

SETTLEMENT AGREEMENT
DJ No. 204-34-72

I. INTRODUCTION

- A. This Agreement is entered into between the United States of America (“United States”) and the Maine Department of Health and Human Services (the “Department”) (collectively “Parties”).
- B. This Agreement arises out of a complaint filed with the U.S. Department of Justice, Civil Rights Division, Disability Rights Section from a Maine resident, alleging that the Home Support Service limits under the Department’s MaineCare “Home and Community Services for Adults with Intellectual Disabilities or Autism Spectrum Disorder” waiver program (the “Section 21 Waiver”) place the complainant’s adult son (“Complainant”) at risk of unnecessary segregation.
- C. On May 1, 2018, the U.S. Department of Justice notified the Department that it had opened an investigation under Title II of the Americans with Disabilities Act (the “ADA”), 42 U.S.C. §§ 12131-12134 (“Title II”), and its implementing regulation, 28 C.F.R. Part 35, and requested information to facilitate its investigation. The Department responded, providing information about the Section 21 program and other requested information and documents. On February 10, 2020, the United States issued a Letter of Findings and Conclusions to the Department (“Findings Letter”), notifying the Department that, upon careful review of the evidence, the United States concluded that the Department is violating Title II of the ADA.
- D. On March 28, 2019, the Department sent a letter to the Complainant in which the Department stated that it would authorize 168 hours per week of Home Support-Quarter Hour services for the Complainant and Assistive Technology.
- E. Title II of the ADA prohibits discrimination against qualified individuals with disabilities in the services, programs, and activities of public entities. 42 U.S.C. § 12132; 28 C.F.R. § 35.130. Title II’s implementing regulation requires public entities to administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities. 28 C.F.R. § 35.130(d). The most integrated setting appropriate is the setting that enables an individual with a disability to interact with non-disabled persons to the fullest extent possible. 28 C.F.R. pt. 35, App. B at 709 (2019). Title II’s implementing regulation also requires public entities to make reasonable modifications in policies, practices, and procedures when necessary to avoid discrimination unless doing so would result in a fundamental alteration of the program. *Id.* § 35.130(b)(7)(i). Title II authorizes the United States to initiate investigations, make findings of fact and conclusions of law, and attempt informal resolution when it finds violations. 28 C.F.R. pt. 35, subpt. F. The United States is also authorized to take appropriate action, including commencing a civil action in a United States District Court, should informal resolution efforts fail. *See id.*

- F. The ADA applies to the Department because it is a “public entity” as defined by Title II of the ADA. 42 U.S.C. § 12131(1). The Department is prohibited from discriminating on the basis of disability either directly or through contractual, licensing, or other arrangements. 28 C.F.R. § 35.130(b)(1).
- G. The Parties agree that it is in their interests, and the United States believes that it is in the public interest, to resolve this matter without engaging in protracted litigation. The Parties have therefore voluntarily entered into this Agreement.
- H. The United States agrees and acknowledges that this Agreement is not, and is not to be construed as, an admission of liability on behalf of the Department, by whom liability is expressly denied. The Parties have entered into this Agreement for the sole purpose of avoiding the burden, expenses, delay, and uncertainties of litigation. The Parties understand that this Agreement resolves certain disputes between the Parties which, if pursued, would be contested, and that this Agreement shall not be construed as a precedent, admission, or agreement concerning any factual or legal questions arising from the underlying dispute.
- I. In consideration of, and consistent with, the terms of this Agreement, the Attorney General agrees to refrain from filing a civil suit in this matter, except as provided in the section entitled “Enforcement.”
- J. The Effective Date is the date of the last signature below. Unless otherwise specified, all time periods designated for an action run from the Effective Date.

II. DEFINITIONS

For purposes of this Agreement, the following terms have the following meanings:

- A. “Agency Per Diem Services” refers to services defined and described in the MaineCare Benefits Manual Ch. II, § 21.05-11.
- B. “Agency Placement” refers to any setting in which a Member receives Agency Per Diem Services.
- C. “Case Manager” refers to the individual who is responsible for assuring the timely convening of the Planning Team, developing the Personal Plan, monitoring the planned services received by the Member, and assuring that those services meet the requirements set forth in the Member’s Personal Plan.
- D. “Home Support Services” refers to direct support services, including habilitative training and/or personal assistance with Activities of Daily Living and/or Instrumental Activities of Daily Living, development, and personal well-being, which can be provided as Agency Per Diem Services, Quarter Hour Services, or services in Shared Living placements. MaineCare Benefits Manual Ch. II, §§ 21.05-11, 21.05-13, 21.05-20.

