

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

BILL M., by and through his father and)
natural guardian, William M; JOHN DOE,)
by and through his mother and natural)
guardian, Jane Doe; HEATHER V., by and)
through her mother and guardian, Marcia V;)
JANE S.; KEVIN V., by and through his)
legal guardian, Kathy V.; JENNIFER T.,)
by and through her legal guardians, Sharon)
and Greg T.; LESLIE H.; CATHERINE M.;)
STEPHANIE B.; CONRAD J., by and through)
his legal guardian, C.W. J.; CHRISTOPHER H.,)
by and through his legal guardian, Sue H.;)
MICHAEL R., by and through his legal guardian,)
Susan R.; and on behalf of themselves and all other)
persons similarly situated,)

Case No. 4:03CV3189

Plaintiffs,)

vs.)

NEBRASKA DEPARTMENT OF HEALTH AND)
HUMAN SERVICES FINANCE AND SUPPORT,)
NEBRASKA DEPARTMENT OF HEALTH AND)
HUMAN SERVICES, RICHARD NELSON,)
in his official capacity as the Director of Nebraska)
Department of Health & Human Services Finance &)
Support; and NANCY MONTANEZ, in her official)
capacity as the Director of Nebraska Department of)
Health & Human Services;)

Defendants.)

SETTLEMENT AGREEMENT

INTRODUCTION

1. Plaintiffs brought the Lawsuit against Defendants alleging violations of the Americans With Disabilities Act ("ADA") (42 U.S.C. §12101 *et seq.*), Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. §794), Medicaid laws and regulations [42 U.S.C. §1396a(a)(8), 42 C.F.R. § 440.230(b), 42 U.S.C. § 1396n(c)(2)(A), 42 U.S.C. §1396a(a)(3), and 42 C.F.R. §§ 431.200 - 431.250] and the due process clause of the Fourteenth Amendment as set forth in the Second Amended Complaint.

2 The Defendants have consistently, continually and steadfastly denied that any aspect of the Developmental Disability Program violated or violates any provision of applicable federal law.

DEFINITIONS

3. "Agency Defendants" shall refer to those Defendants who are either Health and Human Services or one of its legal predecessors named in the Second Amended Complaint.

4. "Defendants" shall refer collectively to the Agency Defendants and the Individual Defendants.

5. When used in reference to any time on or after July 1, 2007, "Department" shall mean the Department of Health and Human Services under the Health and Human Services Act (*Neb. Rev. Stat.* § 81-3110 to 81-3124), enacted in 2007. When used in reference to any time prior to July 1, 2007, "Department" shall collectively refer to those entities known as the Department of Health and Services and the Department of Health and Human Services Finance and Support which existed under the Nebraska Health and Human Services System Act (*Neb. Rev. Stat.* §§81-3101 to 3311), which Act was repealed in 2007. In reference to any time period, and unless specifically stated otherwise, "Department" may also refer to the Division of Developmental Disabilities, a subdivision of the Department of Health and Human Services both before and after enactment of the Health and Human Services Act (Laws 2007, LB 296, *Neb. Rev. Stat.* §§ 81-3110 to 81-3124) in 2007.

6. "Developmental disability" shall be defined as it is presently defined in *Neb. Rev. Stat.* § 83-1205.

7. "Home and Community-Based Services" are specialized services provided to persons with developmental disabilities in the community as opposed to in an ICF/MR, are funded by a combination of Federal and State Medicaid funds, and are authorized by waivers granted to the State of Nebraska pursuant to §1915(c) of the Social Security Act and by *Neb. Rev. Stat.* §§ 83-1215, 68-1202 to 68-1210.

8. "ICF/MR" is an intensive care facility for the mentally retarded. The ICF/MR operated by the State of Nebraska is Beatrice State Developmental Center ("BSDC").

9. "Individual Defendants" shall refer to those Defendants who are individuals and were named in the Second Amended Complaint in their official capacities, and those individual officials, namely Christine Peterson and John Wyvill, who, pursuant to the Health and Human Services Act, Laws 2007, LB 296, have succeeded to duties and responsibilities pertinent to developmental disabilities and Medicaid.

