

## SETTLEMENT AGREEMENT

### I. INTRODUCTION

A. This Agreement is entered into between the United States of America (“United States”) and the State of North Dakota (“State”) (collectively “Parties”).

B. In December 2015, the United States Department of Justice (“United States”) notified the State that it was investigating whether the State’s long-term services are administered in the most integrated setting appropriate to individuals with physical disabilities, under Title II of the Americans with Disabilities Act (the “ADA”), 42 U.S.C. §§ 12131-12134, and its implementing regulation, 28 C.F.R. §§ 35.101-35.190. The United States opened the investigation following receipt of complaints alleging that the complainant adults with physical disabilities were capable of, and did not oppose, living in integrated, community settings with the types of community-based services that already exist in the State’s long-term care service system. The complainants further alleged that they and others like them could not access and maintain necessary community-based services and were forced to enter, or were at serious risk of entering, nursing facilities to receive necessary services.

C. This Agreement resolves the United States’ investigation of the State’s alleged violations of Title II of the ADA. The Parties recognize that providing adequate community-based services is the most effective way to enable individuals with physical disabilities to remain in a community setting.

D. The Parties are committed to full compliance with the ADA. The purpose of this Settlement Agreement is to ensure that the State will meet the ADA’s requirements by providing services, programs, and activities for individuals with physical disabilities in the most integrated setting appropriate to their needs. To achieve the goal of integration, the State will develop and implement effective measures to prevent unnecessary admissions to nursing facilities and to transition successfully nursing facility residents to the community where appropriate and unopposed.

E. Nothing in this Settlement Agreement will be construed as an acknowledgement, an admission, or evidence of liability of the State under the ADA or any federal or state law, or defense under the ADA. This Settlement Agreement may not be used as evidence of the State’s liability in any civil or criminal proceeding, except proceedings to enforce or implement this Agreement.

F. The Parties agree that the initiatives of the State’s Aging Services Division, Medical Services Division, Program of All-inclusive Care for the Elderly (PACE) program, and the Money Follows the Person (MFP) program are relevant to compliance with this Agreement. Additionally, the Parties agree that the measures of the sixty-sixth Legislative Assembly of North Dakota are good faith steps towards meeting the terms of this Agreement. These measures include Senate Bill 2012 to provide for an appropriation to fund investments in home and community-based services, House Bill 1032 to make Service Payments for the Elderly and Disabled (SPED) program more affordable, House Bill 1034 to require establishment of guidelines for nursing facilities to act as providers of in-home services, House Bill 1099 to expand the in-home service array, and Senate

Bill 2124 to provide flexibility for specialization of home and community-based case management services.

G. The Effective Date is the date of the last signature below. Unless otherwise specified in this Agreement, compliance with each requirement of this Agreement must be achieved by the date specified in the Implementation Plan under Section VI. The time required for achieving compliance will be considered an implementation period that runs from the Effective Date to the date specified in the Implementation Plan or this Agreement, whichever applies. No enforcement action for non-compliance may be taken during the implementation period for any such requirement.

## II. JURISDICTION

A. The ADA applies to the State of North Dakota because it is a “public entity” as defined by Title II of the ADA. 42 U.S.C. § 12131(1).

B. Title II of the ADA prohibits discrimination against qualified individuals with disabilities in the services, programs, or 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 ADA 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. Part 35, Subpart 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.*

C. 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.

D. In consideration of, and consistent with, the terms of this Agreement, the United States agrees to refrain from filing a civil suit in this matter, except as provided in the section entitled “Enforcement.”

## III. DEFINITIONS

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

A. **“Case Manager”** refers to the individual who coordinates and leads the Person Centered Planning process in accordance with Section VIII. As part of that process, Case Managers will provide each Target Population member with information about and assistance in accessing Community-Based Services consistent with the requirements of Sections VII, VIII, X, XI, and XII.

B. **“Community-Based Services”** refers to State-administered long-term services and supports that Target Population members are eligible to receive and which are determined under Section VIII to be necessary to serve Target Population members in the community. These may include durable medical equipment, home modifications, nursing

visits, transportation to medical appointments, personal care services, and supervision services.

C. **“Community Provider”** refers to an individual or entity that provides one or more Community-Based Services, paid in whole or in part by the State, to Target Population members.

D. **“Diversion”** is a set of activities that occur before a Target Population member is admitted to a nursing facility, which seek to provide an appropriate alternative to a nursing facility and meet the Target Population member’s needs in the Most Integrated Setting.

E. **“Housing Specialist”** refers to an individual designated to provide Target Population members Housing Services, including assistance locating and securing Permanent Supported Housing. Housing Specialists have demonstrated experience locating and securing integrated housing—including housing funded or subsidized through federal, state, and local sources—and providing pre- and post-tenancy resources to individuals with disabilities. A Housing Specialist is employed by the State or by an entity that is separate from property owners or managers. Housing Specialists provide assistance where Case Managers encounter challenges assisting individuals to obtain or maintain integrated housing.

F. **“Housing Supports”** refers to supports by the State that enable Target Population members to obtain and maintain a rented or owned private residence. Such supports include assistance with searching for and securing an appropriate rental unit, meeting and negotiating with landlords, completing the application process, requesting reasonable accommodations, arranging for home modifications prior to move-in or in response to changing needs over time, the moving process, establishing a household, and meeting the obligations of tenancy. Housing Supports are flexible and available as needed and desired, but are not mandated as a condition of tenancy. Housing Supports will be integrated with other Community-Based Services and may be provided by a Housing Specialist, Case Manager, or other service provider not affiliated with the owner or management of the individual’s residence. “Housing Services” as described in Section XII is an umbrella term that encompasses both Housing Supports and Permanent Supported Housing.

G. **“Informed Choice”** refers to the process by which the State ensures that Target Population members have an opportunity to make an informed decision about where to receive services. Informed Choice means a choice made after the State has provided Person Centered Planning and information about the benefits of integrated settings; facilitated visits or other experiences in such settings; and offered opportunities to meet with other individuals with disabilities who are living, working, and receiving services in integrated settings, with their families, and with Community Providers. Informed Choice also entails making reasonable efforts to identify and address any concerns or objections raised by the Target Population member or another relevant decision-maker.

H. **“Most Integrated Setting”** means a setting that enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible. 28 C.F.R. pt. 35, app. B. The Most Integrated Setting for a Target Population member will usually be a private residence owned or rented by the individual or their family member and in

which the individual or their family member has property rights. The Most Integrated Setting appropriate for an individual is determined through Person Centered Planning, as described in Section VIII.

I. **“Natural Supports”** refers to informal, unpaid caregiving that individuals, who are typically but not necessarily a family member or friend, provide to Target Population members.

J. **“Nursing Facility Level of Care”** refers to criteria that an individual must meet to be eligible to receive services provided by a nursing facility. ND ADMIN. CODE 75-02-02-09, as may be amended.

K. **“Peer Supports”** refers to individuals with disabilities or their caregivers who have received training and are available to share their experiences with Community-Based Services with Target Population members.

