any directives HCFA may provide. [FN3]

III. *Plan Regarding Distinct Part Certification*

A. *Background*

***3** This Court's April 23rd memorandum and order required a further hearing to determine an appropriate remedy as to the distinct part certification findings and directed that prophylactic steps would be considered to prevent or mitigate provider attrition. See memorandum at 19, 25.

The state defendant has formulated the present plan regarding distinct part certification to address overall remedies, including system incentives and

disincentives to prevent or reduce provider attrition. In summary, this plan:

1. requires certification of all available licensed nursing home beds in facilities that participate in Medicaid;

2. prohibits involuntary transfer or discharge based upon source of payment;

3. imposes admissions practices to regulate and enforce full certification and first come, first served requirements;

4. establishes procedures for orderly provider withdrawal from the program, including patient protection and incentives to reduce such attrition; and

5. includes draft policies, enforcement strategies and notification procedures.

As to provider attrition, the Department has recently substantially enhanced Medicaid nursing home reimbursement. While adequacy of reimbursement rates are not an issue in this case and the state believes its current rates are adequate, payment rates will soon be capped at the 65th percentile rather than the 50th percentile, and calculation methods have changed, raising rates by approximately $9.00 from an estimated $41.89 to approximately $51.00 per day, per patient. That financial incentive is coupled with procedural disincentives in the plan including:

1. notification requirements;

2. duty to retain patients and comply with Medicaid requirements under specified circumstances; and

3. exclusion from the Medicaid program for at least two years after withdrawal.

B. *Certification of All Beds*

1. Effective immediately upon judicial approval of this plan, the Department will certify all available licensed nursing home beds for Medicaid participation in all nursing homes participating in Medicaid (hereinafter "facilities").

a. Facilities which offer nursing home services only at the skilled level of care (SNF) will have all licensed beds certified for Medicaid participation at the SNF level.

b. Facilities which offer nursing home services only at the intermediate level of care (ICF) will have all licensed beds certified for Medicaid participation at the ICF level.

c. Facilities which offer nursing home services at both the SNF and ICF levels of care will have all SNF beds dually certified, that is, certified for both SNF and ICF participation. All other licensed nursing home beds will be certified as ICF only.

This plan does not preclude a distinct part which has been certified by the Department as meeting all regulatory requirements, including the *Linton* requirements, such as a distinct part SNF which is located in a hospital or an ICF distinct part in a residential home for the aged. It is recognized that OBRA '87 requirements will eliminate the distinctions between SNF and ICF care as of October, 1990.

C. *Transfer and Discharge*

***4** 1. Immediately upon judicial approval of this plan, no resident will be involuntarily transferred or discharged from a Medicaid participating nursing facility because their source of payment is Medicaid.

a. Residents who are currently paying for nursing home care with non-Medicaid funds

and who exhaust those resources shall be encouraged to and entitled to apply for Medicaid. No resident may be transferred or discharged involuntarily because their source of payment has changed to Medicaid.

b. Effective upon judicial approval of this plan, residents who are Medicaid eligible as of June 1, 1990, but who are in facilities that have not sought Medicaid reimbursement for that resident because a Medicaid certified bed had not been available will not be required to pay any more than the resident's liability as determined by the Department of Human Services (*e.g.*, social security, VA, Champus benefits, etc.). The facility will be required to make residents aware that it cannot transfer the residents because their source of payment has changed to Medicaid and will be required to encourage and assist all residents to apply for Medicaid. A Medicaid eligible resident is one who has an approved Pre-Admission Evaluation ("PAE") and has been determined to be financially eligible by the Department of Human Services. A resident whose PAE has been denied shall be considered Medicaid eligible until the exhaustion of their Medicaid appeals consistent with *Doe v. Word,* No. 3-84-1260 (M.D.Tenn.). [FN4]

c. All residents who are determined to be financially eligible for Medicaid participation by the Department of Human Services as of June 1, 1990, but who have not submitted a PAE, or who have applied and not been finally denied, will also pay no more than the resident's liability as determined by DHS, until a PAE is denied and their appeals have been exhausted under *Doe v. Word, Id.*

2. Immediately upon judicial approval of this plan, residents receiving SNF services in nursing facilities which offer both SNF and ICF nursing home services may not be discharged involuntarily because the level of care for the resident changes to ICF.