10. "Lawsuit" shall mean the above captioned legal proceeding wherein the Second Amended Complaint and the Answer form the pleadings which set forth the issues in this case.

11. "LB 297 Workgroup" shall mean the workgroup which was originally convened in 2004 pursuant to Legislative Bill 297 (98th Legislature, Second Session). The LB 297 Workgroup may also be referred to herein as the "OAP Workgroup." The terms LB 297 Workgroup and OAP Workgroup shall also refer to a workgroup re-convened pursuant to this Agreement to complete further work on issues relating to the OAP.

12. "LR156 Workgroup" shall mean the workgroup called for by Legislative Resolution 156 (100th Legislature, First Session). The LR 156 Workgroup may also be referred to herein as the "Wait List Workgroup."

13. "Medicaid" is the joint program administered by the Federal and Nebraska state governments pursuant to the Federal Medicaid Act, 42 U.S.C. §1396. As a condition to its receipt of Federal Medicaid funding, Nebraska has a written comprehensive state plan for medical assistance which has been submitted to, and approved by, the Federal Centers for Medicare and Medicaid Studies pursuant to 42 U.S.C. §1396(a). See also, *Neb. Rev. Stat.* § 68-907(4). The Medicaid program includes home and community-based services provided under the waiver approved for Nebraska by the Centers for Medicare and Medicaid Studies pursuant to §1915(c) of the Federal Social Security Act (42 U.S.C. § 1396n(c), 42 C.F.R. § 441.300) through which specialized services are provided to developmentally disabled persons in the State of Nebraska.

14. "OAP" shall mean the Objective Assessment Process which is referred to in *Neb. Rev. Stat.* §§ 83-1209(1)(e) and 83-1216(1). The OAP is a process for assessing the abilities and difficulties of each person receiving developmental disability services, and assigning adequate and equitable funding to each such person for the provision of specialized services. This process is objective in that the assignment of funding is determined in relation to readily observed and verifiable characteristics of each individual being assessed, and system experience with the funding that will be necessary to provide adequate services to meet the individual's needs, rather than making such determination by subjective impressions and beliefs as to the individual's needed services.

15. "Plaintiffs" shall refer to those individuals listed as named Plaintiffs in the Second Amended Complaint.

16. "Released Claims" shall mean all the claims of Plaintiffs set forth in the Second Amended Complaint as they specifically pertain to any regulations, policies, procedures, conditions, determinations or actions of Defendants made, or in existence, on or before the date upon which this Agreement is executed.

17. The "Second Amended Complaint" is that Second Amended Complaint (filing 126) which was filed in the above-captioned case on April 24, 2006.

18. "Specialized service" shall mean a service provided specifically for persons with developmental disabilities.

19. "Wait List" shall mean a list maintained by the Department of persons with developmental disabilities who have requested one or more specialized services, but who are not receiving at least one such service and are waiting for funding to receive such specialized service. The Wait List is also known as the "Register of Persons with Unmet Needs."

RECITALS

20. WHEREAS, protracted litigation is not in the best interests of the parties; and

21. WHEREAS, in the interests of avoiding the uncertainties and expense of further litigation and a trial on the merits, the parties wish to resolve their differences by compromising and entering into a mutually agreeable settlement.

AGREEMENT

NOW, THEREFORE, the parties enter into the following Agreement:

22. To resolve those claims set forth in the Second Amended Complaint which concern the OAP, the parties agree the Department will reconvene the LB 297 Workgroup. In addition to the original members of the LB 297 Workgroup, Plaintiffs' counsel may select up to twelve additional participants to be members of the LB297 Workgroup. Defendants may also select additional participants in a number no greater than the number of additional participants selected by Plaintiffs' counsel. The Department agrees to pay the reasonable and necessary expenses of participation of the original OAP work group participants in connection with their official duties. The Department further agrees to pay the reasonable and necessary expenses of participation of up to four new workgroup participants selected by Plaintiffs' counsel and up to four new workgroup participants selected by Defendants in connection with their official duties. Among the new participants selected by Plaintiffs' counsel who will be added to the workgroup is an expert in developmental disability systems. The Department agrees to pay all reasonable and necessary out-of-pocket costs, travel, lodging and food expenses of this expert while he is participating in the work group. Such expense reimbursement for the expert and all other members of the work group shall be in accordance with the requirements of the Department of Administrative Services that apply to expense reimbursement for employees of the State of Nebraska. The Department agrees it will provide specific documents to the work group for their review and comment relative to the OAP and implementation. The Department will allow a reasonable time for that input to be received and convene no less than one

