

1992 WL 554299
United States District Court, E.D. California.

Richard VALDIVIA et al.
v.
CALIFORNIA DEPARTMENT OF HEALTH
SERVICES.

Civ. No. S-90-1226EJG/PAN. | Aug. 11, 1992.

Opinion

Order After Hearing and Order of Permanent Injunction

EDWARD J. GARCIA, District Judge:

*1 This matter was before the court on July 24, 1992 for hearing on plaintiffs' motion for summary judgment and for a permanent injunction, defendants' cross-motion for summary judgment and intervenor's motion for summary judgment. Toby Edelman, Eugenie Mitchell and Kathleen Lammers appeared on behalf of plaintiffs. Mark Waxman and Robert Gerst appeared on behalf of intervenor. Supervising Deputy Attorney General Dennis Eckhart and Deputy Attorneys General Darryl Mansfield and Mateo Munoz appeared on behalf of defendants. After considering the parties' written and oral arguments and the record in this matter, and for the reasons stated in the court's oral analysis in open court on the record, the court entered the following order.

1) Hearing on intervenor's motion for summary judgment is continued to August 14, 1992 at 9:00 a.m.

2) As to plaintiff's motion for summary judgment and for a permanent injunction and defendants' cross-motion for summary judgment, IT IS HEREBY ORDERED as follows:

a) *Comprehensive Resident Assessments*—Plaintiffs' motion for summary judgment and for a permanent injunction is granted, and defendants' cross-motion for summary judgment is denied. The state shall ensure that the assessments address discharge potential, special treatments or procedures, dental condition, rehabilitation potential, and drug therapy, pursuant to 42 C.F.R. § 483.20(b)(2). The assessments shall be conducted promptly upon admission, promptly after a significant change in a resident's physical or mental condition, and at

least once every twelve months. 42 U.S.C. §§ 1395i-3(b)(3)(C)(i), 1396r(b)(3)(C)(i).

b) *Residents' Rights*—Plaintiffs' motion for summary judgment and for a permanent injunction is granted, and defendants' cross-motion for summary judgment is denied, in the following areas: free choice, protection of resident funds, bed-hold policy and admissions practices. The state shall ensure that facilities protect and promote residents' rights in these areas, per statutory and regulatory requirements: free choice (42 U.S.C. §§ 1395i-3(c)(1)(A)(i), 1396r(c)(1)(A)(i)); protection of resident funds (42 U.S.C. §§ 1395i-3(c)(6), 1396r(c)(6)); bedhold policy (42 C.F.R. § 483.12(b)); and admissions practices (42 U.S.C. §§ 1395i-3(c)(5)(A), 1396r(c)(5)(A)).

c) *Survey and Certification Requirements*—Plaintiffs' motion for summary judgment and for a permanent injunction and defendants' cross-motion for summary judgment are denied. The court finds disputed issues of material fact on the question of the state's present compliance with paragraph 2(d) of the January 11, 1991 preliminary injunction order.

d) *Transfer and Discharge Appeals*—Plaintiffs' motion for summary judgment is granted on the question of defendants' failure to timely comply with the statutory requirements, and defendants' motion for summary judgment is granted on the question of defendants' present compliance with the law. The court will defer, until conclusion of the trial of this action, ruling on plaintiffs' motion for a permanent injunction.

*2 e) *Nurse Aide Training and Competency Programs*—Plaintiffs' motion for summary judgment is granted on the question of defendants' failure to timely comply with the statutory requirements, and defendants' motion for summary judgment is granted on the question of defendants' present compliance with the law. Plaintiffs' motion for a permanent injunction is denied.

f) *Nurse Aide Registry*—Plaintiffs' motion for summary judgment is granted on the question of defendants' failure to timely comply with the statutory requirements, and based on the oral representations of defendants' counsel regarding the correction of registry deficiencies, defendants' motion for summary judgment is granted on the question of defendants' present compliance with the law. The court will defer, until conclusion of the trial of this action, ruling on plaintiffs' motion for a permanent injunction.

g) *Education Programs*—Plaintiffs' motion for summary

judgment and for a permanent injunction is granted, and defendants' cross-motion for summary judgment is denied. The state shall conduct periodic education programs for the staff and residents (and their representatives) of skilled nursing facilities in order to present current regulations, procedures, and policies under the reform law, in accordance with 42 U.S.C. §§ 1395i-3(g)(1)(B) and 1396r(g)(1)(B).