- E. “ICF” refers to an Intermediate Care Facility as defined in the MaineCare Benefits Manual Ch. II, § 50.01-1.
- F. “Interdisciplinary Team” refers to the team of individuals responsible for person centered planning with an individual receiving MaineCare services in an ICF. MaineCare Benefits Manual Ch. II, §§ 50.01-8 – 50.01.10.
- G. “MaineCare” means the joint federal / state program of medical assistance administered by the Department pursuant to 42 U.S.C. § 1396a and 22 M.R.S. § 3173.
- H. “Member” refers to a person currently eligible for and receiving Section 21 Waiver services.
- I. “Personal Plan” refers to a “Personal Plan” as defined and described in the MaineCare Benefits Manual Ch. II, §§ 21.02-22 and 21.04.
- J. “Provider” refers to an individual or entity that has been approved by the Maine Medicaid program to provide Section 21 Waiver Home Support Services.
- K. “Quarter Hour Services” refers to services defined and described in the MaineCare Benefits Manual Ch. II, § 21.05-13.
- L. “Section 21 Waiver” is a Department waiver program, authorized pursuant to Section 1915(c) of the Social Security Act, that provides Home and Community Benefits for Members with Intellectual Disabilities or Autism Spectrum Disorder pursuant to MaineCare Benefits Manual Chapter II, Section 21.

III. ACTIONS TO BE TAKEN BY THE DEPARTMENT

- A. *Exceptions Process.* The Department agrees to seek approval from the federal Centers for Medicare and Medicaid Services (“CMS”) to amend the Department’s Section 21 Waiver to establish an exceptions process authorizing Section 21 Members, and individuals applying for the Section 21 waiver, to seek, and the Department to authorize, services in excess of otherwise-applicable Section 21 Waiver monetary and/or unit caps where necessary to ensure that Members receive adequate and appropriate services and supports in the most integrated setting appropriate to their needs, consistent with Title II of the ADA, and consistent with existing Section 21 health and safety requirements. If approved by CMS, the Department agrees to adopt a rule that establishes the exceptions process. When determining whether to grant an exception to monetary or unit caps, the Department may consider the availability of natural supports for the Member (though Members are not required to rely on natural supports if they choose not to do so or if the proposed person(s) is unable or unwilling to provide natural supports), and whether MaineCare services other than those subject to the monetary or unit caps can meet the Member’s needs in the most integrated setting appropriate to their needs. The Department may deny a requested exception if granting it would fundamentally alter the Section 21 Waiver program.

1. Implementation Schedule.

i. The Department will develop and submit the waiver amendment application referenced in Paragraph III.A. to CMS within 270 days of the Effective Date of this Agreement. The Department will notify the United States upon submitting to CMS the waiver amendment application referenced in Paragraph III.A. and will provide the United States with a copy of the application. The Department will notify the United States upon receiving approval (or denial) from CMS.

ii. If approved by CMS, within 270 days of the date of CMS approval, the Department will adopt a rule that establishes the exceptions process.

iii. For two years after implementation of the waiver amendment as required under Paragraph III.A.1.ii., the Department will maintain any and all records documenting its implementation and application of the exceptions process, including, but not limited to, records of all steps taken to implement the amendment upon receipt of CMS approval, requests for exceptions under the rule, and any other requests for authorization of more than 84 hours per week of Quarter Hour Services or Agency Per Diem Services in single-person Agency Placements and records of all requests for reasonable modifications or accommodations in which more than 84 hours per week of Quarter Hour Services or Agency Per Diem Services in single-person Agency Placements is requested. Such records will include the date of the request, the determination regarding the request and the reason(s) for the determination, the date of the determination, and who participated in the decision-making. The United States shall have access to these records, with advance written notice, in order to assess compliance with this Agreement.

B. *Modifying the Personal Planning Process.* The Department will adopt a rule to require that the services Section 21 Members receive, and the setting(s) in which they receive such services, will be determined by the Members' individual needs identified through an assessment of functional need and preferences rather than by provider preference. The Department will respect Members' exercise of their right to choice of services and providers, including the right to receive direct support services in the most integrated setting appropriate to their needs.