meeting with the work group. The expert will sign a confidentiality agreement relating to the performance of his duties hereunder and must also commit to not provide testimony for the parties in any subsequent litigation as to the subject areas of his review as a member of said work group.

23. The foregoing OAP workgroup will work with the Department to develop an exception process whereby initial individual OAP numbers would be subject to refinement based on specific aspects of the person's situation. The work group will provide advice and input as to this process but the Department will retain the final authority to adopt an exception process acceptable to the Department through the promulgation of rules and regulations in that regard.

24. The OAP workgroup will also review any implementation plan developed by the Department and may make recommendations to the Department with respect to system-wide implementation.

25. In connection with the those claims set forth in the Second Amended Complaint relating to the Wait List issue, Defendants agree to obtain funding for the Wait List Workgroup contemplated by LR156. At this time, the Department has secured \$40,000 from the Nebraska Planning Council on Developmental Disabilities for this process.

26. In order to complete its work, an independent contractor will be selected from bids responding to a request for proposals by the Nebraska Planning Council on Developmental Disabilities. The independent contractor will facilitate the work of the Wait List Workgroup. The Wait List workgroup shall include interested stakeholders, and the Plaintiffs shall have a right to select up to twelve members of the workgroup.

27. Consistent with LR 156, the Wait List Workgroup shall: (a) submit recommendations for a strategic plan to incrementally reduce the number of persons on the waiting list for developmental disabilities to meet the intent of the legislature; (b) consult with the Department to review and make any revision to the rate methodology; and (c) submit the workgroup's recommendations on the strategic plan and revisions to the rate methodology in a report to the Medicaid Reform Council, the Legislature and the Governor.

28. The Department seeks to fulfill due process and notice requirements through the provision of a formal written notice of decision to all applicants or clients of the Developmental Disability Program. With respect to the due process and notice issue, Defendants agree to use the following procedures and forms in connection with a request for developmental disability services:

A. The Department will initiate action on an individual's request for a specific home and community-based service and complete such action, when feasible, within 45 days of his or her request. At the time of a request for services, each applicant will receive a written notice explaining his or her right to

have action on his or her application initiated within 45 days, and to request a fair hearing if no action has been initiated in that time frame, or if adverse action is taken on the request. In conformity with 42 CFR §431.206(b), that notice will include a statement as to the method by which the individual may request a hearing, that he may use legal counsel, represent himself, or be represented by a relative, friend or other spokesman. In addition, that notice will clearly indicate that if the individual requests a fair hearing due to inaction, then that request must be made within 90 days of the date of the original request for services. 42 CFR § 431.221(d).

B. Upon completion of the action on the request, whether the individual is determined to be eligible for services or is denied the requested service for any reason, including a lack of Departmental funding, a written Notice of Decision will be issued. The notice will clearly state the determination and that the individual has a right to appeal the determination and the notice will set forth the deadline for appealing. The notice will be in conformity with 42 CFR §431.210, and it will provide that the individual may make an appeal request, in writing, anytime within 90 days after the date of the Notice of Decision..

C. Attached as Exhibits 1 and 2 are the notices which the Department intends to use to implement the foregoing Paragraphs 28 (A) and 28 (B) and they are incorporated herein by this reference.

29. The Plaintiffs and Defendants agree to work in good faith with each other to fully implement all the terms of this Agreement.

30. Plaintiffs wish to obtain and will seek Court approval of the Settlement Agreement since most of the named Plaintiffs are under guardianship. In addition, they will ask the court to retain jurisdiction to determine attorney's fees and costs, if any, as discussed in Paragraph 33 below. Upon completion of that process, Plaintiffs will release their Released Claims, and act to dismiss the Lawsuit with prejudice.