3. An involuntary transfer or discharge of a resident inconsistent with the requirements of this section shall be considered an unlawful involuntary discharge under state and federal laws and regulations prohibiting such discharge and subject to all penalties and disciplinary actions pursuant thereto.

4. Residents shall be notified by the nursing home of transfer and discharge policies upon admission to the nursing home by means of the Resident Rights and Responsibilities form required by OBRA '87. This form also includes a notice of the resident's right to appeal an involuntary transfer and shall be in compliance with the attached notice. All notices required in this plan shall be issued to the residents and their designated representative. See Collective Exhibit A [Editor's Note: Omitted.]

D. *Admission Practices*

***5** 1. All nursing facilities participating in Medicaid must admit residents on a first come, first served basis in accordance with the terms of this plan and the Department's rules.

a. (i) Effective immediately upon judicial approval of this plan, each nursing facility shall maintain a single waiting list for applicants. Such list will contain sufficient information to identify the applicant and for the state to monitor compliance with the plan.

(ii) For the purposes of this plan, the term "applicant" means any person who seeks admission to nursing home care. The use of the term is not limited to those persons who have completed an official application or have complied with the nursing home's pre-admission requirements, but it includes all persons who have affirmatively expressed an intent to be considered for current or future admission to the nursing home or requested that their name be entered on any waiting list. "Applicant" does not include those persons who make only a casual inquiry concerning the nursing home or its admission practices, who request information on these subjects, and who do not express any intention that they wish to be actively considered for admission.

b. Any person contacting a nursing home to casually inquire concerning its services or admissions policies shall be informed by the facility of his or her right to apply and be considered on a non-discriminatory basis in accordance with the policies and procedures set out herein. Brochures, admission forms and similar written materials used by a facility to market its services or describe its admissions policies shall contain a similar notice of applicant rights as provided herein. Pursuant to T.C.A. § 68-11-910(a)(5), such notice shall also inform the inquirer or applicant of the complaint and advocacy services available to him in the event that he believes his rights have been violated. The same notice shall be incorporated into the notices required by T.C.A. § 68-11-910(b). (See Collective Exhibit A [Editor's Note: Omitted).]

2. The nursing facility must admit applicants in the order in which the referral or request was received by the facility. Deviations from this principle shall be documented and may only be based upon the following exceptions:

a. medical need, including but not limited to, the expedited admission of patients being discharged from hospitals, and patients who previously resided in a nursing home at a different level of care, but who, in either case, continue to require institutional medical services;

b. the applicant's sex, if the only available bed is in a room or a part of the nursing home that exclusively serves residents of the opposite sex;

c. as necessary to implement the provisions of a plan of affirmative action to admit racial minorities, if the plan has previously been approved by the Department;

d. emergency placements requested by the Department when evacuating another health care facility or by the Adult Protective Services of the Department of Human Services;

***6** e. where a Medicaid-eligible resident's hospitalization or therapeutic leave exceeds the period paid for under the Tennessee Medicaid program for the holding of a bed in the facility for the resident and if the resident continues to require the services provided by the nursing home, then the resident must be readmitted to the facility immediately upon the first availability of a bed in the facility.

f. other reasons or policies, *e.g.*, community-based waiver or care approved in advance in writing by the Medical Director of the Department's Bureau of Manpower and Facilities; provided, however, that no such approval shall be granted if to do so would in any way impair the Department's or the facility's ability to comply with its obligations under federal and state civil rights laws, regulations or conditions of licensure or participation; or

g. where, with the participation and approval of the Department, expedited admission is approved for residents who are being displaced from another facility or its waiting list as a result of that facility's withdrawal from the Medicaid program.

3. If an applicant, whether on his or her own behalf or acting through another, requests admission or to be placed on a list of applicants awaiting admission, the information on the waiting list must be recorded and preserved.

