

Settlement Agreement

Plaintiffs, Jacob Van Meter, Gail Fletcher as guardian of Adam Fletcher, and Eric Reeves, and Defendant, Mary Mayhew, Commissioner, Maine Department of Health and Human Services, by and through the undersigned counsel, hereby agree as follows:

WHEREAS, the parties have agreed to settle Civil Action Docket No. 1:09-cv-00633, *Van Meter, et. al. v. Mary Mayhew, Commissioner, Maine Department of Health and Human Services*, now pending in the United States District Court for the District of Maine. Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, this settlement agreement is subject to Court approval. Without such approval, this settlement agreement shall be null and void and of no force and effect.

THEREFORE, the parties agree to the following terms and conditions:

I. DEFINITIONS

- A. "Centers for Medicare and Medicaid Services" (CMS) means the United States federal agency that administers Medicare, Medicaid, and the Children's Health Insurance Program.
- B. "Defendant" means the Department of Health and Human Services (DHHS), its Commissioner, officers, and agents. Defendant is the single state agency responsible for the overall administration of the Medicaid program in the State of Maine, and includes any successor thereto.
- C. "Home and Community Based Waiver" (HCBW) means a program for home and community based services approved and operated pursuant to Section 1915(c) of the Social Security Act, codified at 42 U.S.C. § 1396n(c).
- D. "Intermediate Care Facility-Other Related Conditions" (ICF-ORC) means a facility that meets State licensing and Federal certification requirements for ICFs-ORC. These facilities are currently described in 42 C.F.R. § 440.150.
- E. "Medicaid" or "MaineCare" means Maine's medical assistance program jointly financed by the state and the federal government for low income individuals and people with disabilities pursuant to 42 U.S.C. § 1396 et seq.
- F. "Named Plaintiffs" means Jacob Van Meter, Eric Reeves, and Adam Fletcher, by his guardian Gail Fletcher.
- G. "Persons with Related Conditions" means individuals who have a severe, chronic disability that meets the conditions described in 42 C.F.R. § 435.1010 and, for purposes of this settlement agreement refers to those conditions, other than Autism.

- H. "Plaintiff Class" refers to the certified class in this case which is described as: "[T]he Named Plaintiffs...and all other Maine residents who currently are or in the future will be: (1) eligible for and enrolled in MaineCare, (2) age 21 or older, (3) have a related condition as defined at 42 C.F.R. § 435.1010, other than autism, and who do not have a diagnosis of Alzheimer's or dementia, and (4) who are or should be screened for admission to nursing facilities pursuant to 42 U.S.C. § 1396r(e)(7) and 42 C.F.R. §§ 483.112 *et seq.*"
- I. "PASRR Level I Screen" is a screening to identify all individuals who are in or have been discharged to a nursing facility and who are suspected of having mental illness or mental retardation (including other related conditions) as defined in 42 C.F.R. § 483.128.
- J. "PASRR Level II Evaluation" means an Evaluation as described in 42 C.F.R. §§ 483.128, 483.130, 483.132, 483.136.
- K. "PASRR Process" refers to the process required pursuant to 42 U.S.C. §1396r(e)(7) and 42 C.F.R. § 483.100-.138.
- L. "Rules" means rules as defined in 5 M.R.S. § 8002(9) of the Maine Administrative Procedure Act.
- M. "SPA" or "State Plan Amendment" refers to a Medicaid State Plan Amendment as currently set forth at 42 C.F.R. § 430.12.
- N. "Specialized Services" is as defined in 42 C.F.R. § 483.120(a)(2). Nothing in this settlement agreement requires Defendant to provide Specialized Services for which Defendant would be required to pay with all State dollars.

II. DEVELOPMENT OF A HCBW TO SERVE THE PLAINTIFF CLASS

Defendant intends to develop a new HCBW, as an alternative to Intermediate Care Facilities, in order to provide community placement options for the Plaintiff Class. Defendant desires to develop the new HCBW for the Plaintiff Class without first having to establish any new Intermediate Care Facilities for Other Related Conditions (ICFs-ORC), if this is feasible under federal law as interpreted by CMS. Defendant intends to apply for the new HCBW using the costs of the existing Intermediate Care Facilities for Persons with Mental Retardation (ICFs-MR) program as its basis. With that understanding, the parties agree to work together in good faith to achieve that goal and to that extent agree as follows:

1. Defendant has determined, based upon preliminary, informal discussions with CMS, that it is unnecessary to establish any ICFs-ORC prior to submitting an application for an HCBW waiver. Defendant shall submit a HCBW application to CMS by November 1, 2011.
2. The HCBW application shall propose to include the following services in the waiver program: home supports; community supports; employment specialist services; work

supports; home accessibility adaptations; communications aids; transportation services; assistive technology; consultation services and assessments; counseling and crisis services; maintenance occupational, physical, and speech therapy; case management and specialized medical equipment to the extent that these services are subject to federal financial participation under the Medicaid program. Defendant shall work in good faith with counsel for the Plaintiff Class in the design and implementation of the HCBW. Before submission of any HCBW application, Defendant shall consult with counsel for the Plaintiff class on the content of the HCBW application that will be necessary for the operation of the HCBW. The parties will work cooperatively to ensure that the HCBW application adheres to the requirements and the intent of this settlement agreement to the extent allowed by state and federal law.

3. At the same time it submits the application to CMS, Defendant shall begin drafting Rules to implement the HCBW with the goal of having those Rules become effective within sixty (60) days of CMS approval of the waiver.
4. In its waiver application, Defendant shall propose to offer services to 15 members of the Plaintiff Class during the first full year of the waiver's operation and to offer services to an additional ten members per year for each subsequent year of the waiver's operation, unless the parties agree that there are no other Plaintiff Class members who seek services under the waiver; provided however that in no event shall the number of approved waiver slots exceed seventy-five (75). If CMS approves the waiver application, Defendant shall offer services to members of the Plaintiff Class as specified above.
5. Defendant shall act in good faith and use its best efforts to establish a HCBW for the Plaintiff Class without the necessity of establishing any ICFs-ORC and to secure CMS approval of the waiver application as submitted. Defendant shall provide copies to counsel for the Plaintiff Class of any questions or objections posed by CMS during this process and the Defendant's responses to those questions or objections.
6. Unless changes in federal law make the continued operation of the HCBW impracticable, Defendant shall continue to maintain the HCBW to provide services to members of the Plaintiff Class. However, should Defendant develop different or additional programs that would allow it to offer substantially the same services to members of the Plaintiff Class, then it may discontinue, in whole or in part, the HCBW set forth herein. In the event that there are an insufficient number of Plaintiff Class members who seek services under the new HCBW for the Plaintiff Class, then Defendant may seek CMS permission to amend the HCBW accordingly.
7. If Defendant reasonably and in good faith determines that it is necessary to establish any ICFs-ORC prior to establishing a HCBW for the Plaintiff Class, Defendant agrees to operate the ICFs-ORC for the minimal period necessary to establish cost data acceptable to CMS to support Defendant's application for a waiver. Defendant will begin to develop a Request for Proposals (or other procurement method) to establish any ICFs-ORC deemed necessary to establish necessary cost data within thirty (30) days of either proposing a State Plan Amendment (SPA) to establish ICFs-ORC or determining that a

SPA is unnecessary, so that there is a minimum of delay in the process to establish any necessary ICFs-ORC.

8. If Defendant reasonably and in good faith determines that it is necessary to establish any ICFs-ORC prior to the establishment of the HCBW for the Plaintiff Class, Defendant will seek input from counsel for the Plaintiff class on the number of ICFs-ORC that Defendant may seek to develop and the location of such ICFs-ORC. Any ICFs-ORC established by Defendant shall not exceed four beds per facility.
9. If the Defendant reasonably and in good faith determines it is necessary to submit a SPA to develop any ICFs-ORC as a step toward the submission of an application to CMS to establish the new HCBW for the Plaintiff Class, then Defendant shall submit that SPA to CMS no later than fourteen (14) days after determining that it is necessary to establish any ICFs-ORC prior to the establishment of the HCBW.
10. If Defendant reasonably and in good faith determines that it is necessary to establish any ICFs-ORC prior to the establishment of the HCBW for the Plaintiff Class, Defendant agrees to pursue expeditiously all necessary approvals from CMS and to issue and award any RFPs, or similar approvals. At the same time it determines that a SPA is unnecessary or submits the SPA to CMS, Defendant shall begin drafting Rules to establish the ICFs-ORC with the goal of having those Rules become effective within sixty (60) days of CMS approval of the SPA or of Defendant's determination that a SPA is unnecessary.
11. If the Defendant reasonably and in good faith determines that it is necessary to establish any ICFs-ORC prior to establishing a HCBW for the Plaintiff Class, the Defendant must submit a HCBW application within thirty (30) days of obtaining cost basis data that Defendant reasonably and in good faith determines is sufficient to support a HCBW application. Defendant shall act in good faith and use best efforts to promptly take all steps necessary to obtain approval of the HCBW application as outlined above.
12. In the event that CMS does not approve a new HCBW that the parties reasonably and in good faith determine is satisfactory to meet the terms, conditions and goals of this settlement, then the parties shall attempt to negotiate a new settlement agreement to otherwise allow Defendant to develop community-based placement options for the Plaintiff Class.
13. Defendant agrees to regularly confer and seek the input of counsel for the Plaintiff class through the process of implementing this settlement agreement and ensure that counsel for the Plaintiff Class has sufficient information as allowed by state and federal law so that they are able to carry out their responsibilities to the Plaintiff Class in ensuring the timely implementation of this settlement agreement.