L. **“Permanent Supported Housing”** refers to affordable, permanent housing coupled with Housing Supports and other Community-Based Services. Permanent Supported Housing is provided in a private residence in which a Target Population member lives alone, unless the Target Population member elects to live in Permanent Supported Housing with family members, a significant other, or one or more roommates of their choosing. Permanent Supported Housing is scattered site; for buildings with two or three units, no more than one unit may be Permanent Supported Housing, and for buildings or complexes with four or more units, no more than 25% of the units in a building or complex may be Permanent Supported Housing. In assessing the 25% limit, only individuals with disabilities and known to the State as receiving State-administered long term care services will be counted. Tenants of Permanent Supported Housing must have access to Community Providers that provide intermittent on-call, planned, and back-up Community-Based Services. Tenants of Permanent Supported Housing have the same tenancy rights and responsibilities as other members of the community. Group homes, nursing facilities, boarding homes, basic care homes, residential care facilities, and assisted living residences do not meet the definition of Permanent Supported Housing. “Housing Services” as described in Section XII is an umbrella term that encompasses both Housing Supports and Permanent Supported Housing.

M. **“Person Centered Planning”** is a Medicaid-mandated process, *see* 42 C.F.R. § 441.725, driven by the individual that identifies supports and services that are necessary to meet the individual’s needs in the Most Integrated Setting. *See* 28 C.F.R. pt. 35, app.

B. The individual directs the process to the maximum extent possible and is provided sufficient information and support to provide Informed Choice. The process is timely and occurs at times and locations convenient to the individual; reflects the cultural and linguistic considerations of the individual; provides information in plain language and in a manner that is accessible to individuals within the Target Population; and includes strategies for resolving conflict or disagreement that arises in the planning process.

N. **“Physical Disability”** means an impairment that substantially limits a major life activity, including one or more major bodily functions, *see* 42 U.S.C. § 12102; 28 C.F.R. § 35.108, such that the individual meets North Dakota’s Nursing Facility Level of Care

by requiring, for example, assistance with activities of daily living such as toileting, eating, or mobility. ND ADMIN. CODE 75-02-02-09, as may be amended.

O. **“Stakeholders”** refers to Target Population members and their families, individuals providing Natural Supports, Community Providers, other relevant healthcare providers who serve Target Population members, and Native American representatives.

P. **Subject Matter Expert** is an individual chosen by the Parties with substantial expertise in management, administration, and financing of states’ home and community-based services programs and services for individuals with physical disabilities. This individual will provide technical assistance and compliance reviews to the State as set forth in the Agreement.

#### IV. TARGET POPULATION

A. For purposes of this Agreement, a Target Population member (“member”) is an individual with a Physical Disability over the age of 21 who is eligible or likely to become eligible to receive Medicaid long-term services and supports and is likely to require such services for at least 90 days. The Target Population is comprised of:

1. Individuals with physical disabilities who are at serious risk of entering nursing facilities to access Medicaid-funded long-term care (“At Risk Target Population”) composed of individuals with physical disabilities who: 1) have been referred for a level of care determination screening to access nursing facility services and are likely to require long-term services and supports; or 2) need services to continue living in the community, have impairments that make them likely to screen at a Nursing Facility Level of Care, and have been determined eligible for SPED with less than \$25,000 in assets; or 3) need Community-Based Services to continue living in the community and currently have a case management provider or have contacted the State’s Aging and Disability Resource Link (ADRL); and

2. Individuals with physical disabilities (“Nursing Facility Target Population”) who: 1) are receiving Medicaid-funded nursing facility services and are likely to require long-term services and supports; or 2) are receiving nursing facility services, are likely to become eligible for Medicaid within 90 days, have submitted a Medicaid application, and have approval for a long-term nursing facility stay.

B. That an individual has both a Physical Disability and either a mental illness or an intellectual or developmental disability does not exclude the individual from the Target Population.

C. That an individual has Natural Supports does not exclude the individual from the Target Population.

D. No person or entity is intended to be a third-party beneficiary of the provisions of this Agreement for purposes of any civil, criminal, or administrative action, and, accordingly, no person or entity may assert any claim or right as a beneficiary or protected class member under this Agreement in any civil, criminal, or administrative

action. No person or entity may assert any claim or right as a beneficiary or protected class member under this Agreement if he or she does not reside in the State of North Dakota and, therefore, does not maintain eligibility for the State's physical disability service system.

**V. SUBJECT MATTER EXPERT**

A. The Parties agree that Michael Spanier will be the Subject Matter Expert ("Expert") retained by the State to provide technical assistance and independent reviews of compliance with the sections of the Agreement. Every three years from the Effective Date, the Parties will confer to evaluate whether the Subject Matter Expert should be retained or replaced. In this reevaluation process, both Parties must agree to replace the Subject Matter Expert.

B. In the event the Expert resigns or the Parties agree to replace the Expert, the Parties will meet and confer within 10 days to discuss a replacement, and the Parties will proceed to replace the Expert.

C. Expert Responsibilities

1. The Expert will provide technical assistance to help the State comply with its obligations under the Agreement. The Parties will cooperate with the Expert. The Expert will also analyze and report on data reflecting the State's progress in complying with all sections of this Agreement. When the Expert's review and approval is required under a term of this Agreement, the Expert will not withhold approval if the State's proposal is consistent with the goals and terms of this Agreement. If the State disagrees with the Expert's lack of approval, the State may notify the United States, which shall make the compliance determination.

2. The Expert and the United States may review compliance with this Agreement at any time. The State will cooperate with efforts to monitor compliance with this Agreement. The Expert and the United States will have full access to employees, facilities, buildings, programs, services, documents, data, records, materials, and things that are necessary to assess the State's compliance and implementation efforts with this Agreement. The Expert and the United States will have access to persons and residences with the consent of the member or guardian. Access will include departmental or individual medical and other records, unless prohibited by federal law and state law not superseded by federal law. The United States and/or the Expert will provide reasonable notice of any visit or inspection. Advance notice will not be required if the Expert or the United States has a reasonable belief that a Target Population member faces a risk of serious harm from an incident referred to in Section XVI. Access 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 information disclosed to the Expert or the United States under this provision. Other than to carry out the express functions as set forth herein, both the United States and the Expert will hold such information in strict confidence to the greatest extent possible.

3. In addition to reviewing and analyzing data, the Expert will assess the quality and sufficiency of Community-Based Services, by reviewing a representative sample of Target Population members.

4. At least every six months, the Expert will draft and submit to the Parties a comprehensive public report on the State's compliance including recommendations, if any, to facilitate or sustain compliance. The Expert shall provide the Parties a draft of his/her report at least seven days before issuing the report. The Parties shall have the opportunity to review and comment on the proposed report. The Parties may agree to allow the Expert an additional five days to finalize a report after he/she receives comments from the Parties. The State will post these compliance reports online to be accessible publicly.

5. The Expert will provide the State with technical assistance relating to any aspect of this Agreement. This technical assistance shall include drafting and completing a proposed Diversion Plan, Capacity Plan, Housing Access Plan, and Safety Plan with State input and agreement; the United States must approve these Plans. The agreed to Plans must be included in the Implementation Plan under Section VI.

6. The Expert will adopt a problem-solving and collaborative approach towards technical assistance and matters of implementation.

D. In completing his or her responsibilities, the Expert may:

1. Hire staff and consultants as necessary to assist in carrying out the Expert's duties and responsibilities;

2. Require written reports and data from the State concerning compliance;

3. Testify in enforcement proceedings involving both Parties regarding any matter relating to the implementation, enforcement, or dissolution of the Agreement, including the Expert's observations, findings, and recommendations in this matter;

4. Communicate privately with a Party, counsel, agents, or staff of a Party, or anyone else the Expert deems necessary for completing his or her responsibilities; and

5. Mediate disputes on implementation matters consistent with Section XVII.

E. The Expert, and any staff or consultants retained by the Expert, do not assume liability for any claim, lawsuit, or demand arising out of activities under this Agreement. This paragraph does not apply to any proceeding for payment under contracts into which they have entered in connection with their work under the Agreement. Nothing in this section may be construed as requiring the State to defend or indemnify the Expert or any staff or consultants hired by the Expert for any third-party claims. Expert shall procure

and maintain during performance under this agreement appropriate levels of insurance covering Expert's activities under this agreement.

