

SETTLEMENT AGREEMENT

This Settlement Agreement is entered into by and among the Pennsylvania Department of Public Welfare (the "Department") and Pennsylvania Advocacy and Resources for Autism and Intellectual Disability, The Arc of Pennsylvania, The Rehabilitation and Community Providers Association, and United Cerebral Palsy of Pennsylvania, Inc. (collectively, the "Associations").

Whereas, the members of the Associations are organizations engaged in advocacy on behalf of individuals with autism and intellectual disability and/or on behalf of entities that furnish in-home and community based care and habilitation services to over 28,000 individuals who are enrolled in Pennsylvania's federally approved, Medical Assistance funded, "Consolidated Waiver" and "Person/Family Directed Support Waiver" programs ("Waiver Programs"); and

Whereas, the Associations have presented to the Department and the Office of the Governor concerns regarding Act 2011-22 (Act of June 30, 2011, P.L. 89, No. 22)("Act 22") and the regulations adopted by the Department under Act 22, effective July 1, 2011, and codified at 55 Pa. Code § 51.1 et seq. (that are applicable to the Associations' members/providers); and

Whereas, the Department and the Associations have negotiated this Settlement Agreement to avoid the costs and uncertainty of litigation.

Now, therefore, in consideration of the mutual promises and obligations contained herein, the Department and the Associations agree as follows:

I. TERM

1. The term of this Settlement Agreement (“Agreement”) is July 1, 2014 through and including June 30, 2017 except as otherwise provided herein. The effective date of this Agreement is the date it is executed by all parties.

II. SCOPE OF SETTLEMENT

2. This Agreement is intended to and does resolve disputes between the Associations and the Department relating to the Department’s adoption and application of certain regulations within 55 Pa. Code Chapter 51 (“Chapter 51”) that apply to members of the Associations. Neither this Agreement nor any consideration given will be deemed or construed as an admission, fault or liability of any kind.

III. RESIDENTIAL HABILITATION VACANCY FACTOR

3. To establish residential habilitation rates for providers who have provided written assurances under paragraph 12 for the period of July 1, 2015 through June 30, 2017, the Department will:

- a. use a residential habilitation vacancy factor, as described at 55 Pa. Code §§ 51.74 (12), 51.74 (14) and 51.98, of 96%;
 - b. and adjust line 19 of the FY 13/14 provider's cost reports "total waiver units of service available" to "total waiver units of service authorized."
4. The Department, for the period July 1, 2013 - June 30, 2015, will amend its policies governing exceptions to the 97% residential habilitation statewide vacancy factor as follows:
- a. To be eligible for the exception, the provider must have an annual occupancy rate below 97% by W code for the applicable period.
 - b. The Secretary shall order and insure that the regulations codified at 55 Pa. Code §§ 51.34(b), 51.98(g) and (h) shall not be applied or considered in any way in the review of waiver requests submitted by providers for an exception to the statewide vacancy factor.
 - c. To compute the value of the revised vacancy factor allowed under the exception, the Department will include vacancies that are attributable to a consumer's absence from his/her residence due to medical reasons (e.g., hospitalization) or therapeutic reasons (e.g., visits with family and/or friends); that are documented in the consumer's records; and that do not exceed the federal time limits (as specified as thirty

(30) consecutive days) that require the Department to dis-enroll the individual from the Waiver Programs.

d. To implement the provisions of c., above, the instructions set forth in Exhibit A will govern the review and approval of residential habilitation vacancy requests. Waiver Requests will document utilization by W code for any utilization that falls below a 97% occupancy. The Department will validate the information contained in the waiver requests using information available in HCSIS and PROMISe.

e. Providers may submit residential habilitation waiver requests relating to FY 2013-2014 until February 28, 2015 and for FY 2014-2015 until September 30, 2015.

f. Residential habilitation waiver requests shall be reviewed and a final written determination issued within sixty (60) calendar days of receipt of the waiver request by the Office of Developmental Programs or its designee. A denial of a request shall be subject to administrative review pursuant to 55 Pa. Code Chapter 41.

g. The Department will use its best efforts to ensure that payments owed to a provider relating to a residential habilitation vacancy

exception request will be paid within forty-five (45) calendar days of approval of a waiver request.