III. PROVISION OF PASRR SPECIALIZED SERVICES

The Defendant shall provide or arrange for the provision of Specialized Services, as defined herein and by 42 U.S.C. § 1396r(e)(7)(G)(iii) and 42 C.F.R. §§ 483.120(a)(2) and as identified in

the PASRR Process for the Plaintiff Class member, to all Plaintiff Class members who are identified by the PASRR Level II Evaluation to need such Specialized Services pursuant to 42 U.S.C. § 1396r(e)(7)(B)(ii)(II) and 42 C.F.R. §§ 483.120(a)(2) and 483.136. The parties agree to work together in good faith to achieve this result and as such agree as follows:

1. Within thirty (30) days of entry of this settlement agreement, Defendant will correspond with all nursing facilities that receive MaineCare payments reminding them of their responsibility to screen and identify residents who are known or suspected of having a “related condition” under PASRR Level I. Defendant will seek input from counsel for the Plaintiff Class as to the content and form of the correspondence before sending the correspondence.
2. Within sixty (60) days of entry of this settlement agreement, Defendant will perform a program review of the PASRR Level II process for the Plaintiff Class, to determine if the process it or its agents, including but not limited to APS Healthcare, uses, complies with the requirements of federal regulations. Defendant will submit the information relied upon, to the extent permitted by law, court order or release, and results of its program review to counsel for the Plaintiff Class at the conclusion of the review.
3. Within forty-five (45) days after receipt by counsel for the Plaintiff Class of the results of Defendant’s program review, experts for the Plaintiff Class shall provide input to Defendant and consult with Defendant on developing a corrective plan, if necessary. If the parties are unable to agree on a corrective plan, or the necessity of such a plan, within 150 days of the date of entry of this settlement agreement then either party may seek to have the Court mediate the dispute.
4. Once a revised PASRR Level II process is in place, if necessary, Defendant will direct the PASRR Level II Evaluation of all identified Plaintiff Class members in compliance with 42 C.F.R. § 483.136 to be completed within sixty (60) days, unless impracticable.
5. Within 30 days of a PASRR Level II Evaluation identifying a member of the Plaintiff Class as needing Specialized Services, Defendant shall provide or arrange for the provision of Specialized Services as defined herein and in 42 U.S.C. § 1396r(e)(7)(G)(iii) and 42 C.F.R. § 483.120(a)(2) and as identified by the PASRR Process for the member.
6. Defendant shall assign a complex case manager to review the Specialized Services and Evaluations that Defendant and experts for the Plaintiff Class have identified as of the date of this settlement agreement as needed by the three (3) Named Plaintiffs, and ensure that the Evaluations and Specialized Services will be provided to the extent available within thirty (30) days from the date of this settlement agreement. The complex case manager will also seek providers for Specialized Services if no providers are currently available so that these Specialized Services will be provided promptly. For those recommended Specialized Services that are not coverable by MaineCare, Defendant will make good faith efforts to arrange the provision of such services.

IV. CASE MONITORING SERVICES

1. Within thirty (30) days of entry of this settlement agreement, Defendant shall assign a case monitor to each member of the Plaintiff Class. The case monitor will facilitate and monitor the provision or arrangement of Specialized Services to Plaintiff Class members as required by 42 C.F.R. § 483.120(b).
2. Within sixty (60) days of entry of this settlement agreement, Defendant shall establish a Complex Case Group to be chaired by a Deputy Commissioner or other official within the Commissioner's office. The group will consist of persons from the office of the Office of Adults with Cognitive and Physical Disability Services, the Office of Elder Services, the Office of Adult Mental Health Services, and the Office of MaineCare Services and representatives as are deemed appropriate by the Commissioner. The Complex Case Group shall review any difficult or unusual cases referred to it by the case monitors to determine what Specialized Services would meet the needs of the Plaintiff Class members identified in the member's PASRR Level II Evaluation. The Complex Case Group shall meet at least monthly.