F. Expert's Budget

1. Within 60 days of the Effective Date of this Agreement, the Expert will prepare a proposed budget for the first year under the Agreement, consistent with the Expert's duties. The Expert annually thereafter will submit to the Parties a proposed budget, no later than March 31, for the duration of this Agreement.

2. At any time, the Expert may submit to the Parties a proposed revision to the approved budget, along with any explanation of the reason for the proposed revision. The State will not unreasonably withhold approval of the Expert's proposed or revised budgets.

G. Reimbursement and Payment

1. The cost of the Expert, including the cost of any staff or consultants to the Expert, will be borne by the State, but the Expert and the Expert's staff or consultants are not agents of the State.

2. The cost of the Expert and reasonable expenses incurred by the Expert or any of the Expert's staff or consultants to the Expert in the course of the performance of the duties of the Expert will be reimbursed by the State up to but not exceeding \$250,000 annually.

3. The Expert will submit monthly statements to the State, detailing all expenses the Expert incurred during the prior month. The Expert must for the last month of each state fiscal year, which ends in June, submit detailed expenses no later than July 10 in the first month of the following state fiscal year.

4. The Expert will not enter into any additional contract with the State while serving as the Expert. If the Expert resigns from the position as Expert, the former Expert may not enter any contract with the State or the United States on a matter related to this Agreement without the written consent of the other Party while this Agreement remains in effect. The State will not otherwise employ, retain, or be affiliated with the Expert, or professionals retained by the Expert while this Agreement is in effect, and for a period of at least one year from the date this Agreement terminates, unless the United States gives its written consent to waive this prohibition.

## VI. IMPLEMENTATION PLAN

A. The State will appoint, within 60 days of the Effective Date, an Agreement Coordinator.<sup>1</sup> The Agreement Coordinator will: lead the State's team tasked with

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<sup>1</sup> The role of the Agreement Coordinator may be filled by the State's designated responsible employee under 28 C.F.R. § 35.107, or any other existing state employee, but only if that person has the relevant experience, authority, and time to be an effective Agreement Coordinator.



ensuring access to Community-Based Services; have sufficient authority to effectuate this Agreement's requirements; and coordinate Agreement-related activities and communications between the Parties to this Agreement and the Subject Matter Expert. This Agreement does not require an Olmstead Coordinator. If the State chooses to have an Olmstead Coordinator, the Agreement Coordinator will communicate with the Olmstead Coordinator regarding activities that support this Agreement. The responsibility and role of the Agreement Coordinator will be addressed in the Implementation Plan.

B. The State will develop an Implementation Plan.

C. At a minimum, the Implementation Plan will:

1. Identify benchmarks and timelines for meeting the Agreement's requirements;
2. Assign agency and division responsibility for achieving those benchmarks; and
3. Establish a method to address challenges to implementation. For example, a method to address challenges to implementation could include defining the efforts the State will make to provide in-reach, outreach, and Person Centered Plans to Target Population members in the face of challenges such as lack of current contact information.

D. The Implementation Plan will provide for the State's review of its relevant services, including the Medicaid State Plan, Medicaid Waivers, EX-SPED, and SPED. The review will evaluate the programs' eligibility criteria, capacity, service arrays, and any barriers related to limitations on service hours. The Implementation Plan will provide for necessary changes, based on the review, to the State's administration of these programs to support Target Population members in the Most Integrated Setting appropriate.

E. Early on and throughout the planning and implementation process, the State will engage with Stakeholders to identify their goals, concerns, and recommendations regarding implementation of this Agreement.

F. Within 120 days of the Effective Date, the State will present a proposed Implementation Plan addressing the first two years of this Agreement's requirements to the United States and Subject Matter Expert. The State will consult with the United States and the Expert on an ongoing basis in developing its Implementation Plan, and the State will within 60 days of the Effective Date provide a formal update on the status of the Implementation Plan development. The United States and the Expert will provide comments regarding the proposed Implementation Plan within 30 days of receipt. The State will timely revise its Implementation Plan to address comments from the United States and the Expert; the Parties and the Expert will meet and consult as necessary. The finalized Implementation Plan must be approved by the United States and the Expert.

G. Eighteen months after the Effective Date and at least every year thereafter, the State, in consultation with the United States and the Subject Matter Expert, will revise the Implementation Plan. These revised Implementation Plans must be approved by the

United States and the Expert. These revisions to the Implementation Plan (“Amendments”) will focus on:

1. Implementation for the upcoming year;
2. Challenges encountered by the State to date and strategies to resolve them; and
3. Plans to address noncompliance if, two years after the Effective Date, the State fails to meet any of the implementation requirements in Sections VII-XVI.

H. The State will make the Implementation Plan and Amendments publicly available, by posting them online, among other means.

## **VII. CASE MANAGEMENT**

A. The State will assist Target Population members in learning about, applying for, accessing, and maintaining Community-Based Services.

B. Upon identifying a Target Population member, the State will provide them a Case Manager as follows:

1. For members not already residing in a nursing facility as of the Effective Date, the State will provide a Case Manager as soon as the State identifies that the person is a Target Population member, and no later than the individual is screened for nursing facility services and has a need for long-term services and supports.
2. For members already residing in a nursing facility as of the Effective Date, the State will provide a Case Manager as soon as the State identifies that the person is a Target Population member and no later than:
  - a) Ninety days if the member has long-term care needs but is on a short-term stay;
  - b) Ninety days if the member is currently in a nursing facility for rehabilitation purposes and the State receives a request to extend the nursing facility stay; and
  - c) One hundred twenty days if the member with long-term care needs currently resides at a nursing facility and is not on a short-term stay or for rehabilitation purposes.

C. The State will provide a sufficient number of Case Managers to enable Case Managers to provide all necessary services listed in a member’s Person Centered Plan, including discussing Community-Based Service options, meeting face-to-face regularly with Target Population Members, as dictated by individual needs, and completing Person Centered Planning when the person is identified as a Target Population member. To ensure a sufficient number of Case Managers, the State will establish a mechanism to

collect reliable and aggregated data from Case Managers on the number, type, and frequency of Case Manager contacts with the Target Population.

D. The State will require nursing facilities to afford Case Managers full access to Nursing Facility Target Population members. *See* 42 C.F.R. § 483.10.

E. The State will provide Case Managers and relevant State agencies access to the data system required by Section XV.

F. Implementation Schedule: Within nine months of the Effective Date the State will provide for the role specialization and training of Case Managers for Target Population members who receive Community-Based Services to support compliance with paragraphs A and C of this section.

G. The State's Aging and Disability Resource Link will support compliance with paragraph A of this section.

### **VIII. PERSON CENTERED PLANS**

A. The State will provide each Target Population member with an individualized, written Person Centered Plan that the member's Case Manager develops through Person Centered Planning. For each Target Population member, the Person Centered Planning process will be used to determine which supports and services would enable the Target Population member to live in a community setting if appropriate and will provide Target Population members with an opportunity to decide whether they oppose receiving those services in the community.

B. The purpose of Person Centered Planning is to identify, arrange, and maintain the supports and services that are necessary to meet the Target Population members' needs in the Most Integrated Setting, consistent with the member's Informed Choice and as appropriate to the member's needs.