h) *Complaint Investigation*—Plaintiffs' motion for summary judgment and for a permanent injunction is denied, and defendants' cross-motion for summary judgment is granted.

i) *Notice of Medicaid Rights*—Plaintiffs' motion for summary judgment is granted on the question of defendants' failure to timely comply with the statutory requirements, and defendants' motion for summary judgment is granted on the question of defendants' present compliance with the law. Plaintiffs' motion for a permanent injunction is denied.

j) *Physical and Chemical Restraints*—Plaintiffs' motion for summary judgment is granted on the question of defendants' failure to timely comply with the statutory requirements, and defendants' motion for summary judgment is granted on the question of defendants' present compliance with the law, except as to the requirement that the physician's order specify the duration and circumstances under which restraints are to be used. *See* 42 U.S.C. §§ 1395i-3(c)(1)(A)(ii)(II), 1396r(c)(1)(A)(ii)(II). As to this requirement only, the court finds that defendants are not presently in compliance with the law, and grants plaintiffs' motion for summary judgment and for a permanent injunction. As to all other issues bearing on physical and chemical restraints, the court will defer, until conclusion of the trial of this action, ruling on plaintiffs' motion for a permanent injunction.

k) *Drug Regimen*—Plaintiffs' motion for summary judgment is granted on the question of defendants' failure to timely comply with the regulatory requirements, and defendants' motion for summary judgment is granted on the question of defendants' present compliance with these requirements. The court will defer, until conclusion of the trial of this action, ruling on plaintiffs' motion for a permanent injunction.

*3 l) *Rehabilitation*—Plaintiffs' motion for summary judgment is granted, and defendants' cross-motion for summary judgment is denied. The court will defer, until conclusion of the trial of this action, ruling on plaintiffs' motion for a permanent injunction.

m) *Enforcement*—Plaintiffs' motion for summary judgment is granted, and defendants' cross-motion for summary judgment is denied. Plaintiffs' motion for a permanent injunction is denied, without prejudice to renewal of the motion during the trial of this action, if plaintiffs are able to show that the necessary changes may be effected through regulation rather than legislation.

n) *Special Master*—The court will defer, until conclusion of the trial of this action, ruling on plaintiffs' request for appointment of a special master pursuant to Fed.R.Civ.P. 53.

IT IS SO ORDERED.

Class Action Stipulation and Order

Jurisdiction

Jurisdiction is conferred pursuant to 28 U.S.C. §§ 1331, 1361.

Class Definition

Pursuant to Fed.R.Civ.P. 23(b)(2), the Court certified a plaintiff class of "all persons in California who are or will be residents in Medicare or Medicaid certified nursing facilities."

Preamble

This action was brought by Richard Valdivia and Eldora Kaski on behalf of themselves and all others similarly situated.

The complaint herein alleges that defendants (California Department of Health Services and Molly Joel Coye, M.D.) failed to implement the federal Nursing Home Reform Law and that this failure deprived plaintiffs and their class of the protections and benefits of this federal legislation.

The District Court granted plaintiffs a mandatory preliminary injunction on January 11, 1991 and issued a Memorandum of Decision on February 25, 1991,

requiring defendants to comply fully and immediately with all aspects of the reform law.

On August 11, 1992, the District Court granted plaintiffs' Motion for Summary Judgment and Permanent Injunction in part, granted Defendants' Motion for Summary Judgment in part, and reserved certain issues for trial.

The parties wish to resolve this action and all claims which are asserted in the complaint.

The parties agree that it is in their best interests to cooperate in reaching the goal of implementing the federal Nursing Home Reform Law to the fullest extent possible. The parties further agree to work together to the fullest extent possible in an effort to reach this goal.

It is the intent of both parties to this settlement that the efforts made to comply with the conditions set forth herein shall be carried out in good faith recognizing that a coordinated effort is in the best interests of the residents who live in skilled nursing facilities and nursing facilities (hereafter SNFs, NFs or facilities).