1. Implementation Schedule: The Department will make the modification(s) referenced in Paragraph III.B. within one year of the Effective Date of this Agreement. The Department will share with the United States each and every modification planned and implemented to comply with Paragraph III.B.

C. *Informing Current and Potential Section 21 Members.* The Department will notify all Section 21 Members (and their guardians), and individuals residing and receiving

MaineCare services in ICFs who may be eligible for Home Support Services (and their guardians), of the changes to the Section 21 Waiver program required and made under this Agreement.

1. Implementation Schedule:

- i. Within 60 days of the Effective Date of this Agreement, the State will notify individuals under Paragraph III.C. about this Agreement and the changes to the Section 21 Waiver the Agreement requires. The notification will explain, in plain language, the changes to the Section 21 Waiver program the Agreement requires, the recipient's right to apply for an exception to Section 21 Waiver service and/or monetary caps once the Agreement's required changes are implemented, and of the recipient's right under Title II of the ADA to receive services in the most integrated setting appropriate to their needs. The notification will explain that the availability of the exceptions process outlined in Paragraph III.A. is conditioned upon approval by CMS and that the changes to the Section 21 Waiver program outlined in Paragraphs III.A. and III.B. will not be effective until adopted in accordance with the Maine Administrative Procedures Act. The State will notify the United States upon its issuance of the notification under this paragraph and will provide the United States with one copy of the notification template sent to individuals.
- ii. Within 30 days after the Department has taken the steps and made the modifications referenced in Paragraphs III.A. and III.B., the Department will notify individuals under Paragraph III.C. of the changes to the Section 21 Waiver program made under this Agreement. The notification will explain, in plain language, the changes made to the Section 21 Waiver program, the recipient's right to apply for an exception to Section 21 Waiver monetary and/or unit caps, and of the recipient's right under Title II of the ADA to receive services in the most integrated setting appropriate to their needs when that does not fundamentally alter the program. The Department will notify the United States upon its issuance of the notification under this paragraph and will provide the United States with one copy of the notification template sent to individuals.

D. *Informing Staff, Case Managers, and Others.* The Department will notify all Department, Office of MaineCare Services, and Office of Aging and Disability Services officials, employees, staff, and agents involved in the administration of the Section 21 Waiver or the implementation of Section 21 Waiver policies and procedures, as well as all Section 21 Case Managers and Home Support Service providers, and all Interdisciplinary Teams serving individuals residing and receiving MaineCare services in ICFs, of the changes to the Section 21 Waiver program made under this Agreement.

1. The notification will include written informational materials addressing the following:

- i. The requirements of Title II of the ADA, with a focus on the requirement that public entities provide services in the most integrated setting appropriate to the needs of each individual unless doing so will result in a fundamental alteration of the program;
 - ii. Changes made by the Department to the Section 21 Waiver program under Paragraphs III.A. and III.B. of this Agreement, including the specific steps the Department has taken and will take to implement those changes; and
 - iii. Information to assist those notified with understanding the changes to the Section 21 Waiver program, including how the exceptions process and the changes to the Personal Planning process are to assist recipients of MaineCare services to receive services in the most integrated setting appropriate to their needs when such services do not fundamentally alter the Section 21 Waiver program.
 2. Implementation Schedule: Within 90 days of the Effective Date of this Agreement, the Department will develop a draft notification and written informational materials under Paragraph III.D. and send the draft to the United States for review and comment. Within 60 days of the United States' comments on the draft notification, or within 30 days of written communication from the United States that it has no comments on the draft notification, the Department will make agreed-to changes based on the United States' comments and distribute the notification and written informational materials under Paragraph III.D. The Department will notify the United States upon the Department's distribution of the notification and written materials and will provide the United States with one copy of the templates for the final notification and written materials.
- E. *Services for the Complainant*. As of the Effective Date of this Agreement, the Department will continue to authorize the Complainant to receive 168 hours per week of Quarter Hour Services, and the use of such Quarter Hour Services at a 2:1 staff to Member ratio for services provided, as needed. Within one week of the Effective Date, the Department will provide to the Complainant, by U.S. Mail, First Class, Postage Prepaid, an Authorization to Release Information form and assistance to complete the form. If within six months of the Effective Date of this Agreement the Complainant or the Complainant's case manager or other representative provides a signed Authorization to Release Information form to the Department, the Department shall, within two weeks of receipt of the signed Authorization to Release Information, issue a vendor call to identify one or more qualified providers of Quarter Hour Services willing to serve the Complainant and who, in the aggregate, have the capacity to provide the Complainant's authorized Quarter Hour Services. The Department shall ensure all authorized services are provided; services to the Complainant will be deemed provided if the Department identifies such providers but the Complainant or his guardians refuse the service. The Department shall issue additional vendor calls as necessary should one or more identified providers become unable to, in the aggregate, provide the Complainant's authorized Quarter Hour

