

SETTLEMENT AGREEMENT

This Settlement Agreement (“Agreement”) is entered into among the United States of America, acting through the United States Department of Justice and on behalf of the Office of Inspector General (“OIG-HHS”) of the Department of Health and Human Services (“HHS”) (collectively the “United States”); the State of Illinois, acting through the Attorney General of the State of Illinois (the “State of Illinois”); and Health Care Service Corporation, a Mutual Legal Reserve Company, and BlueCross and BlueShield of Illinois, a division of Health Care Service Corporation, (hereafter collectively referred to as “the Parties”), through their authorized representatives.

I. DEFINITIONS

- A. “Agreement” means this Settlement Agreement executed by the Parties.
- B. “State of Illinois” means the State of Illinois, its officers, agents, employees, agencies, and departments, including the Office of the Attorney General of the State of Illinois.
- C. “Illinois Attorney General” means the Office of the Attorney General of the State of Illinois.
- D. “BCBS” means both Health Care Service Corporation, a mutual legal reserve company authorized to conduct business in Illinois, with its principal place of business in Chicago, Illinois, and BlueCross and BlueShield of Illinois, a division of HCSC doing business in Illinois. BCBS provides and/or administers health insurance benefits and adjudicates claims for the health insurance plans it issues or administers.
- E. “Parties” means the United States, the State of Illinois and BCBS.
- F. “ILCS” means the State of Illinois Compiled Statutes.
- G. “U.S.C.” means the United States Code.

H. “Medicaid” and “Medicaid Program” means the Home and Community Based Services (“HCBS”) waiver program, authorized under section 1915(c) of the Social Security Act, 42 U.S.C. §1396n(c). Included in the HCBS waiver program in Illinois is a waiver program for medically fragile, technology dependent individuals under the age of 21 (the “MFTD waiver”), administered in Illinois pursuant to 305 ILCS 5/5-2(7) and 305 ILCS 5/5-2.05(a) and Section 1915(c) of the Social Security Act, 42 U.S.C. §1396n(c). The Division of Specialized Care for Children (“DSCC”) operates the MFTD waiver program pursuant to an agreement with the Illinois Department of Healthcare and Family Services (“HFS”).

I. “Covered Conduct” is defined in Section II, Paragraph B below.

J. “Settlement Amount” is defined in Section III, Paragraph A below.

II. RECITALS

A. The United States and the State of Illinois contend that BCBS submitted or caused to be submitted claims for payment to the Medicaid Program.

B. The United States and the State of Illinois contend that they have certain civil claims against BCBS arising from BCBS’s review of BCBS-administered plan beneficiaries’ claims for private duty skilled nursing health insurance benefits whereby BCBS denied such benefits based on BCBS’s determination that such claims were custodial, maintenance, and/or respite care and shifted the costs for such private duty skilled nursing health insurance benefits to Medicaid, and the State of Illinois contends it has civil claims against BCBS for denials that shifted such costs to individual existing and newly eligible beneficiaries, through the following acts and practices during the period from January 1, 2000 through March 16, 2010: (1) fraudulently denying private duty skilled nursing care to eligible beneficiaries needing complex nursing care, using internal home health care guidelines that were more restrictive than the

benefit plan language provided to beneficiaries; (2) improperly influencing the outcome of any appeals and external review processes relating to the denials described above; (3) knowingly referring eligible beneficiaries to Medicaid and thereby knowingly submitting or causing the submission of false and/or fraudulent claims, records, or statements to the Medicaid Program in order to get benefit claims paid; (4) causing the State of Illinois to present fraudulent claims to the United States when the State of Illinois sought matching funds from the United States; and (5) continuing to confirm that private duty skilled nursing services were not available to beneficiaries who had been shifted to Medicaid. The above-described conduct is referred to throughout this Agreement as the “Covered Conduct.”

C. BCBS denies the occurrence of the Covered Conduct and expressly denies any intentional wrongdoing or liability for the Covered Conduct.