THEREFORE, it is hereby stipulated and agreed by the parties and their undersigned attorneys that all claims asserted by the two named plaintiffs in the complaint on behalf of the statewide class are settled according to the terms and conditions set forth in this Stipulation, as follows:

DUTIES AND RESPONSIBILITIES

*4 1. The defendants CALIFORNIA DEPARTMENT OF HEALTH SERVICES (DHS) and MOLLY JOEL COYE, M.D. (DHS, State Defendants, or State), their agents, servants, employees, successors in interest, and all other persons acting under the authority of DHS, are permanently enjoined from failing to comply with, and failing to implement, all provisions of the federal nursing home reform law, including 42 U.S.C. §§ 1395i-3(a)-(h) and 1396r(a)-(h), and regulations attendant thereto, 42 C.F.R. § 483.1-483.80.

2. The State defendants, their agents, servants, employees, successors in interest, and all other persons acting under the authority of DHS, shall immediately take all necessary measures to ensure the State's compliance in the following areas:

a. Comprehensive resident assessments:

1. *Duty:* The State shall use all available tools, mechanisms, and remedies available in accordance with federal requirements¹ to require that each resident receives, and each facility provides, comprehensive resident assessments that address areas including, but not limited to, discharge potential, special treatments or procedures, dental condition, rehabilitation potential, and drug therapy, as required by 42 C.F.R. § 483.20(b)(2). The assessment shall be conducted in accordance with federal requirements after a significant change in a resident's physical or mental condition, and at least once every twelve months, 42 U.S.C. §§ 1395i-3(b)(3) and 1396r(b)(3); 42 C.F.R. § 483.20.

2. Implementation:

See Education [at 3. after j.].

Training [at 6. and 7. after j.].

Survey [at i.].

Enforcement [at j.].

b. Comprehensive Care plan:

1. *Duty:* The State shall use all tools, mechanisms and remedies available in accordance with federal requirements to require that each resident receives, and each facility develops, individualized care plans. 42 U.S.C. §§ 1395i-3(b)(2), and 1396r(b)(2); 42 C.F.R. § 483.20(d).

2. Implementation:

See Education [at 3. after j.].

Training [at 6. and 7. after j.].

Survey [at i.].

Enforcement [at j.].

c. Quality of care:

1. *Duty:* The State shall use all tools, mechanisms and remedies available in accordance with federal requirements to require that each resident receives, and each facility provides, the level of care and services required by 42 U.S.C. §§ 1395i-3(b)(4) and 1396r(b)(4) and by 42 C.F.R. § 483.25.

2. Implementation:

See Education [at 3. after j.].

Training [at 6. and 7. after j.]

Survey [at i.].

Enforcement [at j.]

d. Quality of life:

1. *Duty:* The State shall use all tools, mechanisms and remedies available in accordance with federal requirements to require that each resident receives, and each facility provides, quality of life as required by 42 U.S.C. § 1395i-3(b)(1), and 1396r(b)(1); 42 C.F.R. § 483.15.

2. *Implementation:*

See Education [at 3. after j.].

Training [at 6. and 7. after j.].

*5 Survey [at i.].

Enforcement [at j.]

e. Residents' rights:

1. *Duty:* The State shall use all tools, mechanisms, and remedies available in accordance with federal requirements to require that each facility protect and promote resident's rights set forth at 42 U.S.C. § 1395i-3(c), 1396r(c), including the following areas: transfer and discharge (42 U.S.C. §§ 1395i-3(c)(2) and 1396r(c)(2)); free choice (42 U.S.C. §§ 1395i-3(c)(1)(A)(i) and 1396r(c)(1)(A)(i)); protection of resident funds (42 U.S.C. §§ 1395i-3(c)(6) and 1396r(c)(6)); "bed-hold" (42 C.F.R. § 483.12(b)); admissions practices (42 U.S.C. §§ 1395i-3(c)(5)(A) and 1396r(c)(5)(A)); and freedom from physical and chemical restraints (42 U.S.C. §§ 1395i-3(c)(1)(A)(ii) and 1396r(c)(1)(A)(ii)); dignity, 42 C.F.R. § 483.15(a); self-determination, 42 C.F.R. § 483.15(b); 42 U.S.C. §§ 1395i-3(c), 1396r(c); 42 C.F.R. §§ 483.10, 483.12, 483.15; accommodation of needs (42 U.S.C. §§ 1395i-3(c)(1)(V) and 1396r(c)(1)(V)).

2. *Implementation:*

See Education [at 3. after j.].

Training [at 6. and 7. after j.]

Survey [at i.].