E. *Facilities Requesting Voluntary Termination of Provider Agreements*

1. Facilities who choose to voluntarily terminate their provider agreement may do so by notifying the Department in writing of such intent. The effective date of the termination will be determined by the Department consistent with this plan. The facility's notice to the Department will provide the following information:

a. the reasons for voluntary termination;

b. the names and Medicaid identification number of all Medicaid-eligible residents;

c. a copy of a letter which shall conform with Collective Exhibit A and which will be sent to all residents explaining the facility's voluntary termination, and a copy of a letter to be sent to all Medicaid-eligible residents explaining the facility's voluntary termination;

d. a copy of a letter which shall conform with Collective Exhibit A and which will be sent to all persons on the waiting list explaining the voluntary termination; and

e. other information determined by the Department as necessary to process the request for termination.

2. The termination of the provider's involvement in Medicaid must be done in such a manner so as to minimize the harm to current residents.

a. Residents who are currently Medicaid-eligible shall be informed, in a notice to be provided by the facility and approved by the Department, that the facility has elected to withdraw from the Medicaid program. The notice shall inform the resident of her right to remain in the facility as a Medicaid patient as long as she wishes to do so and remains otherwise eligible under the rules of the Medicaid program. The notice shall also inform the resident that, if she wishes to transfer to another facility, under the supervision of the Department, the nursing home where she now resides will assist in locating a new placement and providing orientation and preparation for the transfer, in accordance with 42 U.S.C. § 1396r(c)(2)(C), and any implementing regulations and guidelines.

***7** b. All other residents of the facility shall receive a separate notice informing them of the facility's intention to withdraw from the Medicaid program. The notice will be provided by the facility after having been first reviewed and approved by the Department. The notice shall inform such residents that, should they become eligible for Medicaid coverage, they will be able to convert to Medicaid from their current source of payment and remain in the facility only during a period that ends June 30, 1991. They will not be eligible for Medicaid coverage of their care in the facility thereafter.

The same notice will caution these residents that, if they require care as Medicaid patients beyond June 30, 1991, they will have to transfer to another facility. The notice will also inform the residents that, when their present facility is no longer participating in the Medicaid program, certain legal rights and protections that apply to all residents (regardless of source of payment) in Medicaid facilities will no longer be available to those who remain in the nursing home. [FN5] Readers of the notice will be informed that, if they wish to transfer, or to have their names placed on waiting lists at other facilities, the nursing home that is withdrawing from the program will assist them by providing preparation and orientation, under the supervision of the Department, as required by 42 U.S.C. § 1396r(c)(2)(C), and any implementing regulations and guidelines.

c. Applicants whose names are on the facility's waiting list will be notified by the facility, on a form that has been reviewed and approved by the Department, that the facility intends to withdraw from the Medicaid program. They will be cautioned that they will not be able to obtain Medicaid coverage for any care that they receive in the facility. The notice shall also inform them that certain legal rights and protections that apply to all residents (regardless of source of payment) in Medicaid-participating facilities will not be available in the nursing home to which they have applied, once that facility has withdrawn from the Medicaid program. [FN6]

Applicants will be informed in the notice that, if they wish to make application at other facilities, the withdrawing facility, under the supervision of the Department, shall assist them in seeking placement elsewhere.

3. As long as a nursing home has a Medicaid-eligible resident, it must comply with all requirements for Medicaid participation. The facility will not, however, be entitled to payment for any additional or newly admitted Medicaid eligible residents under any circumstances.

4. After June 30, 1991, or the date on which the last resident who was Medicaid-eligible as of June 30, 1990, under ¶ III(E)(2)(a) is lawfully and appropriately transferred or discharged, whichever event occurs later, the nursing facility will be decertified and its Medicaid provider agreement terminated. Such transfers shall be considered an involuntary transfer and shall comply with Department rules and regulations governing involuntary transfers or discharges.

***8** 5. Facilities which terminate their provider agreements shall not be permitted to participate in Medicaid for a period of at least two years from the date the provider agreement is terminated.

6. Unless the facility notifies the Department within 30 days after giving a notice of termination, the facility may not stop the termination procedure consistent with this order without written approval from the Department.

F. *Policies and Procedures*

All nursing homes will be required to establish policies and procedures addressing admission, transfer and discharge, consistent with this plan and rules of the Department. See Collective Exhibit B [Editor's Note: Omitted].

G. *Enforcement Strategy*

1. A nursing home which violates this plan or facility policies and procedures adopted pursuant thereto shall be subject to civil monetary penalties as provided by state law, suspension of admissions or other licensure disciplinary action, imposition of temporary management, imposition of a monitor (which may include a monitor of the admission process), and/or involuntary termination from Medicaid, and/or any other remedy available under the law.