31. Plaintiffs agree to forebear from filing any further suits concerning: (a) the OAP until completion of the OAP Workgroup process, and (b) the Wait List until completion of the Wait List Workgroup process. In the event a workgroup is not completed on or before July 1, 2009, any of the Plaintiffs may file further suit after July 1, 2009 with respect to the issue that was before such workgroup.

32. Notwithstanding any other provision in this Agreement, each Plaintiff shall retain the right to administratively appeal any specific action or inaction taken with respect to his or her specialized supports and services by the Department at any time following execution of this Agreement. In the event of an adverse administrative decision, each Plaintiff shall also retain the right to seek judicial review of such an administrative decision.

33. Plaintiffs' counsel intend to file a motion with the Court seeking an award of attorney's fees and costs from the Defendants, and Defendants agree the Court may retain jurisdiction of this case to decide such request for attorneys fees and costs. Defendants do not agree that any attorney fees or costs should be awarded and will oppose any such motion. Defendants do not by this agreement waive any grounds they may have to object to such fees and costs, either in whole or in part, including Defendants' position that this agreement does not confer prevailing party status on Plaintiffs. Plaintiffs and their counsel do not by this agreement waive any grounds they may have for recovery of attorney's fees and costs, including Plaintiffs' position that this agreement does confer prevailing party status on Plaintiffs, and nothing in this agreement shall constitute Plaintiffs' or their counsel's agreement or consent to waive an award of attorney's fees and costs from Defendants.

34. This Agreement may be executed in counterparts.

Dated this 31st day of March, 2008.

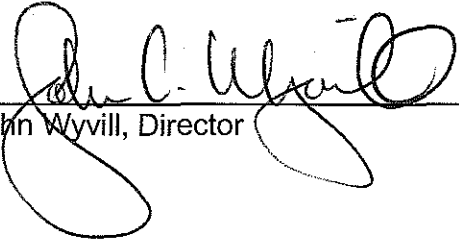
Agreed to by Defendants:

NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES



By: Christine Peterson, Chief Executive Officer

DEVELOPMENTAL DISABILITIES DIVISION



By: John Wyvill, Director

Agreed to by Plaintiffs:

BILL MATHIES

By: William Mathies, his guardian

ROBBIE McCARTNEY (John Doe)

By: Bonnie McCartney, his guardian

Agreed to by Defendants:

NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES

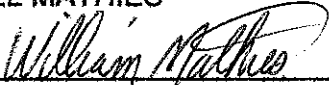
By: Christine Peterson, Chief Executive Officer

DEVELOPMENTAL DISABILITIES DIVISION

By: John Wyvill, Director

Agreed to by Plaintiffs:

BILL MATHIES



By: William Mathies, his guardian

ROBBIE McCARTNEY (John Doe)

By: Bonnie McCartney, his guardian

Agreed to by Defendants:

NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES

By: Christine Peterson, Chief Executive Officer

DEVELOPMENTAL DISABILITIES DIVISION

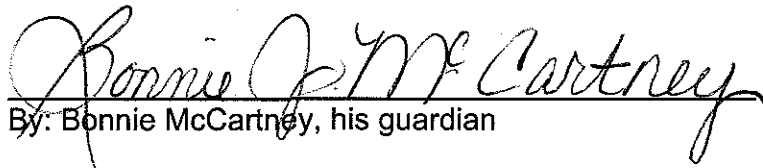
By: John Wyvill, Director

Agreed to by Plaintiffs:

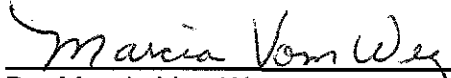
BILL MATHIES

By: William Mathies, his guardian

ROBBIE McCARTNEY (John Doe)