Enforcement [at j.].

f. Rehabilitation:

1. *Duty:* The State shall use all tools, mechanisms, and remedies available in accordance with federal requirements to require that each resident receives and each facility provides, needed therapy services to attain or maintain highest practicable physical, mental, and psychosocial functioning, in accordance with the comprehensive resident assessment and individualized plan of care. 42 U.S.C. §§ 1395i-3(b)(4)(A)(i), 1396r(b)(4)(A)(i); 42 C.F.R. §§ 483.20, 483.25.

2. *Implementation:*

i. The State shall clearly articulate and consistently implement its policy that residents of nursing facilities receive needed therapy services in order to attain or maintain the highest practicable physical, mental, and psychosocial well-being, in accordance with the comprehensive resident assessment and individualized plan of care.

ii. In cooperation and consultation with plaintiffs, as specified below, the State shall take all steps necessary to process properly completed Treatment Authorization Requests (TARs) for therapy, including but not limited to, physical therapy, occupational therapy, and speech therapy, so that such therapies are approved on a timely basis necessary for the resident to attain or maintain the highest practicable physical, mental, or psychosocial functioning in accordance with the comprehensive resident assessment and individualized plan of care. This standard, which is mandated by the federal nursing home reform law, requires more comprehensive coverage of therapy services than do the standards for medical improvement that are currently contained in State law and regulation. TARs for therapy services necessary to attain or maintain the highest practicable level of physical, mental or psychosocial functioning shall not be denied on the grounds that the purpose of the therapy is to maintain the current level of functioning, rather than to improve it.

*6 iii. In the event that the State revises its reimbursement system to include such therapies as part of the daily rate, and not as an ancillary charge, the State shall continue to use all tools, mechanisms, and remedies available in accordance with federal requirements to require that each resident receive such therapy needed to attain or maintain the highest practicable physical, mental, and psychosocial

functioning.

iv. *See* Education [at 3. after j.].

Training [at 6. and 7. after j.].

Survey [at i.].

Enforcement [at j.].

g. Freedom from use and use of physical and chemical restraints:

1. *Duty:* The state shall use all tools, mechanisms, and remedies available in accordance with federal requirements to require that each facility uses physical and chemical restraints on residents only in accordance with federal requirements. 42 U.S.C. §§ 1395i-3(c)(1)(A)(ii) and 1396r(c)(1)(A)(ii); 42 C.F.R. § 483.13(a).

2. *Implementation:*

i. Within 18 months from the date of this Stipulation, the State shall modify its regulations to require that physicians' written orders specify the duration and circumstances under which restraints are to be used. 42 U.S.C. §§ 1395i-3(c)(1)(A)(ii)(II), 1396r(c)(1)(A)(ii)(II).

ii. *See* Education [at 3. after j.].

Training [at 6. and 7. after j.].

Survey [at i.].

Enforcement [at j.].

h. Transfer and discharge:

1. *Duty:* The State shall use all tools, mechanisms, and remedies available in accordance with federal requirements to require that each facility transfers and/or discharges residents only in accordance with federal requirements. 42 U.S.C. §§ 1395i-3(c)(2) and 1396r(c)(2); 42 C.F.R. § 483.12.

2. *Implementation:*

i. The State shall:

a. prepare and submit to the Office of Administrative Law (OAL) emergency regulations to require facilities to include the address and telephone number of the local DHS Licensing and Certification office in the required

notices of intended transfer or discharge that they must provide to residents.

b. provide plaintiffs with the name of a staff person in DHS headquarters office, designated to accept complaints on transfer and discharge practices of the State and/or facilities and to keep a log of such complaints. This shall not include transfer and discharge appeals filed with the State's Citation Review Conference Unit.

c. respond by taking appropriate actions, including, but not limited to, investigating facility practices, providing focused, in-service training to surveyors, and imposing sanctions against facilities.

See Education [at 3. after j.].

Training [at 6. and 7. after j.].

Survey [at i.].

Enforcement [at j.].

i. Survey, certification and complaints:

1. *Duty:* The State shall survey and certify facilities in accordance with the requirements of 42 U.S.C. §§ 1395i-3(g) and 1396r(g).

i. *Surveys:* The State shall conduct periodic certification surveys of facilities' compliance with federal "Requirements of Participation," as specified by the federal Nursing Home Reform Law and its implementing regulations, by using the entire survey protocol that is designated by the Federal Department of Health and Human Services, and in accordance with all applicable federal requirements.