5. The Department, for the period July 1, 2014 through June 30, 2015, will amend its policies to temporarily reclassify residential capacity related to transitional bed openings as of the date the opening occurs. The Department will process any reclassification change expeditiously but in no case later than forty-five (45) days after a request is received. The provider may bill retroactively to the date the transitional opening occurred. All residential capacity for an individual home shall be restored to the capacity level that existed prior to the application of the temporary policy effective as of the date of the policy changes. During the effective period of this policy, a provider may not act arbitrarily and capriciously in its refusal of a referral. For the period referenced above, this Agreement controls the review, approval and denial of reclassification requests.

IV. RETENTION FACTOR

6. The Department, for the period July 1, 2015 - June 30, 2017, will amend its policies to allow for a two (2) percent retention factor affecting cost based residential rates to be calculated as follows:

- a. ODP will use cost reports submitted in FY 2014-15 based on FY 2013-14 costs (Year 7 cost report) for purposes of computing the retention factor for FY 2015-16 rates.

b. The retention factor will be a percentage addition to a provider's otherwise calculated rate if the total per unit provider costs by W code decrease from the cost report submitted in FY 2013-14 (Year 6 cost report) as compared to the per unit costs submitted in FY 2014-15. If year over year (Year 7 less Year 6) unit costs by W code are less, the provider's rates for the specific W code would be increased up to a maximum of two (2) percent. The percentage refers to the Year 6 costs less Year 7 costs divided by Year 6 costs. The application of the retention factor will not cause the provider's rate to exceed the prior year's PROMISE paid rate.

c. For FY 2016-17 rates, ODP will compare the provider's per unit costs by W code in the cost report submitted in FY 2015-16 based on FY 14-15 costs (Year 8 cost report) as compared to the per unit payment rate before the vacancy factor is applied by W code in FY 2015-16 for purposes of computing a retention factor of up to a maximum of two (2) percent in each fiscal period.

d. A provider will identify the estimated amount of revenue that will be retained by application of the retention factor in its annual cost report.

e. Retention factor applies only to cost based residential rates.

V. APPLICATION OF A NEGATIVE RATE ADJUSTMENT FACTOR (“RAF”)

7. The Department will not adopt or impose or apply a negative RAF to any provider’s payment rates in any form for any reason during the term of this Settlement Agreement.

VI. REVIEW BY THE CENTERS FOR MEDICARE AND MEDICAID SERVICES (“CMS”)

8. As a condition precedent, the terms of this Agreement regarding the retention factor policy are contingent upon approval from the federal Centers for Medicare and Medicaid Services (CMS). The Department will consult and collaborate with the Associations and commits to an open, transparent process in seeking any necessary approval from CMS for any elements of the agreement. The Department affirms that it will apprise the Associations of its communications with CMS staff and will promptly share with the Associations pertinent information (including any official correspondence) between CMS officials and/or staff and Department officials and/or staff relating to the review by CMS of the retention factor policy. The Department will submit its proposal relating to the retention factor policy to CMS within thirty (30) days of the effective date of this agreement.

VII. OFFICE OF DEVELOPMENTAL PROGRAMS (“ODP”) STAKEHOLDER WORKGROUP

9. The Department will reconvene the ODP Stakeholder Workgroup on or before December 15, 2014, to continue the Workgroup’s review of Chapter 51

and to obtain recommendations for amendments to Chapter 51. The Workgroup will consider and analyze possible revisions to the operational, programmatic and payment policies set forth in Chapter 51. The Workgroup shall conclude its deliberations and present its recommendations to the Department regarding revisions to Chapter 51 by December 15, 2015.

10. The Department, in consultation with the Associations, will consider whether to adopt recommendations made by the Workgroup as amendments to Chapter 51, including adoption of regulations by final-omit rulemaking. Any party may express support of or opposition to the approval of any regulations that the Department proposes to adopt.

VIII. FORBEARANCE OF LITIGATION BY THE ASSOCIATIONS

11. During the term of this Settlement Agreement each Association agrees to not initiate or participate in any litigation that challenges the Chapter 51 rate setting regulations as they exist as of the Effective Date of this Agreement.