By: Bonnie McCartney, his guardian

HEATHER VOMWEG


By: Marcia VomWeg, her guardian

JANE SMITH

By: Patricia McGill Smith, her guardian

KEVIN VOKOUN

By: Kathy Vokoun, his legal guardian

JENNIFER TURNER

By: Sharon and Greg Turner, her legal guardians

LESLIE HANLEY

CATHERINE MILLER

STEPHANIE BAIRD

HEATHER VOMWEG

By: Marcia VomWeg, her guardian

JANE SMITH

Patricia McGill Smith

By: Patricia McGill Smith, her guardian

KEVIN VOKOUN

By: Kathy Vokoun, his legal guardian

JENNIFER TURNER

By: Sharon and Greg Turner, her legal guardians


LESLIE HANLEY

CATHERINE MILLER

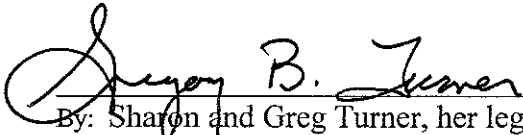
STEPHANIE BAIRD


IN WITNESS WHEREOF, I have hereunto set my hand and seal this 2nd day of April, 2008.

KEVIN VOKOUN


By: Kathy Vokoun, his legal guardian

JENNIFER TURNER


By: Sharon and Greg Turner, her legal guardians


By: Sharon and Greg Turner, her legal guardians

LESLEY HANLEY

Leslie Hanley

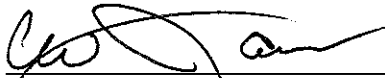
CATHERINE MILLER

Cathy Miller

STEPHANIE BAIRD

Stephanie J. Baird

CONRAD JAMES

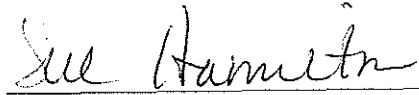


By: C.W. and Sally James, his legal guardians



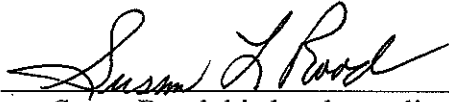
By: C.W. and Sally James, his legal guardians

CHRISTOPHER HAMILTON

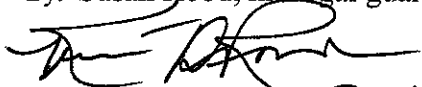
A handwritten signature in cursive script that reads "Sue Hamilton". The signature is written in dark ink and is positioned above a horizontal line.

By: Sue Hamilton, his legal guardian

MICHAEL ROOD



By: Susan Rood, his legal guardian



Kenneth D. Rood, legal guardian



Division of Developmental Disabilities

State of Nebraska

Dave Heineman, Governor

Nebraska Department of Health and Human Services
Division of Developmental Disabilities
Community-Based Services For Persons with Developmental Disabilities

NOTICE OF RIGHTS AND OBLIGATIONS

Name: _____

Date of Birth: _____ NFOCUS Person Number: _____

Notice of Rights

As a person who has requested Developmental Disability services, I understand that I have the following rights:

- The right to have action initiated on my request within 45 days of the date of my request for services with the action completed and a decision made within that time if feasible.
- The right to receive written notice of any decision on my request or any termination or change of previously authorized services.
- The right to file an appeal in writing from any decision or inaction on my request and to have a fair hearing on my appeal. I understand that I must appeal within 90 days of the date of any Notice of Decision that I receive and after 45 days from the date of my request for services if I am appealing inaction on my request.

Notice of Obligations

I have been informed of and I understand and agree to the following obligations:

- I must apply for and accept all benefits that I may be eligible to receive, which may include SSI, SSA, Nebraska Medicaid, and Home & Community-Based waiver services.
- I must complete and submit required information annually or as requested. This may include benefit and resource information or a copy of my tax returns for the determination of my ability to pay for community-based developmental disabilities. *I may request an ability to pay determination prior to accepting services.*
- I must participate in any assessment or evaluation that may be required which may include, but are not limited to, psychological, medical, and dental evaluation(s) and the Objective Assessment Process.
- I must pay the amount of my Medicaid share of cost obligation to my DD provider when I am informed that I have a Medicaid share of cost obligation.

I have been informed that failure to fulfill the above obligations may result in denial or termination of funding for developmental disabilities services.