2. Involuntary Termination--a facility which is involuntarily decertified because of its failure to comply with the provisions of the Court Order and plans submitted thereto, shall not be permitted to participate in Medicaid for a period of five years.

H. *Notification*

1. All facilities shall post in a conspicuous location a poster notification prepared by the Department which describes applicants' and residents' rights consistent with this plan. (See Collective Exhibit A [Editor's Note: Omitted]).

2. Any nursing home which, from June 1, 1988, through June 1, 1990, discharged or transferred residents because a Medicaid certified bed was not available or offered must notify such persons or their representative that the facility no longer has such a policy and that it admits persons on a first come, first served basis regardless of the source of payment. See Collective Exhibit A [Editor's Note: Omitted].

3. The Department shall prepare a press release for distribution to the wire services concerning this plan and rights of applicants and residents pursuant thereto.

IV. *Defendant's Plan to Redress the Finding of Unintended Disparate Impact on Minorities' Access to Nursing Homes*

A. *Background*

Since the original filing of this lawsuit, the Department of Health and Environment ("DHE") has made numerous administrative enhancements to increase enforcement of

Title VI compliance. Those enhancements include:

1. The Office of Civil Rights Compliance ("OCRC"), which is part of the Bureau of Manpower and Facilities of the Department, developed draft rules for Title VI civil rights compliance and enforcement which are expected to improve elderly minority residents' access to nursing home services. A copy of the draft regulations, Chapter 1200-8-16, is attached as Collective Exhibit B [Editor's Note: Omitted].

***9** 2. In July, 1988, the DHE initiated and funded a local community referral project in Shelby County, known as the Minority Applicant Pool System ("MAPS"), to identify and place elderly minority individuals in appropriate nursing home facilities. The MAPS project is administered by the Delta Commission on Aging in cooperation with the Memphis Regional Health Center ("the Med").

3. In December, 1988, four staff positions were added to the Office of Civil Rights Compliance, including three Regional Coordinators (Health Facilities Surveyors) and one office clerk. The staff, as mandated by state law, is responsible for conducting periodic compliance reviews and investigating complaints on the 1,040 health care facilities licensed under the authority of the Board for Licensing Health Care Facilities. It is the Department's policy to conduct annual reviews on all nursing homes. All (approximately 290) nursing homes were reviewed by OCRC in 1989 either through a desk or on-site review.

B. *Compliance Plan and Remedies*

Consistent with prior United States Supreme Court holdings, this Title VI plan involves initial use of racially neutral practices, *i.e.* full certification of all nursing home facilities and enforcement of a neutral policy of a first come, first served single waiting list. In view of this Court's finding of disparate impact on minorities' access to nursing home care as a result of admission practices, and in order to remedy such disparate impact, however, subsequent steps, if they become necessary, involve race conscious remedies. The first such remedies are premised upon the state's Method of Administration Plan, approved by the Office of Civil Rights Compliance of the Department of Health and Human Services as part of the Title VI compliance regulations under 45 C.F.R. Part 80. Those intermediate steps focus upon voluntary procedures to enhance minorities' access to nursing home care. They include, *inter alia,* creation of an identified pool of minorities eligible to be placed on the racially neutral first come, first served waiting lists; enhancement of such referrals through community outreach; development of an implementation of Title VI public service announcements and conducting education programs for nursing home staff.

Only after non-compliance of long duration will race preferential procedures, *i.e.*, preferential admissions, be used. Thus, only a limited portion of the plan, narrowly tailored to deal with non-compliance of long duration, authorizes use of race preferential procedures, consistent with the dictates of *Wygant v. Jackson Board of Education,* 106 S.Ct. 1842, 1847, 1850, 476 U.S. 275, 274, 90 L.Ed.2d 260 (1986), and cases cited therein; *Hazelwood School District v. United States,* 433 U.S. 299, 97 S.Ct. 2736, 53 L.Ed.2d 768 (1977); *Fullilove v. Klutznick,* 448 U.S. 448, 491, 100 S.Ct. 2758, 2781, 65L.Ed.2d 902 (1980). *See also, Local 28 of Sheet Metal Workers International Association v. Equal Employment Opportunity Commission,* 106 S.Ct. 3019, 478 U.S. 421, 92 S.Ct. 344 (1986). Consistent with Supreme Court rulings, it is intended such remedies will be of temporary duration until compliance is achieved.