C. The state-administered Person Centered Plan will move with the member across settings (e.g., the home, hospital, nursing facility) and may be combined with other relevant plans (e.g., care plans, service plans). All state-administered Person Centered Plans for the Target Population member will:

1. Identify the Most Integrated Setting appropriate for the member and the member's preferred setting(s) (e.g., the member's home, a family home, an apartment);
2. Identify the services, including, if appropriate, the Community-Based Services necessary for the member to successfully live in the Most Integrated Setting. Members will not be 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. The Person Centered Plan will note any necessary but unavailable services;
3. Identify the Housing Services, if any, necessary for the member to successfully live in the Most Integrated Setting;
4. List any barriers to receiving Community-Based Services (e.g., lack of

available providers, ineligibility for a necessary service, lack of housing, lack of funding or authority) and identify strategies to address those barriers;

5. State the intended duration of any anticipated nursing facility stay, if applicable, and the reason(s) for that duration;
6. Reflect health, safety, and other risk factors for the member and strategies to address them, including contingency plans to avoid unnecessary institutionalization;
7. List all service requests made by or on behalf of the member and the resulting authorization determinations;
8. Identify whether the member requires Transition Services in accordance with Section XI, and if so:
  - a) Include a detailed, written discharge plan identifying the Transition Services, Community-Based Services, and/or Housing Services needed to transition the member to and maintain the member in the Most Integrated Setting appropriate;
  - b) List the date on which the transition to the identified Most Integrated Setting appropriate will occur and the timeline for completing the steps necessary to effect the transition; and
  - c) Be updated as frequently as required by state policy or at the request of the member, but at a minimum annually to reflect any changes in the needs and preferences of the member and caregiver(s), including the member's desire to move to a community setting.

D. Person Centered Plans will be developed and led by the Case Manager with input, at a minimum, from:

1. The Target Population member to the fullest extent possible, including when the member has a legal guardian, consistent with state law. N.D. Cent. Code § 30.1-28-12, as may be amended. The member will have a primary role in developing the Person Centered Plan when possible;
2. The member's family and/or friends, if consistent with the permission and desire of the member; and
3. The Target Population member's legal guardian, where applicable, to the extent the guardianship order confers residential and/or medical decision-making upon the guardian. *See* N.D. Cent. Code § 30.1-28-04(5), as may be amended. Any decision(s) made by the guardian about where the member will receive services should reflect the member's preferences, as documented in the Person Centered Plan, to the fullest extent possible. *See* N.D. Cent. Code § 30.1-26-01(3), as may be amended.

E. The State will implement policies to resolve conflicts that arise during Person Centered Planning, including the option for Target Population members to obtain a second opinion from a neutral healthcare professional about whether the member could receive Community-Based Services and if so, what Community-Based Services are necessary. If a member obtains a second opinion and provides it to the member's Case Manager or the State, that evaluation will be included in the Person Centered Plan.

F. The State will fully implement Person Centered Plans to enable Target Population members to receive all identified services, in accordance with the Implementation Plan, including those that require reasonable modification to existing programs and services, in the Most Integrated Setting appropriate.

G. To assist the State in determining whether Target Population members are offered the most integrated placement appropriate to their needs, the Subject Matter Expert will review all transition plans that identify a setting other than the member's home, a family home, or an apartment as the individual's Most Integrated Setting for the first two years of the Agreement. Thereafter, the Parties and the Expert will determine the appropriate scope of review as part of the State's Implementation Plan.

H. The State will administer Person Centered Planning training to ensure Case Managers and state staff are aware of and implement Person Centered practices consistently across the State.

I. Implementation Schedule

1. For the first 30 months after the Effective Date the State will obtain ongoing technical assistance on Person Centered Planning to support compliance with the provisions of this section.

2. Within one year of the Effective Date and annually thereafter the State will provide for the Person Centered Planning training of Case Managers required to ensure compliance with paragraph H of this section.

3. As interim benchmarks, Case Managers will provide Person Centered Planning to:

a) At least 290 Target Population members within one year of the Effective Date;

b) At least an additional 290 Target Population members within two years of the Effective Date;

c) At least an additional 650 Target Population members within four years of the Effective Date;

d) At least an additional 670 Target Population members within six years of the Effective Date;

e) At least an additional 670 Target Population members within eight years of the Effective Date.

f) For the purposes of the requirements of this Implementation Schedule, each unique individual may count only once.

g) For the purposes of the requirements of (a)-(f), at least half of the Target Population members who receive Person Centered Planning each year will be Nursing Facility Target Population members.

h) For the purposes of the requirements of (a)-(g), the State will have satisfied each interim benchmark if it has either (1) met the benchmark or (2) largely met the benchmark and demonstrated significant efforts to reach the actual benchmark and important reasons why the benchmark was not completely met.

4. Within seven years of the Effective Date, the State will update its Implementation Plan to address providing Person Centered Planning to all remaining Target Population members.

## **IX. ACCESS TO COMMUNITY-BASED SERVICES**

A. The State will timely administer the Community-Based Services and supports necessary to comply with this Agreement according to the standards and timelines set forth in this Agreement.

B. The State will administer its Community-Based Services so that they are available statewide, and are delivered in the Most Integrated Setting appropriate, including at a Target Population member's home, workplace, and other community settings, consistent with the Implementation Plan.

C. The State will administer Community-Based Services to have sufficient flexibility to address fluctuations in a Target Population member's needs or Community Provider availability, including, for example, arranging for contingency plans in the event of Community Provider unavailability.

D. Within one year of the Effective Date, the State will take necessary steps to enable Target Population members who self-direct their care (in which a Target Population member hires his or her own Community Provider) to receive sufficient support to self-direct, including information and assistance to enable the member to identify, select, supervise, and resolve conflicts and challenges with their Community Providers.

E. Target Population members will not be categorically denied Community-Based Services for any reason relating to their diagnosis, disability, or care needs, including members who a) have significant medical needs; b) require assistance or supervision due to dementia, Alzheimer's disease, acquired brain injury, or a risk of falling; or c) need assistance managing diabetes and related complications. Such denials must be based on individualized assessments.

F. Absent a fundamental alteration, when a Target Population member and the member's physician or other qualified health care professional deem it appropriate for the member to be assisted with a particular service by a non-nurse, allowing a trained Community Provider or caregiver to perform the service would be a reasonable modification under the ADA. Under those circumstances, the State will permit the delegation of nursing tasks. If the limits of the North Dakota Nurse Practices Act, N.D. Cent. Code § 43-12.1, as may be amended, are a barrier to one or more members

receiving services in the community, the State will make reasonable modifications, consistent with 28 C.F.R. § 35.130(b)(7), to address the barrier(s) through the Implementation Plan. The State will administer training to the Community Provider or caregiver from qualified nurses sufficient to ensure that the Provider or caregiver can perform needed nursing-related services for the Target Population member in the community.

G. Unless otherwise required by State or federal law, no Target Population member will be categorically denied any Community-Based Service under this Agreement due to forensic status or history, medical needs, or substance abuse history, nor will any Target Population member be denied Community-Based Services on the basis of co-occurring mental illness, intellectual or developmental disability, cognitive impairment, or brain injury.

H. Implementation Schedule.

1. Within nine months of the Effective Date the State will develop and seek approval by the Centers for Medicare & Medicaid Services (CMS) to expand the service array under the home and community-based services Medicaid waiver to include residential habilitation, community-support services, and companionship services to support compliance with paragraphs A, B, and C of this section.