Signature (Individual/Parent of a minor child/legal guardian) Date

Signature (Family member or other witness) Date

Signature (DHHS staff providing information) Date

I have received the Financial Questionnaire and understand that I must submit the completed questionnaire within 20 days to the DHHS Financial Responsibility office.

Signature (Individual/Parent of a minor child/legal guardian) Date

Original: Individual File

Copy: Individual/Parent of a minor child/legal guardian

**Nebraska Department of Health and Human Services
NOTICE OF DECISION**



1. Person ID:		2. Date:
3. Name:		4. Health and Human Services/ Developmental Disabilities
5. Address:		6. Address:
		7. Svc Coord:

SECTION I: Initial Eligibility

- A Your application for Developmental Disabilities funded services is being considered but a decision regarding your eligibility has not been made. Your case is pending until a determination can be made.
- B It has been determined that you are _____ for Developmental Disabilities funded services.

SECTION II: Developmental Disabilities Funding Available

- C Based on the Objective Assessment Process (OAP), Developmental Disabilities funding for
- Day services will be \$ _____ beginning _____ and ending _____
- Residential services will be \$ _____ beginning _____ and ending _____

SECTION III: Respite funding

- D It has been determined that your family is _____ for Developmental Disabilities respite funding. If eligible, your family may receive up to 30 days of respite services per year.

SECTION IV: Six Month Reassessment

- E Based on the six-month reassessment your Developmental Disabilities funding for
- Day services will be \$ _____ beginning _____
- Residential services will be \$ _____ beginning _____

SECTION V: Priority One Funding

- F Priority One (Emergency) funding, based on the Support Needs Assessment (SNA) has been _____

SECTION VI: Termination

- G services funded by Developmental Disabilities will be terminated effective _____

SECTION VII: Explanation:

- H The reason(s) for the above action(s) are: _____ The manual reference(s) that supports or the change in federal or state law that requires the action(s) are: _____

Service Coordinator

Date

Original: person or guardian

Copy: case record (correspondence)

PLEASE READ THE BACK OF THIS FORM REGARDING YOUR RIGHTS



YOUR RIGHTS

RIGHT TO HAVE ACTION INITIATED WITHIN 45 DAYS

The Nebraska Department of Health and Human Services shall initiate action on your request for any specific home and community-based service within 45 days of your request. If feasible, the action on your request will be completed within that period. At the time of your request for services, you received a written notice explaining your right to have action initiated on your application within 45 days. If no action has been taken on your request for services by the department within 45 days, you have the right to request a fair hearing, by requesting a hearing within **90 DAYS** of the date of your original request for services.

RIGHT TO APPEAL WITHIN 90 DAYS

You have the right to appeal and request a fair hearing with respect to any action or inaction of any state employee or official with regard to your application for Health and Human Services Developmental Disabilities services and their funding. You may appeal if your application for Developmental Disabilities funding is denied or if action on your request has not been initiated upon within 45 days of the date of your request. You may also appeal, if your Developmental Disabilities funding is suspended, reduced, discontinued, or terminated.

If the department has denied your request for services or funding for services, or has taken any other adverse action with respect to services for you, then you (or your representative) have **90 DAYS** following the date of the Notice of Decision to appeal the decision and request a fair hearing.

A request to appeal a decision in no way restricts your Service Coordinator from continuing normal Service Coordination activities and implementing changes to your services that are not directly related to the appeal issue.

To file an appeal, you may contact your Developmental Disabilities Service Coordinator at Health and Human Services to request an appeal form. Your worker will explain the appeal procedure and if needed, assist you in completing the appeal form. The appeal request **MUST** be in writing on the appeal form, and the written form **MUST** be submitted to the department within 90 days of the date of the decision.

Once you've filed an appeal, arrangements for a hearing will be made and you will be notified of the time and place. You may represent yourself at the hearing, be represented by another person, or be represented by a lawyer chosen by you at your own expense.

INFORMAL DISPUTE RESOLUTION

An Informal Dispute Resolution may be requested prior to or after filing an appeal. Your Service Coordinator can explain this option to you.