*7 ii. *Notification of ombudsprograms:* The State shall require that surveyors contact substate ombudsprograms at the beginning of all surveys to solicit comments about potential problems and concerns and shall invite substate ombudsprograms to participate in all exit interviews.

iii. *Consistency of surveys:* The State shall use all tools, mechanisms, and remedies available in accordance with federal requirements to require that programs are implemented to measure and reduce inconsistency in the application of survey practices. 42 U.S.C. §§ 1395i-3(g)(2)(D) and 1396r(g)(2)(D).

iv. *Public disclosure of results of inspections and surveys:* The State shall use all tools, mechanisms, and remedies available in accordance with federal requirements to provide information to the public concerning surveys and

certifications, including approved statements of deficiencies and plans of correction. 42 U.S.C. §§ 1395i-3(g)(5) and 1396r(g)(5).

v. *Complaints*: The State shall conduct prompt and thorough complaint investigations to determine facilities' compliance with the federal "Requirements of Participation" in accordance with federal requirements and shall take appropriate enforcement actions against any facility that is not in compliance with federal requirements. The State shall provide a system by which it reports on a timely basis to the ombudsprogram its findings of noncompliance with federal Requirements of Participation, including adverse actions. 42 U.S.C. §§ 1395i-3(g)(4), 1396r(g)(4).

vi. *Investigations of allegations of resident neglect, abuse, and misappropriation of resident property*: The State shall maintain compliance with federal requirements to provide a process for receiving and timely reviewing allegations of neglect, abuse, and misappropriation of residents' property. 42 U.S.C. §§ 1395i-3(g)(1)(C), 1396r(g)(1)(C).

vii. *See Education* [at 3. after j.].

Training [at 6. and 7. after j.].

Survey [at i.].

Enforcement [at j.].

2. *Implementation*: The State shall use the federal survey protocol, and its successors, for taking into consideration complaint histories in deciding survey schedule and size and composition of survey teams (e.g., a ratio of team size to number of beds, inclusion of professionals with specialized knowledge). The State shall require surveyors, in every standard survey they conduct, to determine facility compliance with Requirements of Participation, including but not limited to: whether residents are transferred and discharged only in compliance with the federal requirements; whether residents' rights and quality of life are provided by the facility in compliance with the federal Requirements of Participation.

i. *Survey consistency*: In consultation and cooperation with plaintiffs, as specified below, DHS shall take steps, by January 1, 1993, to promote consistency in the survey process, both in identifying deficiencies and in applying remedies. The steps shall include establishment of a committee to make recommendations regarding policies and programs. The State shall require that surveyors use the federal survey protocol, including forms, procedures, and Interpretive Guidelines, in conducting surveys and in

investigating complaints, in accordance with federal requirements.

*8 ii. *Survey and certification documents*: DHS shall maintain in all DHS District Offices:

A) the full complement of the current survey protocol, State Operations Manuals, including survey forms, procedures, and Interpretive Guidelines, for use by their surveyors;

B) the full complement of State Agency Letters;

C) a full set of the current, applicable Medicare and Medicaid statutes and regulations.

iii. *Unannounced surveys*:

DHS shall, by July 1, 1993, assure that Life Safety Code surveys are conducted after surveyors conduct standard certification surveys, and by January 1, 1993, shall explore options including, but not limited to: assuming within DHS the responsibility to conduct Life Safety Code surveys and/or the State Fire Marshal to be in compliance with these federal requirements.

iv. *Complaints*: The State's system for responding to complaints shall continue to include: that response be in a timely and effective manner; criteria for conducting investigations, on-site visits, scheduling follow-up visits, and citing deficiencies.

j. Enforcement:

1. *Duty*: The State shall implement and utilize a comprehensive enforcement system in compliance with federal requirements. 42 U.S.C. § 1396r(h).

2. *Implementation*: In cooperation and consultation with plaintiffs, as set forth below, the State shall maintain a comprehensive enforcement system under Title XIX of the Social Security Act, which includes mechanisms and strategies to effectively apply appropriate remedies when federal Requirements of Participation are not met. The system shall be designed to deter noncompliance, to impose appropriate sanctions for noncompliance, to bring about sustained compliance with federal requirements, and to protect residents and correct deficiencies for specific residents whose care was deficient or whose rights were violated, as determined by DHS. The system shall set forth guidelines for assessing penalties and remedies allowed under federal requirements in order to respond consistently and effectively to deficiencies that are found during the course of surveys, as well as those

that are found during complaint investigations. As part of this system, the State shall establish, by law or regulations, as appropriate, the sanctions specified by the federal Nursing Home Reform Law, 42 U.S.C. § 1396r(h)(2).