IX. PROVIDER FORBEARANCE OF LITIGATION

12. The Department will offer to apply the provisions of paragraphs 3 through 7 to every provider of residential habilitation services. As a condition precedent, the implementation of paragraphs 3 through 7 is contingent upon a provider's agreement that during the term of this Agreement it will not challenge either Act 22 as reflecting an unconstitutional delegation of legislative authority or

whether the Department must comply with the provisions of the Commonwealth Document Law, 45 P.S. §§ 1201 et seq., the Commonwealth Attorneys Act, 71 P.S. §§ 732-101-732-506, and the Regulatory Review Act, 71 P.S. §§ 745.1-745.15, in order to apply the Chapter 51 regulations subsequent to June 30, 2012 (i.e., whether Act 22 imposed a sunset date or time restriction on the regulations).

The Department will provide the Associations the opportunity to review and comment on its proposed provider agreement and will consider any comments received by the Associations in finalizing the provider agreement.

X. CANCELLATION

13. The Associations or the Department may cancel this Agreement upon written notice to the other Party if: (1) The other Party breaches this Agreement and fails to cure such breach within seven (7) days of written notice of a breach; or, (2) if the breaching party cannot reasonably cure the breach within seven (7) days, and it fails to continuously and diligently work to cure the breach until the breach is cured. Cancellation pursuant to this section shall be effective upon delivery of written notice after expiration of the applicable cure period.

14. Upon mutual written agreement, the Parties may cancel this Agreement at any time.

15. Upon the Effective Date of this Agreement's cancellation, all terms and conditions of this Agreement shall cease to apply to any Party.

XI. MISCELLANEOUS PROVISIONS

16. The Department agrees to use its best efforts to promptly finalize and release providers' FY14/15 final payment rates consistent with the terms of this Agreement.

17. This Agreement shall be governed by the laws of Pennsylvania. For the purposes of construing the Agreement, this Agreement shall be deemed to have been drafted by all Parties and shall not, therefore, be construed against any Party for that reason in any dispute. In the event that a dispute arises among the Parties relating to the interpretation and implementation of the terms of this Agreement, the Parties agree that any action to enforce the terms of this Agreement shall be filed with the Department's Bureau of Hearings and Appeals.

18. This Agreement constitutes the complete agreement between and among the Parties. This Agreement may be amended in writing only by mutual written consent of the Parties.

19. This Agreement is not binding on any other state agency or any federal agency.

20. Each party shall bear its own costs and attorneys' fees related to this Settlement Agreement.

21. The undersigned persons represent and warrant that they are fully authorized to execute this Agreement.

22. This Agreement may be executed in counterparts, each of which constitutes an original and all of which constitute one and the same Agreement.

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23. This Agreement is binding on the Parties' successors and transferees.

Beverly Mackereth
Beverly D. Mackereth, Secretary
Department of Public Welfare

Maureen Cronin
Maureen Cronin, Executive Director
The Arc of Pennsylvania

October 28, 2014
Date

Shirley Walker
Shirley Walker, President & CEO
Pennsylvania Advocacy and
Resources for Autism and
Intellectual Disability

Richard S. Edley
Richard S. Edley, President & CEO
Rehabilitation and Community
Providers Association

Jeffrey W. Cooper
Jeffrey W. Cooper, President
United Cerebral Palsy of
Pennsylvania, Inc.

October 28, 2014
Date

EXHIBIT A: Residential Habilitation Vacancy Exception Instructions

Information submitted for each Waiver residential eligible procedure code:

Demographic Information:

1. Provider Agency Name
2. Business Address
3. Cost Report/MPI (Master Provider Index)
4. Fiscal Year
5. Name of Provider Contact
6. Title of Provider Contact
7. Provider Contact Phone Number
8. Provider Contact Email
9. Service Location Code (SLC)
10. AE where the SLC is located

Vacancy Factor Calculation:

11. Available days = total days minus respite days billed, base days, non-ODP days, transitional vacancy days and days that exceed the federal limits
12. Medical leave days by service location as documented in consumer record
13. Therapeutic leave days by service location as documented in consumer record
14. Add medical and therapeutic leave days for all service locations in this W code
15. 1- number 14 divided by number 11 for revised occupancy rate
16. Subtract number 15 from 97% for variance
17. Multiply number 16 plus 1 by the current rate = new rate
18. Provider will claims adjust using the new rate for services billed from the start of the fiscal year

Payment Rate Calculation:

19. Any rate modifier
20. Participant data on 5-8 person homes (how many people are in those settings)
21. If a high cost exception has been granted
22. Start and end dates for location/procedure codes
23. Additional details on respite days (drop down boxes)
24. Details on other non-billable days