2. Within nine months of the Effective Date the State will amend the financial and functional eligibility of the SPED program to expand access to Community-Based Services and support compliance with paragraphs A, B, and C of this section.

## **X. INFORMATION, SCREENING, AND DIVERSION**

A. Information

1. Within 18 months of the Effective Date and thereafter, the State will provide information about Community-Based Services, Person Centered Planning, and Transition Services to all Target Population members and guardians, if applicable, who formally request or are referred for placement in a nursing facility or who are screened for a continued stay in a nursing facility.

2. Within 21 months of the Effective Date and thereafter, the State will demonstrate that it provided information about Community-Based Services, Person Centered Planning, and Transition Services to all Target Population members and their guardians, if applicable, who formally request or are referred for placement in a nursing facility or who are screened for a continued stay in a nursing facility. The State will ask members to indicate in writing whether they received such information.

B. Screening and Evaluation

1. Within two years of the Effective Date and thereafter, for each Target Population member, all screenings and evaluations for nursing facility services will be incorporated into Person Centered Planning in accordance with Section

VIII to determine which supports and services would enable the member to live in the Most Integrated Setting appropriate and to provide members with an opportunity to decide whether they oppose receiving those services in that setting, prior to entering a nursing facility, if applicable.

2. Within 18 months of the Effective Date and thereafter, the State will implement incremental changes to its initial and continued stay Nursing Facility Level of Care process and Community-Based Service eligibility process to ensure that members who meet criteria for a particular nursing facility service are offered that same service in the community if the community-based version exists or can be provided through reasonable modification to existing programs and services. Such services include, for example: supervision services and/or personal care services for up to 24 hours per day; nurse visits to administer, for example, oral, injectable and other medications, wound care, bowel and bladder care, or specialized feeding; and durable medical equipment such as Hoyer lifts. At Risk Target Population members will be offered specific Community-Based Services prior to their entry to a nursing facility.

3. Within 24 months of the Effective Date and thereafter, the State will require at least annual level of care determination screening for continued stay in a nursing facility for Target Population members.

C. Diversion: The Subject Matter Expert, with input of the State, will draft and complete an agreed upon Diversion Plan, in accordance with Section V, for a Diversion system that has the capability to promptly identify Target Population members seeking admission to nursing facilities and provide intervention, Person Centered Planning, and services to prevent unnecessary segregation. The Diversion Plan will also address preventing unnecessary segregation for members who are hospitalized and at risk of being discharged to nursing facilities and others who have been referred for nursing facility services.

## **XI. TRANSITION SERVICES**

A. In accordance with the Implementation Plan, the State will transition Target Population members identified in Section VIII.I.3. to the community, consistent with Informed Choice and the Most Integrated Setting set forth in the member's Person Centered Plan. The transition will occur as soon as practicable after the member chooses to pursue transition.

B. Within 18 months of the Effective Date and thereafter, transitions will occur no later than 120 days after the member chooses to pursue transition to the Most Integrated Setting. The State will identify any member whose transition has been pending more than 100 days to the Subject Matter Expert and the United States on at least a biannual basis.

C. The State will provide transition services sufficient to prepare the person to return to an integrated community setting with the supports necessary to prevent unnecessary readmission to a nursing facility during transition and for the first year post-transition. Case Managers will assist members to access transition services. The State will provide



all services necessary to ensure the member's health and safety in the community in accordance with the member's Person Centered Plan.

D. The State will also provide such transition services to At Risk Target Population members identified in Section VIII.I.3 whose Person Centered Plan identifies the need for Transition Services.

E. Implementation Schedule

1. On the Effective Date and thereafter the State will continue to provide transition services consistent with the requirements of this section, consistent with the member's Informed Choice, as appropriate to the member's needs, and comparable in nature to those provided to date under the Money Follows the Person program.

2. As interim benchmarks:

(a) Within two years of the Effective Date, the State will, consistent with the member's Informed Choice, as appropriate to the member's needs, transition at least 100 Nursing Facility Target Population members identified in Section VIII.I.3.a. and b. and divert at least 100 At Risk Target Population members identified in Section VIII.I.3.a. and b. from nursing facilities to Community-Based Services;

(b) Within four years of the Effective Date, the State will, consistent with the member's Informed Choice, as appropriate to the member's needs, transition at least 60% of Nursing Facility Target Population members identified in Section VIII.I.3.a., b., and c.; and divert at least an additional 150 At Risk Target Population members identified in Section VIII.I.3.a., b., and c. from nursing facilities to Community-Based Services, so that a total of at least 250 At Risk Target Population members will have been diverted since the Effective Date;

(c) Within six years of the Effective Date, the State will, consistent with the member's Informed Choice, as appropriate to the member's needs, transition at least 70% of the Nursing Facility Target Population members identified in Section VIII.I.3.a., b., c., and d. from nursing facilities to Community-Based Services; and divert at least an additional 150 At Risk Target Population members identified in Section VIII.I.3.a., b., c., and d. from nursing facilities to Community-Based Services, so that a total of at least 400 At Risk Target Population members will have been diverted since the Effective Date;

(d) Within six years and three months of the Effective Date, the State will update its Implementation Plan to ensure transitioning or diverting from nursing facilities to Community-Based Services all remaining Target Population members whose Person Centered Plan indicates now or in the future that transition or Diversion is appropriate and unopposed. The Plan will address transitioning members within (120 days after the member

chooses to pursue transition and diverting members in time to avoid unnecessary nursing facility stays.

(e) Within seven years of the Effective Date, the State will, consistent with the member's Informed Choice, as appropriate to the member's needs, transition at least 85% of the Nursing Facility Target Population members identified in Section VIII.I.3.a., b., c., and d. from nursing facilities to Community-Based Services;

(f) For the purposes of the requirements of (a)-(e), the State will have satisfied each interim benchmark if it has either (1) met the benchmark or (2) largely met the benchmark and demonstrated significant efforts to reach the actual benchmark and important reasons why the benchmark was not completely met.

3. Within eight years of the Effective Date, the State will transition or divert from nursing facilities to Community-Based Services all Target Population members whose Person Centered Plan indicates that transition or Diversion is appropriate and unopposed. Transitions will continue to occur within 120 days after the member chooses to pursue transition and Diversions will continue to occur in time to avoid unnecessary nursing facility stays.

4. For the purposes of the requirements of this Implementation Schedule, each unique individual may count only once.

## **XII. HOUSING SERVICES**

A. The Subject Matter Expert, with the input of the State, will draft and complete an agreed upon Housing Access Plan, in accordance with Section V. The Housing Access Plan will offer:

1. Housing Supports to Target Population members whose Person Centered Plan identifies available integrated housing but who need services to access it (e.g., promptly assisting members to access home modifications); and

2. Permanent Supported Housing to Target Population members whose Person Centered Plan identifies lack of housing as a barrier to Community-Based Services.

3. Within the timeframes set forth in paragraphs B.1.a-c of this section, for Nursing Facility Target Population members who choose to transition to housing that does not meet the 25% limit in the definition of Permanent Supported Housing, the Subject Matter Expert may evaluate and make a determination whether the housing otherwise meets the requirements of 28 C.F.R. § 35.130(d) and, if so, the housing will count towards the implementation requirements in paragraphs B.1.a-c of this section. If the Parties disagree with the Expert's § 35.130(d) determination, the parties may jointly agree to override the Expert's determination.

4. To count towards the implementation requirements in Sections XI and XII, transitions under this Agreement cannot be to housing in group homes, nursing facilities, boarding homes, basic care homes, residential care facilities, or assisted living residences.