V. CONSULTATION WITH PLAINTIFFS' COUNSEL

1. Throughout the process of implementing the terms of this settlement agreement, the parties agree to cooperate in good faith. Defendant agrees to, among other things, provide timely information to counsel for the Plaintiff Class, including waiver applications, state plan amendments, procedures to implement provisions of this settlement agreement, to ensure that Plaintiffs' counsel are able adequately to monitor implementation of this settlement agreement. Defendant shall consult with Plaintiffs' counsel about the adoption of any necessary Rules designed to implement this settlement agreement, including but not limited to, any Rules regarding the establishment and operation of ICFs-ORC and the HCBW and any Rules related to the provision of Specialized Services. Such consultation includes soliciting comments from counsel for the Plaintiff Class and working with counsel for the Plaintiff Class on the development of Rules prior to engaging in formal rulemaking pursuant to the Maine Administrative Procedure Act.
2. Absent a court order otherwise providing for the release of information to counsel for the Plaintiff Class regarding members of the Plaintiff Class, as provided below, Defendant shall send a release of information to identified members of the Plaintiff Class so that they may consent, if they so choose, to release of their identities and protected health information to counsel for the Plaintiff Class.
3. To ensure that Plaintiffs' counsel are able adequately to monitor implementation of this settlement agreement Defendant shall provide the following information regarding the members of the Plaintiff Class, to the extent authorized by law, court order or release, to counsel for the Plaintiff Class within 30 days of the Department receiving (i) all PASRR Level I Screens that indicate that member is suspected of having a related condition; (ii) all PASRR Level II Evaluation Reports, including all information relied upon in conducting the PASRR Level II Evaluation, and all notes compiled in conducting the

PASRR Level II Evaluation; (iii) all offers of non-nursing facility placements made to a member of the Plaintiff Class. Upon counsel for the Plaintiff Class's request for additional information regarding an individual member of the Plaintiff Class, the Defendant shall provide any and all information reasonably requested within thirty (30) days of such a request, to the extent authorized by law, court order or release.

VI. NOTICE TO CLASS MEMBERS

1. The parties agree to provide appropriate notice to the Plaintiff Class subject to approval by the court. That notice shall include an individual notice given to each currently known member of the Plaintiff Class and to any new members of the Plaintiff Class identified during the term of this settlement agreement. Furthermore, a one-time notice shall be provided to all nursing facilities in Maine regarding the terms of the settlement agreement.
2. The parties will collaborate to draft a notice that shall be phrased in simple, non-legal language and that shall include the essential terms of the settlement and the names and contact information for counsel for the Plaintiff Class.
3. The notice to known members of the Plaintiff Class and to the nursing facilities and home health agencies shall be sent out no later than thirty (30) days after the court approves the notice.
4. Counsel for the Plaintiff Class will by motion seek a protective order to obtain from the Defendant the names, addresses, and telephone numbers of members of the Plaintiff Class, and of their guardians, if any, and any and all information and/or documents in Defendant's possession regarding any member of the Plaintiff Class. Defendant will, as required by 42 C.F.R. § 431.306(f), notify the Court of the applicable statutory provisions, policies, and regulations restricting disclosure. Defendant will, however, comply with any court order that requires it to disclose information about members of the Plaintiff Class. Absent a court order, the parties will collaborate in good faith to draft an authorization for release of information to be sent to identified members of the Plaintiff Class so that they may consent, if they so choose, to release of their protected health care information to counsel for the Plaintiff Class. The Defendant will send the authorization to identified members of the Plaintiff Class with the notice described above.

VII. LEGISLATIVE APPROPRIATION

1. In entering into this agreement, the Department undertakes to use its best efforts and act in good faith to carry out the terms of this agreement, including proposing a legislative appropriation of funds necessary to fulfill its obligations under this agreement. Plaintiffs hereby acknowledge that the Legislature has exclusive control over the appropriation of monies to fund the expenditures contemplated in this agreement, that the Department cannot and does not control the appropriation of funds, and that the Department cannot guarantee that sufficient funds will be appropriated to allow it to perform its obligations under this agreement.