i. The enforcement system shall:

- A. define the purposes of the system and of the remedies;
 - B. set forth guidelines for appropriately assessing monetary penalties and other intermediate remedies (in lieu of or in addition to termination) allowed under federal requirements;
 - C. identify guidelines for approving and monitoring plans of correction;
 - D. define the role of the complaint investigation process in the comprehensive enforcement system;
 - E. encourage and promote use of intermediate sanctions, as appropriate, rather than termination, to achieve the purposes of the comprehensive enforcement system;
 - *9 F. identify mechanisms to better inform the public as to actions taken by the State against facilities that are not in compliance with federal Requirements of Participation;
 - G. identify the factors to be considered in determining which remedies may or must be imposed, assuring that more substantial remedies are imposed for more serious deficiencies.
- ii. In consultation and cooperation with plaintiffs, as specified below, the State, by July 1, 1993, shall identify the necessary components of the comprehensive enforcement system. By no later than October 1, 1993, the State shall establish a workplan and begin implementation of this system.

EDUCATION PROGRAMS

3. The State shall conduct periodic educational programs for facility staff, residents, and residents' representatives, concerning current regulations, procedures, and policies. 42 U.S.C. §§ 1395i-3(g)(1)(B) and 1396r(g)(1)(B).

4. *Implementation:* In cooperation and consultation with plaintiffs, as specified below, the State shall provide education to residents that shall include, but not be limited to: comprehensive resident assessments and care

planning; quality of care; quality of life; residents' rights; rehabilitation; physical and chemical restraints; transfer and discharge; survey, certification, complaints; and enforcement.

5. The Department shall, by January 1, 1993, provide a work plan describing the alternatives for providing information and education to residents and/or their representatives, providers, facility staff, and ombudsprograms.

SURVEYOR TRAINING

6. The State shall train surveyors in accordance with federal requirements. 42 U.S.C. §§ 1395i-3(g)(2)(E)(iii), 1396r(g)(2)(E)(iii).

7. *Implementation:* In consultation and cooperation with plaintiffs, as specified below, the State shall give special consideration to development of training curricula and to training surveyors on the following issues: comprehensive resident assessment and individualized care plans; quality of care; quality of life; residents' rights; rehabilitation; physical and chemical restraints; transfer and discharge.

INFORMATION SYSTEMS

8. By October 1, 1993, the State shall develop mechanisms to determine whether federal requirements are being carried out by both the State and facilities.

9. The State shall use available data to measure, to the extent possible, whether residents are receiving the care and services to which they are entitled under the federal Nursing Home Reform Law. The State shall initially focus on the provision of therapy services and the use of chemical and physical restraints. Information to be used may include, but is not limited to: the Automated Certification and Licensing Administrative Information Management System (ACLAIMS); the Online Survey Certification and Reporting System (OSCARS); and information derived from the Treatment Authorization Requests (TARs).

10. The State's findings shall be provided to plaintiffs.

*10 11. In cooperation and consultation with plaintiffs, as specified below, the State shall explore ways to determine whether facilities' admissions agreements violate provisions of the federal Nursing Home Reform Law and

to impose appropriate enforcement actions, as necessary.

12. Deficiencies in the State's information system shall be identified and, to the extent possible, corrected.

CONSULTATION AND COOPERATION WITH PLAINTIFFS

13. Defendants shall engage in any necessary cooperative activity with plaintiffs required to achieve completion of the terms and conditions of this Stipulation. Such cooperative activity shall include, but not be limited to, the following: provision of documents as specified in this Stipulation; generation of computer data; formal and informal meetings with DHS personnel (on reasonable notification); and any other means necessary to implement the federal Nursing Home Reform Law.

14. The State shall provide plaintiffs with the opportunity to review and comment on State-generated drafts of All-County Letters, District Administrator memoranda, All-Facility Letters, Provider Bulletins, emergency regulations, regulations packages, and similar policy or operational directives which deal with the provisions of the federal Nursing Home Reform Law. This review and comment process does not apply to documents generated by HCFA and transmitted by the State.