B. Implementation Schedule

1. As interim benchmarks, the State will provide, by utilizing any federal, state, or local funding source or assistance:

a) Permanent Supported Housing or housing that the Subject Matter Expert agrees otherwise meets the requirements of 28 C.F.R. § 35.130(d) to 20 members whose Person Centered Plans identify a need for Permanent Supported Housing, within one year of the Effective Date;

b) Permanent Supported Housing or housing that the Subject Matter Expert agrees otherwise meets the requirements of 28 C.F.R. § 35.130(d) to an additional 30 members whose Person Centered Plans identify a need for Permanent Supported Housing, within two years of the Effective Date;

c) Permanent Supported Housing or housing that the Subject Matter Expert agrees otherwise meets the requirements of 28 C.F.R. § 35.130(d) to an additional 60 members whose Person Centered Plans identify a need for Permanent Supported Housing, within three years of the Effective Date; and

d) Permanent Supported Housing to an additional number of members, allocated each year for the remaining years of the Agreement, based on the aggregate need for Permanent Supported Housing identified in Person Centered Plans.

e) For the purposes of the requirements of (a)-(c), the State will have satisfied each interim benchmark if it has either (1) met the benchmark or (2) largely met the benchmark and demonstrated significant efforts to reach the actual benchmark and important reasons why the benchmark was not completely met.

2. The State will ensure its Implementation Plan, beginning within four years of the Effective Date, addresses allocating, each year for the remaining years of the Agreement, sufficient Permanent Supported Housing to serve all remaining Target Population members whose Person Centered Plans identify a need for Permanent Supported Housing.

3. For the purposes of the requirements of this Implementation Schedule, each unique individual may count only once.

C. In accordance with the Implementation Schedule, the State will develop and provide the Housing Services described in this section to enable Target Population

members to live and receive services in the community, in accordance with Informed Choice and the Most Integrated Setting set forth in the member's Person Centered Plan.

D. The Case Manager, with the help of a Housing Specialist where necessary, will provide Housing Supports for Target Population members, including:

1. Working with members and their social networks to identify any and all housing opportunities. This will include examining whether, with housing modifications and all necessary and available Community-Based Services, or reasonably modified services and programs, the individual could return to a previous address, rent a private home or apartment alone or with another individual(s) of the member's choosing, apply for subsidized housing, or live in the home of family or friends;

2. Assisting the member to access housing modifications and all necessary and available Community-Based Services, or reasonably modified services and programs, to enable the individual to transition to or remain in the identified housing, including assisting the member to access reasonable modifications to services and programs;

3. Upon admission of a Target Population Member to a hospital or nursing facility, the member's Case Manager or a Housing Specialist will work proactively with the member and the member's property manager, landlord, or mortgage company to preserve the member's tenancy or ownership for at least 90 days. This includes providing Housing Supports and:

- a) Assisting members to avail themselves of any applicable local or federal policies permitting individuals to deduct the cost of the nursing facility stay from their income for purposes of calculating a local or federal rental subsidy;

- b) Ensuring that members who receive local or federal housing subsidies will pay no more in rent than 30% of their monthly adjusted income, in accordance with 24 C.F.R. § 982.1; and

- c) Documenting to the nursing facility, Social Security Administration, and other relevant entities that members may continue to receive their monthly cash benefit payment to maintain and return to their housing, in accordance with 42 C.F.R. § 435.725(d).

E. Housing Specialists will receive in-person training on federal laws that prohibit housing discrimination against individuals with disabilities, with a particular emphasis on the Fair Housing Act and Title II of the ADA, and the Agreement's requirements.

F. Permanent Supported Housing: In the event that the State provides Housing Supports but does not identify any viable housing opportunity, the State will note that lack of accessible, affordable housing is a barrier to receiving Community-Based Services in the member's Person Centered Plan. Based on the aggregate need for Permanent Supported Housing as identified through Person Centered Plans, the State will provide Permanent Supported Housing to such members by: (1) utilizing existing

affordable housing and housing subsidized by any local, state, or federal funding source; (2) sustaining existing State funding for rental assistance as developed by the State's Money Follows the Person program; and (3) reasonably expanding existing capacity by funding and providing rental subsidies for use as Permanent Supported Housing slots in an amount such that the member's rent does not exceed 30% of their monthly adjusted income. Permanent Supported Housing will remain available to a member as long as needed and desired.

### **XIII. COMMUNITY PROVIDER CAPACITY AND TRAINING**

A. The State will take steps necessary to ensure an adequate supply of qualified, trained Community Providers to enable Target Population members to transition to and live in the Most Integrated Setting consistent with their Informed Choice and needs.

B. The State will provide guidance and training to Community Providers on complying with safety assurance and incident reporting procedures developed under Section XVI of this Agreement.

C. The Subject Matter Expert will draft and complete, in accordance with Section V, an agreed upon Capacity Plan, which will address, at minimum:

1. Shortages in Case Managers and Community Providers;
2. Service authorization and reimbursement systems, reimbursement rates, and disparities in the wages of nursing facility and Community Provider staff, taking into account number of hours worked, overtime, and commute times;
3. Additional incentives for Community Providers who serve Target Population members with significant medical and/or supervision needs (including overnight needs and/or the need for intermittent on-call services), members on Native American reservations, and members in rural areas;
4. Training Community Providers with sufficient frequency, intensity, and in all areas of the State about this Agreement, the array of Community-Based Services, Person Centered Planning, and the State's authorization and reimbursement system.

D. Implementation Schedule

Within six months of the Effective Date the State will provide technical guidance to nursing homes that make a commitment to provide Community-Based Services and to Community Providers with operations in rural areas that make a commitment to expand Community-Based Services; these efforts will support compliance with paragraph A of this section. While not required by this Agreement, North Dakota may provide limited grants to nursing homes that make a commitment to provide Community-Based Services and to Community Providers with operations in rural areas that make a commitment to expand Community-Based Services.

#### **XIV. IN-REACH, OUTREACH, EDUCATION, AND NATURAL SUPPORTS**

##### **A. Nursing Facility Target Population:**

1. The State will within nine months of the Effective Date and annually thereafter conduct individual or group in-reach to each nursing facility, informing residents about Community-Based Services and the Agreement's requirements. The State will also make Peer Supports available for these members in person or virtually upon request and subject to availability. As interim benchmarks, within four years of the Effective Date, the State will conduct individual in-reach to at least 1,000 Nursing Facility Target Population members, and, after that date, to any newly admitted or identified Nursing Facility Target Population members in accordance with the schedule outlined in Section VII.B.2.a., b., and c. or identification as an At Risk Target Population member. The Nursing Facility Target Population members included in Section VIII.I.3.a., b., and c. count toward the 1,000. For the purposes of the requirements of this provision, the State will have satisfied each interim benchmark if it has either (1) met the benchmark or (2) largely met the benchmark and demonstrated significant efforts to reach the actual benchmark and important reasons why the benchmark was not completely met.

2. Within eight years of the Effective date, the State will provide individual in-reach to any newly admitted or identified Nursing Facility Target Population members in accordance with the schedule outlined in Section VII.B.2.a., b., and c. or identification as an At Risk Target Population member.

B. The State will provide communications to Target Population members whose disability impairs their communication skills that are as effective as communications to others. *See* 28 C.F.R. § 35.160. Whenever possible, communications should be provided in person to allow for individualization.

C. Stakeholders: The State will provide frequent outreach and training to Stakeholders, including At Risk Target Population members and their families, about Community-Based Services and the Agreement's requirements.