2. Defendant shall make reasonable efforts to inform plaintiffs' counsel of the status of legislative appropriation of funds necessary to provide the services specified in this settlement agreement. Defendant shall provide plaintiffs' counsel with copies of all formal budget proposals submitted to the Governor's office and the Department of Administrative and Financial Services (DAFS) that affect funding for the services specified in this settlement agreement. If the Governor imposes budgetary curtailments, Defendant shall provide to plaintiffs' counsel copies of all documents submitted to the Governor's office or DAFS showing the impact, if any, of any such curtailments on funds available for the services specified in this settlement agreement. After the Governor submits a proposed biennial or supplemental budget to the Legislature, the Defendant shall notify plaintiffs' counsel of any proposals by the Department for funds to provide the services specified in this settlement agreement that were not included in the Governor's proposed budget. Plaintiffs' counsel may make reasonable requests for additional information in the Department's possession otherwise available under the Freedom of Access Act (FOAA) relating to budgeting of funds for services specified in this settlement agreement without the necessity of submitting a formal FOAA request.
3. In the event that budgetary cuts make it impossible to fulfill the terms of this settlement agreement, then the parties agree to utilize the procedure set forth in Paragraph IX below.

VIII. DISMISSAL AND RETENTION OF JURISDICTION

1. The parties agree to request an order of dismissal pursuant to Rule 41(a)(2), without prejudice, and incorporating by reference the terms of this settlement agreement.
2. If Defendant is able to implement the HCBW without establishing any ICFs-ORC, the parties agree to request that the Court retain jurisdiction solely for the purposes of mediation and enforcement of the terms of the settlement agreement for a period of three years from the date the Court approves the settlement agreement.
3. If Defendant is unable to implement the HCBW without establishing any ICFs-ORC, the parties agree to mediate in an attempt to reach an agreement upon a reasonable extension of the retention of the Court's jurisdiction solely for the purposes of mediation and enforcement of the terms of the settlement agreement.
 - a. If the parties reach agreement, the parties shall file a joint motion with the Court seeking the agreed-to extension of the retention of the Court's jurisdiction.
 - b. If the parties cannot reach agreement after mediation, either party may seek an extension of time of the Court's jurisdiction solely for the purposes of mediation and enforcement of the terms of the settlement agreement.

IX. MISCELLANEOUS PROVISIONS

1. In the event that the parties disagree on the implementation of any of the provisions in the settlement agreement, the parties agree not to seek enforcement of any provision or to void the settlement agreement and/or to initiate litigation without first providing reasonable notification to the other party and seeking a good faith resolution of any disputed matter.
2. In the event that the parties continue to disagree on the implementation of any of the provisions in the settlement agreement after seeking a good faith resolution, the parties may then choose an appropriate course, including moving the Court for enforcement of any provision in the settlement agreement to the extent provided in Section VIII, voiding the settlement agreement and/or initiating litigation.
3. This settlement agreement shall apply solely to the Class of Plaintiffs and services at issue in this lawsuit. By entering into this Settlement Agreement, Plaintiffs do not waive any right to appeal, grieve, or challenge decisions of the Department regarding provision of services to them.
4. In entering into this agreement, the Defendant does not admit liability to the Class of Plaintiffs or any other persons and specifically reserves the right to raise and maintain all of its defenses in any subsequent litigation.

Dated: August 25, 2011

/S/

Jeffrey Neil Young
MCTEAGUE HIGBEE
4 Union Park P.O. Box 5000
Topsham, ME 04086
(207) 725-5581
jyoung@mcteaguehigbee.com

/S/

Jack Comart
Maine Equal Justice Partners
126 Sewall Street
Augusta, ME 04330-6822
(207) 626-7058, ext. 202
jcomart@mejp.org

/S/

Staci K. Converse
Peter M. Rice
Disability Rights Center
24 Stone Street
P.O. Box 2007

Augusta, ME 04338
(207) 626-2774
sconverse@drcme.org
price@drcme.org

/S/

Martha Jane Perkins
National Health Law Program
211 N. Columbia St., Second Floor
Chapel Hill, NC 27516
(919) 968-6308
Perkins@healthlaw.org

Attorneys for Plaintiffs

/S/

James E. Fortin
Assistant Attorney General
Office of the Attorney General
Six State House Station
Augusta, ME 04333
(207) 626-8800
James.Fortin@maine.gov

/S/

Janine A. Raquet
Assistant Attorney General
Office of the Attorney General
Six State House Station
Augusta, ME 04333
(207) 626-8800
Janine.Raquet@maine.gov

Attorneys for Defendant