***10** 1. *Full certification ("first come, first serve")*

Section III's requirement of full certification is expected to increase utilization of beds by Medicaid recipients and, as a result, to increase utilization by Medicaid minorities.

2. *Execution of Assurances of Compliance by Organizations with Multiple Facilities*

Any entity with two or more nursing home facilities in Tennessee will be required to execute an Assurance of Compliance with Title VI and comply with Title VI federal and state rules and regulations as to all of its Tennessee nursing homes if any of its nursing homes receive Medicaid funds.

3. *Expansion of MAPS*

The Department is committed to expanding the Minority Applicant Pool System ("MAPS") concept, currently in operation in Shelby County, to provide a MAPS approach in each of the four metropolitan areas. See ¶ 2, p. 5, *infra.* Development of MAPS in Shelby County required approximately three years. It is anticipated MAPS can be in place in the other three metropolitan areas within approximately three years. That system is designed to identify and refer for placement elderly minority individuals in appropriate nursing home facilities.

The Department will explore the feasibility of expanding the MAPS concept statewide through development of specific local service delivery areas. Because rural areas lack the service network available in metropolitan areas, feasibility studies are required.

4. *Monitoring of Minority Utilization*

(a) Consistent with the Methods of Administration Plan of the Department, approved by the Department of Health and Human Services Office for Civil Rights, each year every Tennessee nursing home is required to complete a questionnaire reporting minority utilization in the facility, among other items pertaining to civil rights compliance. The percentage of minority residents in the nursing home will be compared to the percentage of minority citizens who are age 65 or older in the county in which the home is located by calculating the difference between the two factors. This computation is illustrated in the following example:

X Health Care Center, which has 100 licensed beds, reports that it has 12 black residents on the date of its report, a day when all beds were occupied. Thus, black residents constitute 12% of its census. X Health Care Center is located in Y county, Tennessee, for which the Department's Center for Health Statistics projects a 1988 population of 10,000 residents age 65 or older, of whom 1,500 are black. Thus, Y county has a 15% black population, age 65 or older. The difference between these two factors is minus 3% (12% in nursing homes contrasted to 15% in the county), identifying a slight under-representation of black residents in X Health Care Center (3 out of 100 patients under representation).

(b) A finding that a nursing home whose reported census of black residents is 10 percentage points (10%) or more below the percentage of black citizens age 65 or older in the county or service area in which the facility is located, according to the above calculation, will raise an inference of non-compliance with this plan. Such finding will trigger an evaluation and follow-up by the Office of Civil Rights Compliance according to the Department's Method of Administration Plan, as approved by the Office of Civil Rights of the United States Department of Health and Human Services. The facility will then be required to develop and implement affirmative action plans to improve access of racial minorities to the facility's services.

***11** 5. *Affirmative Action Plans*

(a) A nursing home may be found to be out of civil rights compliance through application of the above statistical standard coupled with an evaluation according to the Method of Administration Plan, through the resolution of a complaint investigation, based upon provisions of a judicial decree, based upon an evaluation, through findings of an administrative agency with jurisdiction over such matters other than the Department, or through other procedures authorized by law. Whenever such non-compliance is found, the nursing home will be required to prepare and submit for the Department's approval a plan of affirmative action, consistent with the Department's Methods of Administration Plan. Once approved, such plan shall be implemented by the nursing home under the supervision of the Department. A finding

of compliance by the Department's Office of Civil Rights Compliance may include but is not limited to reliance upon absence of statistical disparity as set forth herein.

(b) In developing the required affirmative action plans, non-compliant nursing homes will be encouraged to develop innovative plans individualized to the facility and its particular service area. The scope and duration of such plans will be determined by the Department's Office of Civil Rights Compliance director, and may include the following actions which are intended to improve access by racial minorities:

(i) enhancement of referrals through community interaction such as outreach to social services agencies, churches, civic groups, elderly apartments, hospital discharge planners, and similar entities,

(ii) development and implementation of Title VI public service announcements for local media,

(iii) conducting on-site Title VI training for that facility's key staff, including the administrator, as determined by the Department and with the supervision and technical assistance of the Title VI staff; and/or

(iv) coordination or development of MAPS resources in counties in which no MAPS is available.