D. The State will publish information on Community-Based Services for individuals who are likely to become Target Population members while the Agreement is in effect, their guardians (if any), their families, and the individuals who are likely to provide Target Population members' Natural Supports. The State will disseminate this information through various means, with the goal of reaching all members of the general public, including Native Americans and individuals living in rural areas. This information will be designed, in part, to address concerns that individuals in the Target Populations cannot receive services in community settings.

E. Individuals Providing Natural Supports: The State will strengthen the Natural Supports of Target Population members by providing:

1. Sufficient quantity and quality of State-administered Community-Based Services to provide respite and other support for individuals voluntarily providing Natural Supports to members;

2. Training for individuals providing Natural Supports to improve their caregiving skills; and

3. Training conducted by individuals who provide Natural Supports for members' friends or relatives about the process for members to transition to and/or receive Community-Based Services.

F. All public information published online or in printed format in accordance with this Agreement will be accurate and accessible to people with disabilities.

## **XV. DATA COLLECTION AND REPORTING**

A. Within 18 months of the Effective Date, the State will enhance its data collection system to collect the following data:

1. For each member of the Target Population:

(a) The Target Population member's contact information (including current address and the type of setting in which he or she is currently residing), legal guardian (if applicable), and Natural Supports (if applicable);

(b) Name and contact information for the member's assigned Case Manager, and the date the member was assigned to the Case Manager;

(c) The most recent date the member acknowledged that he or she received information about Community-Based Services;

(d) Name and location of any nursing facility to which the member was admitted or readmitted and for each facility, the date(s) of the stay(s);

(e) Information from the member's Person Centered Plan, including: any barriers to transition identified, the Most Integrated Setting listed, the date the Most Integrated Setting was most recently updated, information about hospital discharge planning, services put in place to avoid unnecessary nursing facility stays, planned date of transition (if applicable), and the date on which the member transitioned to the Most Integrated Setting (if applicable);

(f) All prior and current Community-Based Services (e.g., supervision services, transportation services) received by the member and the quantity of approved services (e.g., number of hours); name and contact information for the member's prior, current, and backup Community Providers;

(g) For Target Population members who have transitioned to or remained in the community, any safety concerns identified in Section XVI.B and any actions taken to address those concerns as required by Section XVI.C; and

(h) Complaints received through the General Complaint Process required by Section XVI.F.

2. To ensure a sufficient number of Case Managers, reliable and aggregated data from Case Managers on the number, type, and frequency of Case Manager contacts with members.

B. The data collection system will be capable of generating summary/aggregate data, including the total numbers of At Risk Target Population members and Nursing Facility Target Population members, and total numbers who have transitioned to the community.

C. The State will use this data to amend the Implementation Plan in accordance with Section VI.

D. The State will provide the United States and Subject Matter Expert biannual reports containing data according to the Implementation Plan. The State will retain all data collected pursuant to this Agreement and make it available to the United States and Subject Matter Expert upon request.

## **XVI. QUALITY ASSURANCE AND RISK MANAGEMENT**

A. For Target Population members who receive Community-Based Services under this Agreement, the State will ensure that the services meet the members' identified needs, including maintaining their health and safety.

B. Safety Assurance, Incident Reporting, and Review: Within 180 days of the Effective Date, the Expert, with input of the State, will draft and complete an agreed upon Safety Assurance Plan, in accordance with Section V, which will include: 1) training Community Providers about incident reporting and review procedures designed to identify, address, and mitigate harm to Target Population members they serve; and 2) ensuring that all licensed agencies or entities employing non-family Community Providers have a quality improvement program that identifies, addresses, and mitigates harm to Target Population members they serve. Under these procedures, the following incidents will trigger reporting to the Agreement Coordinator, United States, and Subject Matter Expert within 7 days of the incident:

- a) Deaths;
- b) Life-threatening illnesses or injuries;
- c) Alleged instances of abuse, neglect, or exploitation;
- d) Changes in health or behavior that may jeopardize continued services;
- e) Serious medication errors;
- f) Illnesses or injuries that resulted from unsafe or unsanitary conditions; or,



g) Any other critical incident that is required to be reported by state law or policy.

C. All reports of the above incidents, with the exception of death by natural causes, will include a remediation plan designed to mitigate harm to the Target Population member and a timeline to complete the plan. In the event the United States does not agree that the State's proposed remediation plan will mitigate the harm, the United States may invoke the Enforcement provision under Section XVII of this Agreement.

D. The State will use the data collection system described in Section XV to improve the availability, accessibility, and quality of the Community-Based Services provided to Target Population members, as well as to ensure the continued health and safety of those Target Population members.

E. While this Agreement is in effect, the State will timely apprise the United States and Subject Matter Expert of any and all proposed amendments to its State-funded services, Medicaid State Plan, or Medicaid Waiver programs that are relevant to this Agreement, and provide assurances that the amendments, if adopted, will not hinder the State's compliance with this Agreement.

F. General Complaint Process: The State will develop and publicize its oversight of the provision of Community-Based Services and provide mechanisms for Target Population members to file complaints related to provision of Community-Based Services, which the State will timely address. The State will notify the United States and the Subject Matter Expert of all complaints received as part of its biannual data reporting required by Section XV. Complaints alleging any incidents listed in paragraph B of this section related to safety will be subject to the requirements of paragraphs B and C of this section.

## **XVII. ENFORCEMENT**

A. After receipt of each of the State's data reports referenced in Section XV.D, the Parties will confer to assess the State's compliance with this Agreement.

B. If the United States believes that the State has violated this Agreement, it will notify the State and include reasonably specific information regarding the violation. For conditions or practices that pose an immediate and serious threat to the life, health, or safety of individuals in the Target Population, the State will have seven days from the date of notice to cure the violation. For all other conditions or practices, the State will have up to 60 days from the date of notice to cure the violation.

C. Nothing in this Agreement will be enforced in a manner that would require a fundamental alteration of the State's programs, activities, or services for persons with physical disabilities.

D. The United States and the State will negotiate in good faith to resolve any dispute. The Parties may jointly agree to request that the Expert help mediate a dispute or make a recommendation to address an implementation matter. Nothing in this Agreement shall prevent the Expert from fulfilling this joint request. Any such mediation or recommendation will not be binding on any Party. If the United States and the State are unable to agree on a resolution within 90 days of the United States' notice of violation,

the United States may commence a civil action in the U.S. Court for the District of North Dakota to enforce the terms of this Agreement or the ADA.

E. The 90-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 in the Target population as described in Section XVI.B, for which the United States may seek appropriate relief including commencing a civil action in the U.S. Court for the District of North Dakota if the United States and the State are unable to agree on a resolution within 10 days of the United States' notice of violation.

F. It is a violation of this Agreement for the State to fail to substantially comply in a timely manner with any of the requirements in this Agreement. The Parties may agree in writing to extend any applicable deadlines specified in this Agreement. The United States will not unreasonably deny requested extensions, if made in advance of any deadline, and following the State's due diligence to meet such a requirement.

G. 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.

H. The Agreement will terminate eight years after the Effective Date if the Parties agree that the State has attained substantial compliance with all provisions and maintained that compliance for a period of one year.

I. Notwithstanding paragraph H of this section, this Agreement will terminate earlier than eight years if the United States determines that the State has demonstrated durable compliance with Title II of the ADA with respect to its long-term services for individuals with physical disabilities. Durable compliance means that the United States determines that substantial compliance has been achieved and maintained for a period of one year, and expects it to be sustained. Regardless of this Agreement's specific requirements, this Agreement will terminate upon a showing by the State that it has come into durable compliance with the requirements of the ADA that gave rise to this Agreement and maintained that compliance for one year.