15. The State shall provide plaintiffs with the opportunity to review and comment on, as provided below, the design, content, and implementation of: the periodic education program as described in paragraphs 3-5; surveyor training, as described in paragraphs 6-7; the TAR process, as referred to in paragraphs 2.f and 2-ii; admissions agreements, as referred to in paragraph 11; and the necessary components of, and the workplan to implement, the comprehensive enforcement system.

16. In order to ensure that defendants are able to comply with the time requirements set forth in this order, defendants shall specify with each document submitted to plaintiffs for review, a reasonable time by which comments must be returned to defendants. In the event comments are not received by the defendants within the time period specified, defendants shall be entitled to assume that no comments are forthcoming and may proceed as necessary to achieve compliance with this order.

17. The signatories hereby recognize and respectively commit themselves towards working together with one another to create and enhance the cooperation and mutual

respect necessary for the successful implementation of this Stipulation. Plaintiffs and defendants are dedicated to the improvement of the health, safety, and well-being of all residents of California's nursing facilities. The State of California reaffirms its policy that the federal Nursing Home Reform Law is the law of the land and will work diligently and unwaveringly towards assuring its full implementation for the protection of the nursing resident population. Likewise, the plaintiffs and their representatives and advocates will continue to strive for and enhance an atmosphere of trust and cooperation in working with the State in order that those protections and safeguards guaranteed by federal and state law provisions are honored and fully implemented for the greater societal good.

MONITORING AND ENFORCEMENT

*11 18. *Access to Documents:* The State shall provide plaintiffs with the following data and documents for purposes of monitoring defendants' compliance with this Stipulation:

a. *Computer records:* Reports from the ACLAIMS/OSCAR computer system. Plaintiffs shall identify by report number, in writing, those reports needed, and the frequency of receiving those reports, but no more frequently than once per quarter.

b. *Survey reports:* Copies of State-generated form 2567 (or successor form), and accompanying HCFA validation survey received from HCFA, when a survey has been conducted by HCFA.

c. *Federal reports:* Any reports received by defendants from HCFA regarding California's compliance with the federal Nursing Home Reform Law, including the monthly State Agency Evaluation Program (SAEP) and the yearly Comprehensive Evaluation Report (CER) and the State's responses, unless the State is specifically prohibited by HCFA from releasing the report.

d. *Computer data:* Computerized data regarding complaint investigations, survey results, and facility profiles. These records will be provided in the same format and under the same terms and conditions currently used to provide like data to the California Advocates for Nursing Home Reform.

e. *Documents:* Documents such as All-County Letters, District Administrator memoranda, Provider Bulletins, regulation packages, and notices of regulation hearings,

updates to the policy and procedure manual, and other final policy, operational directives, and/or reports written about or developed to implement the federal Nursing Home Reform Law.

f. *Education programs*: Documents regarding education programs.

g. *Surveyor training*: Documents regarding surveyor training, including training plans and schedules.

h. *Transfer and discharge*: Statistics on transfer and discharge appeals hearings; information on F-tag violations related to transfer and discharge; and transfer and discharge logs identified in paragraph 2.f.2.b. (on a quarterly basis).

RESOLVING DIFFERENCES

19. a. Any dispute arising out of this Stipulation shall first be addressed by informal discussions between the parties.

b. Prior to seeking judicial intervention concerning this Stipulation, the party seeking such intervention shall notify the other party in writing, specifying the nature of the dispute and the suggested remedy. This notice shall clearly state that it is a "Formal Notice of Dispute: *Valdivia v. California Department of Health Services* " and shall be served upon the appropriate DHS Deputy Director and upon the DHS Office of Legal Services (Sacramento).

c. At any mutually agreeable time within 20 days after receipt of the notice, the parties shall meet and confer in an attempt to resolve the dispute.

d. In the event that the parties are still unable to resolve the dispute, either party may seek judicial relief from the appointed federal magistrate judge. The decision of the magistrate judge may be appealed to the District Court judge assigned to this matter.

CLASS NOTICE

*12 20. Within 60 days after the notice is approved by the Court, defendants shall cause to be posted at all skilled nursing and nursing facilities a notice to all class members informing them of their rights pursuant to this Stipulation and advising them of the terms of the Stipulation entered in this case. Defendants will bear the

costs of developing and disseminating the notice to the members of the class. The notice shall be developed in consultation with plaintiffs.

OTHER PROVISIONS

21. Because the parties desire to avoid the expense, inconvenience and uncertainty of further litigation of this action, they have reached a mutually satisfactory resolution of their disputes.