Subject to no objection being raised by HCFA, an additional affirmative action requirement may be imposed for entities with two or more nursing facilities in Tennessee where one of the facilities does not participate in Medicaid and it has been found to not comply with Title VI. After a period of one year of operating under an approved affirmative action plan, if non-compliance continues, the Director of Civil Rights Compliance shall impose a requirement of deviating from the first come, first served waiting list to increase minority participation. Such requirement may include alternating admissions by race with a limitation upon admissions if no minority applicant is available. In lieu of that requirement, the non-compliant facility may opt to enroll in the Medicaid program, to be accomplished within three months of exercising that option.

(c) Other activities may be mandatory under the Methods of Administration Plan. Participation in MAPS is mandatory if a non-compliant facility is located within a MAPS service area.

C. *Enforcement*

***12** In the event a facility fails to develop or implement an affirmative action plan or noncompliance continues after corrective action plans have been attempted, the matter will be referred to the Office of General Counsel for enforcement action. This Compliance Plan shall not, however, preclude enforcement by the Department or protected persons through other procedures authorized by law or rule. Enforcement may include seeking denial, suspension or revocation of a facility's license pursuant to T.C.A. § 68-1-218, Chapter 1200-8-16-.02, Rules of the Department of Health and Environment; imposition of civil penalties where applicable pursuant to T.C.A. § § 68-1-218, 68- 11-801, *et seq.*; requirement of temporary management; termination of a provider agreement; or any other sanction authorized by law, including termination of federal financial participation under the procedures set forth at 42 C.F.R. § 80.8(c).

D. *Reports to the Court*

On October 1, 1990, and on a quarterly basis for two years thereafter, the defendant shall file with the Court and serve on plaintiffs' counsel a report on the implementation of this plan. For one year thereafter, the same information shall continue to be compiled and provided upon request to plaintiffs' counsel, but need not be routinely filed with the Court. The reports required by this paragraph

shall include the following information:

a. the name, address and Medicaid provider number of each facility that is licensed to provide nursing home care in the state, but which is not participating in the Medicaid program;

b. the identity of the owners of each such non-participating facility;

c. the number of licensed beds in each such facility, broken down (if applicable) by the type of care provided;

d. if the facility has given notice after June 1, 1990, of an intent to withdraw from the Medicaid program, the date on which such notice was received by the Department;

e. if a facility has given notice since June 1, 1990, of an intent to withdraw from the Medicaid program, the report shall state the number of Medicaid patients remaining in the facility as of the date the report is prepared; and

f. if the Department has any information regarding the facility's receipt of federal funds (either directly, or as part of a larger entity) the report shall identify the source of each different type of such federal funds.

After the initial report due to be filed by October 1, 1990, subsequent reports need only update the initial report as necessary to reflect intervening changes. It is not necessary for subsequent reports to reiterate information contained in the original report regarding circumstances which remain unchanged.

E. *Court Approval*

Upon judicial approval, this submission shall become a final order.

FN1. In the event this plan is not adopted in its entirety or is modified in any respect, the state reserves its right to appeal issues previously raised as well as remedies imposed.

FN2. The proposed rules and regulations and notices are subject to modification so long as they remain consistent with this plan and federal and state law.

FN3. This plan reflects the position of the State, which intends to implement it as written, upon judicial approval. In the event of unanticipated H.H.S. objections, the State will seek to implement this plan and reserves the right to seek joinder of responsible federal officials, which does not foreclose use of other necessary administrative or judicial remedies.

FN4. It is the parties' intent to incorporate the requirement of *Doe v. Word, Id.*, that a nursing home may not discharge a resident who is appealing a denial of a PAE until there has been a final denial of the PAE and any appeal that is pursued has been exhausted. Compliance with *Doe*, however, is not the subject of this lawsuit.

FN5. Licensed only nursing homes must continue to comply with all federal and state laws and rules and regulations applicable to licensed only facilities.

FN6. See footnote 5 above.

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