J. Notwithstanding paragraphs H and I of this section, if the United States determines that the State has demonstrated durable compliance with a part of the Agreement and also determines that said part is sufficiently severable from the other requirements of the Agreement, the Parties agree to terminate that part of the Agreement. In determining whether the State has demonstrated durable compliance with a part of the Agreement, the United States may assess collectively all the requirements of the Agreement to determine whether the intended outcome of the part has been achieved. Regardless of this Agreement's specific requirements, substantive parts of this Agreement will terminate upon a showing by the State that it has come into compliance with the requirements of the ADA that gave rise to this Agreement and maintained that

compliance for one year, and a determination that said part is sufficiently severable from the other requirements of the Agreement.

K. In any dispute regarding compliance with any provision of this Agreement, or compliance with the requirements of the ADA that gave rise to this Agreement, the State will bear the burden of demonstrating that it is in compliance with this Agreement.

L. The State may seek termination of any subset of provisions that together relate to development of a Community-Based Service. The burden will be on the State to demonstrate that it has attained and maintained its substantial compliance as to that subset, consistent with paragraph J of this section.

M. For the purposes of this Agreement, substantial compliance will mean something less than strict or literal compliance. Non-compliance with mere technicalities, or isolated or temporary failure to comply during a period of otherwise sustained compliance, will not constitute failure to maintain substantial compliance.

N. 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.

O. Nothing in this Agreement "shall be construed to require an individual with a disability to accept an accommodation, aid, service, opportunity, or benefit provided under the ADA." *See* 28 C.F.R. § 35.130(e)(1).

P. The Parties intend to allow the State to leverage the funding of the services listed herein to the fullest extent permitted by available federal, state, local, and private funding. Nothing in this Agreement precludes the State from seeking authority from the Centers for Medicare & Medicaid Services (CMS) for approval of coverage of Medicaid services under a different name than that used in this Agreement, provided the State can demonstrate that the coverage for such services is otherwise legally permitted.

Q. The Parties have signed this Agreement in good faith and the State will take all appropriate measures to seek and secure funding necessary to implement the terms of the Agreement and fulfill the requirements under Title II of the ADA. In the event that the State concludes that a biennial appropriation is insufficient to meet one or more provisions of this Agreement and the Implementation Plan, the following will occur:

1. The State will notify the United States in writing within the first three months of the State's fiscal year. In that writing, the State will identify the funding granted and specify the resulting impact on the provision(s) of the Implementation Plan and the Agreement. The United States and Subject Matter Expert will be given access to all data and documents regarding the State's assertions regarding the insufficiency of funds and any proposed altered provisions or time frames.

2. The Parties will meet and confer within 20 business days of this notification to discuss the limitations in funding and the plan to continue implementation of the Agreement at a reasonable pace and the resulting effect on the provisions and time frames set forth in the Implementation Plan and Agreement. Before that meeting, the State will provide all additional underlying

documents it is relying on to support its assertions and any proposed altered provisions and time frames.

3. If the Parties cannot reach agreement on a revised plan for continued implementation of the Agreement at a reasonable pace, the United States may withdraw its consent to this Agreement, which would render the Agreement null and void. The United States may revive any claims under Title II of the ADA otherwise barred by operation of this Agreement.

R. This Agreement will constitute the entire integrated agreement of the Parties. Since both Parties participated in the drafting of the Agreement, any ambiguity will not be construed for or against either Party.

S. Any modification of this Agreement will be executed in writing by the Parties. No oral agreement entered into at any time will bind either the State or the United States.

T. The United States and the State 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.

## **XVIII. GENERAL PROVISIONS**

A. This Agreement is binding on all successors, assignees, employees, agents, contractors, and all others working for or on behalf of the State to implement the terms of this Agreement.

B. The State will work in good faith to uphold and defend all elements of this Agreement, including relevant service programs, policies, and regulations.

C. The State 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, assisted, or participated in any manner in an investigation, proceeding, or hearing related to this Agreement. The State will timely and thoroughly investigate any allegations of retaliation in violation of this Agreement and take any necessary corrective actions identified through such investigations.

D. The State will take all necessary measures to prohibit private or public entities from coercing, intimidating, threatening, interfering with or retaliating against any Target Population member related to his or her exercise, or another individual's aid or encouragement to a Target Population member to exercise, any protection of this Agreement.

E. The Parties agree that, as of the Effective Date, for purposes of the Parties' preservation obligations pursuant to Federal Rule of Civil Procedure 26, litigation is not "reasonably foreseeable" related to this Agreement. To the extent that either Party previously implemented a litigation hold to preserve documents, electronically stored information, or things related to this Agreement, the Party is no longer required to

maintain such a litigation hold. Nothing in this paragraph relieves the Parties of any other obligations imposed by this Agreement.

F. 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.

G. The Parties will promptly notify each other of any court or administrative challenge to this Agreement, or any portion thereof, and will defend against any challenge to this Agreement.

H. 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' allegations, under Title II of the Americans with Disabilities Act (the "ADA"), 42 U.S.C. §§ 12131-12134, and its implementing regulation, 28 C.F.R. §§ 35.101-35.190, that North Dakota does not administer its long-term services in the Most Integrated Setting appropriate to individuals with physical disabilities. 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.

I. 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.

J. The performance of this Agreement will begin immediately upon the Effective Date.

K. The State will maintain sufficient records and data to document the State's implementation of the Agreement's requirements and will make such records available to the United States and the Subject Matter Expert for inspection and copying on a reasonable basis, including any reports or allegations of complaints by or health and safety reports about Target Population members. 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. The State will also make available any other reasonably accessible data that the United States or Subject Matter Expert may need to assess compliance with the Agreement. Other than to carry out the express functions as set forth herein, the United States and the Subject Matter Expert will hold such information in strict confidence to the greatest extent possible.

L. This Agreement will be interpreted in accordance with federal law and the laws of the State of North Dakota. The venue for all legal actions concerning this Agreement will be in the United States Court for the District of North Dakota.

M. "Notice" under this Agreement will be provided by overnight courier to the following or their successors:

Rebecca B. Bond  
Chief, Disability Rights Section  
Victoria Thomas  
Trial Attorney, Disability Rights Section  
United States Department of Justice  
Civil Rights Division  
150 M St, NE  
Washington, DC 20002

AGREED AND CONSENTED TO:

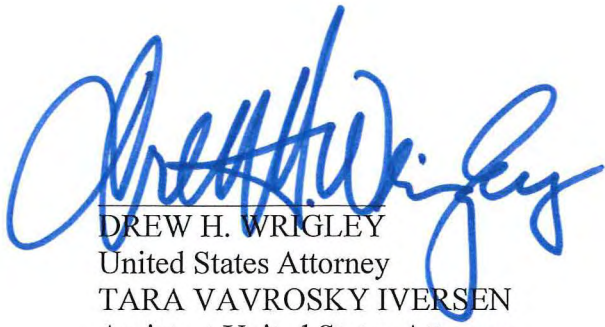
FOR THE UNITED STATES

*Eric S. Dreiband*

ERIC S. DREIBAND

Assistant Attorney General  
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Date: December 14, 2020



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FOR THE STATE OF NORTH DAKOTA



DOUG BURGUM  
Governor

North Dakota State Capitol  
600 E. Boulevard Ave.  
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Date: December 11, 2020