22. The Department of Health Services, on behalf of all defendants, agrees to all terms and conditions contained in this Stipulation without admitting liability on any of plaintiffs' claims in this action.

23. The parties declare, represent, acknowledge, and agree that no promise, inducement or agreement not herein expressed has been made to plaintiffs or defendants and that this Stipulation contains the entire agreement between the parties.

24. The parties agree that this Stipulation is the product of mutual negotiations and is deemed to have been drafted by both plaintiffs and defendants.

25. This Stipulation has been drafted pursuant to current federal law and regulation. In the event that a change occurs in either federal law or regulation, it is agreed that the State shall implement mandatory changes, and may implement optional changes, in federal law and regulation. However, during the period of time that the Court retains jurisdiction, the State shall provide plaintiffs with written notice prior to implementing mandatory changes which affect this Stipulation and in the event an optional change in federal law or regulation occurs which affects this Stipulation.

26. The State shall draft and submit regulatory and/or statutory changes, as necessary, in order to implement the terms and/or conditions of this Stipulation.

27. Defendants shall make all good faith efforts to see that the terms of this Stipulation are fully implemented. Defendants' goal shall be to promote and improve the quality of care, quality of life, and personal dignity of residents in SNFs and NFs.

28. In the event that defendants attempt to bring a separate action against any federal official or agency related to any issue raised in this action, defendants shall provide a copy of the complaint to plaintiffs' counsel at

the time of its service on any defendant.

29. In the event that circumstances beyond the control of the parties to this Stipulation result in the failure to comply or adhere to a timetable or deadline set forth in this agreement, the parties agree to consult with one another so as to agree: to the establishment of a new timetable or deadline, or reasonable alternatives to achieve performance of the conduct or activity required.

30. This Stipulation shall be binding upon the Director of DHS, his or her agents, employees, and successors in interest.

*13 31. Defendants shall not seek a stay of the Order entered as a result of this Stipulation.

32. The parties declare, represent, acknowledge, and agree that no promise, inducement or agreement not herein expressed has been made to plaintiffs or defendants and that this Stipulation constitutes the entire agreement between the plaintiffs and defendants to this action.

33. The terms and conditions of this Stipulation shall become immediately effective upon execution of this document by the signatories.

34. The parties acknowledge that they must seek Court approval for this Stipulation pursuant to Fed.R.Civ.P. 23. In the event that obtaining Court approval for entry of the Stipulation renders compliance with the timeframes anticipated herein impossible, the timeframes may be suspended until such times as are set by agreement of the parties or by further order of the Court.

RETENTION OF JURISDICTION

35. The Court shall retain jurisdiction for a period of 36 months from the date of entry of this order to enforce or amend any provision of this order and, if necessary, to modify or clarify any of its provisions upon noticed motion by counsel for any party. This clause does not prohibit any party, after the 36-month period from enforcement procedures for violations of a permanent injunction as otherwise provided by law.

COSTS AND ATTORNEYS' FEES

36. Plaintiffs are the prevailing parties in this lawsuit for purposes of attorneys' fees under 42 U.S.C. § 1988. Notwithstanding Local Rules 292 and 293, plaintiffs may move for an award of reasonable attorneys' fees and for costs no later than 180 days after the date of entry of this Order. Plaintiffs' counsel shall, within three months of entry of this Order, submit to defendants compilations documenting their hours for an award of reasonable attorneys' fees. The parties shall make a good faith effort to resolve and settle the question of payment of reasonable attorneys' fees and costs prior to submitting the issue to the Court for adjudication.

The parties agree and stipulate to the foregoing.

This 9th day of October, 1992.

[Approval of Stipulation]

For the reasons stated in the Court's oral analysis on the record at the hearing on April 9, 1993, the Court finds:

- 1) the terms of this Stipulation are fair to the members of the class;
- 2) the class has been adequately represented in the negotiations which resulted in this Stipulation;
- 3) class notice has been adequately provided for; and
- 4) this is an action seeking solely injunctive and declaratory relief.

The foregoing appearing satisfactory to the Court and pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, the same is approved and SO ORDERED this 9th day of April, 1993. [Filed April 13, 1993.]

¹ The term "federal requirements" as used in this document shall mean all statutory, regulatory and official written Health Care Financing Administration ("HCFA") directives used by the State to implement the federal Nursing Home Reform Law.