Services. The Complainant's continued receipt of Section 21 Waiver services will be contingent upon his remaining a Maine resident eligible for and needing and requesting MaineCare services.

1. For two years after the Effective Date of this Agreement, the Department will maintain any and all records regarding the Complainant, including, but not limited to, Personal Plans (*i.e.*, PCP forms), service requests and determinations (*i.e.*, service authorizations, denials, increases, or reductions), assessments, and EIS notes. The United States shall have access to these records, as permitted by law, with advance written notice, in order to assess compliance with this Agreement. The Department shall seek to minimize the number of releases requested of the Complainant for the purpose of issuing vendor calls and obtaining permission to provide the United States with access to Complainant's protected health information.
- F. *Compensatory Damages.* The Department will pay the Complainant or a trust formed for the Complainant's benefit \$100,000 within 30 days of the Department's receipt of the completed release attached hereto as Attachment A and receipt of completed IRS Form W-9's for the Complainant. The Department will make this payment by check made payable to the Complainant in his full and legal name, or the trust referenced above, as identified in the completed versions of Attachment A. Within 15 days of payment to the Complainant, the Department shall send the United States proof of payment.

IV. TERM

- A. This Agreement will terminate either (1) upon the Department's substantial compliance with all of the requirements set forth under Section III of this Agreement, or (2) three years after the Effective Date, whichever is sooner.
- B. The Department shall be considered to be in substantial compliance with this Agreement when the Department has (1) requested CMS approval of the exceptions process described in Paragraph III.A. and, if approved by CMS, adopted the rule described in Paragraph III.A.; (2) adopted the rule described in Paragraph III.B.; (3) completed the requirements set forth in Paragraphs III.C. and III.D.; (4) completed the requirements set forth in Paragraph III.E.; and (5) tendered payment of \$100,000 to or on behalf of the Complainant in exchange for a release from the Complainant.

V. ENFORCEMENT

- A. The Parties agree to work collaboratively to achieve the purposes of this Agreement. In the event of any dispute over the Agreement's language, requirements, or construction, the Parties will meet and confer (telephonically, electronically, or in-person) in an effort to achieve a mutually agreeable resolution.
- B. The Parties will negotiate in good faith to resolve informally any dispute, including disputes concerning interpretation of or compliance with this Agreement prior to

initiating court action. If the United States believes that the Department has violated this Agreement, it will notify the Department in writing and include reasonably specific information regarding the violation. If the United States and the Department are unable to agree on a resolution within ninety (90) days of the United States' notice of violation, the United States may commence a civil action in the U.S. District Court for the District of Maine for the limited purpose of enforcing the terms of this Agreement.

- C. The ninety-day negotiation period does not apply to conditions or practices that pose an immediate and serious threat to the life, health, or safety of individuals identified pursuant to this Agreement, for which the United States may seek appropriate relief including commencing a civil action in federal court if the United States and the Department are unable to agree on a resolution within ten (10) days of the United States' notice of violation.
- D. It is a violation of this Agreement for the Department to fail to comply in a timely manner with any of the requirements in this Agreement. The Parties may agree in writing to extend any deadlines specified in this Agreement. The United States will not unreasonably deny requested extensions, if made in advance of any deadline, and following the Department's due diligence to meet such a requirement.
- E. Failure by the United States to seek enforcement of any provision or deadline of this Agreement will not be construed as a waiver of the United States' right to enforce any deadlines or provisions of this Agreement.
- F. In any dispute regarding compliance with any provision of this Agreement, the Department will bear the burden of demonstrating that it is in compliance with this Agreement.

VI. GENERAL PROVISIONS

- A. Nothing in this Agreement is intended to override the right of an individual to refuse offered services.
- B. This Agreement will constitute the entire integrated agreement of the Parties.
- C. Any modification of this Agreement will be executed in writing by the Parties.
- D. The United States and the Department will each bear the cost of their own attorneys' fees and expenses incurred in connection with reaching this Agreement. This provision does not apply to any litigation related to this Agreement.
- E. This Agreement is binding on all successors, assignees, employees, agents, contractors, and all others working for or on behalf of the Department to implement the terms of this Agreement.
- F. The Parties will promptly notify each other of any court or administrative challenge to this Agreement, or any portion thereof. The Department will work in good faith to

uphold and defend this Agreement, including relevant policies, services, and regulations promulgated under this Agreement, against any challenge by any third party.

- G. The Department will not retaliate against any individual because that individual has opposed any act or practice that violates this Agreement, or because that individual has made or may make a complaint, testified, or participated in any manner in an investigation, proceeding, or hearing related to this Agreement. The Department will timely and thoroughly investigate any allegations of retaliation in violation of this Agreement and take any necessary corrective actions identified through such investigations.
- H. The Department will take all necessary measures to ensure that no State or Department official, representative, or staff member, and no Provider, case manager, or other Department contractor or agent, coerces, intimidates, threatens, interferes with, or retaliates against any person related to his or her exercise, or another individual's aid or encouragement to any person to exercise, any protection of this Agreement.
- I. If any term of this Agreement is determined by any court to be unenforceable, the other terms of this Agreement will nonetheless remain in full force and effect.
- J. The Parties represent and acknowledge that this Agreement is the result of extensive, thorough, and good faith negotiations. The Parties further represent and acknowledge that the terms of this Agreement have been voluntarily accepted, after consultation with counsel, for the purpose of making a full and final compromise and settlement of the United States' findings under Title II and its implementing regulation as set forth in the Findings Letter referenced in Paragraph I.C. of this Agreement. Each Party to this Agreement represents and warrants that the person who has signed this Agreement on behalf of a Party is duly authorized to enter into this Agreement and to bind that Party to the terms and conditions of this Agreement.
- K. This Agreement may be executed in counterparts, each of which will be deemed an original, and the counterparts will together constitute one and the same Agreement, notwithstanding that each Party is not a signatory to the original or the same counterpart.
- L. In addition to any specific record retention obligations contained elsewhere in this Agreement, the Department will maintain sufficient records and data to document the Department's implementation of the Agreement's requirements and will make such records available to the United States for inspection and copying on a reasonable basis. Such action is not intended, and will not be construed, as a waiver, in litigation with third parties, of any applicable statutory or common law privilege associated with such information. Other than to carry out the express functions as set forth herein, the United States will hold such information in strict confidence as permitted by federal law.

M. This Agreement will be interpreted in accord with federal law and the laws of the State of Maine. Where there is a question about choice of law, federal law will govern. The venue for all legal actions concerning this Agreement will be in the United States District Court for the District of Maine.

N. "Notice" under this Agreement will be provided by email and certified mail to the following or their successors:

If to the United States:

Rebecca B. Bond
Chief, Disability Rights Section
Lindsey Weinstock
Trial Attorney, Disability Rights Section
United States Department of Justice
Civil Rights Division
4 Constitution Square
150 M Street, NE
Washington, D.C. 20530

If to the Department:

Jeanne M. Lambrew, Commissioner
Maine Department of Health and Human Services
109 Capitol Street
11 State House Station
Augusta, ME 04333

with a copy to:

Aaron M. Frey, Attorney General
Office of the Attorney General
111 Sewall Street, 6th Floor
6 State House Station
Augusta, ME 04333

IN WITNESS WHEREOF, the parties have set their hands effective as of the date first above written.

Dated: June 4 , 2021

Lindsey Weinstock
Lindsey Weinstock, Trial Attorney
Disability Rights Section
Civil Rights Division
U.S. Department of Justice
4 Constitution Square
150 M Street, NE
Washington, D.C. 20530

Counsel for the United States

Dated: June 3 , 2021

Jeanne M. Lambrew
Jeanne M. Lambrew, Ph.D., Commissioner
Maine Dept. of Health and Human Services