D. This Settlement Agreement is neither an admission of liability by BCBS nor a concession by the United States or the State of Illinois that their claims are not well founded.

E. The State of Illinois and BCBS hereby agree that this Settlement Agreement constitutes an Assurance Of Voluntary Compliance under the Illinois Consumer Fraud and Deceptive Business Practices Act (“Consumer Fraud Act”).

F. To avoid the delay, uncertainty, inconvenience, and expense of protracted litigation of the above claims, and in consideration of the mutual promises and obligations of this Settlement Agreement, the Parties further agree and covenant as follows:

III. TERMS AND CONDITIONS

A. **Payments by BCBS:** BCBS shall pay to the United States and the State of Illinois, collectively a total of \$25 (twenty-five) million (the “Settlement Amount”), allocated as

described below. The Settlement Amount is to be paid to the United States and the State of Illinois as follows:

1. **To the United States:** BCBS agrees to pay the United States the sum of \$9,500,000.00 by electronic funds transfer pursuant to written instructions to be provided by the U.S. Attorney’s Office for the Northern District of Illinois. BCBS agrees to make this electronic funds transfer no later than ten (10) days from the Effective Date of this Agreement.
2. **To the State of Illinois and Illinois Attorney General:** BCBS agrees to make the following payments:
 - i. BCBS agrees to pay the State of Illinois the sum of \$14,250,000.00 by electronic funds transfer pursuant to written instructions to be provided by the Illinois Attorney General. BCBS agrees to make this electronic funds transfer no later than ten (10) days from the Effective Date of this Agreement.
 - ii. BCBS agrees to make a payment to Illinois consumers as determined by the Illinois Attorney General in the amount of \$1,250,000.00. This payment is a portion of the Settlement Amount identified above. Payment shall be made in the form of an electronic funds transfer pursuant to written instructions provided by the Illinois Attorney General for deposit into the “Illinois Attorney General Trust Account” no later than ten (10) days from the Effective Date of this Agreement.

B. **United States’ Release as to BCBS:** Subject to the exceptions in Section III, Paragraphs D-E (concerning excluded claims) below, and conditioned upon BCBS’s full

payment of the Settlement Amount, the United States releases BCBS from any civil or administrative monetary claim the United States has for the Covered Conduct under the False Claims Act, 31 U.S.C. §§ 3729-3733; the Civil Monetary Penalties Law, 42 U.S.C. § 1320a-7a; the Program Fraud Civil Remedies Act, 31 U.S.C. §§ 3801-3812; or the common law theories of payment by mistake, unjust enrichment, and fraud.

C. **State of Illinois' Release as to BCBS:** Subject to the exceptions in Section III, Paragraph E (concerning excluded claims) below, and conditioned upon BCBS's full payment of the Settlement Amount, the State of Illinois releases BCBS from any civil or administrative monetary cause of action that the State of Illinois has for any claims submitted or caused to be submitted to the State Medicaid Program relating to the Covered Conduct and any claims the State of Illinois has relating to the Covered Conduct under the Illinois False Claims Act, 740 ILCS § 175/1 *et seq.*; the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS § 505/1 *et seq.*; or the common law theories of payment by mistake, unjust enrichment, and fraud.

D. **United States' Preservation of Law Enforcement Actions:** OIG-HHS expressly reserves all rights to institute, direct, or maintain any administrative action seeking exclusion against BCBS (and/or its officers, directors, and employees) from Medicare, Medicaid, and all other Federal health care programs (as defined in 42 U.S.C. § 1320a-7b(f)) under 42 U.S.C. § 1320a-7a (the Civil Monetary Penalties Law), 42 U.S.C. § 1320a-7(a) (mandatory exclusion), and/or 42 U.S.C. § 1320a-7(b) (permissive exclusion).

E. **United States' and State of Illinois' Preservation of Law Enforcement Actions:** Notwithstanding the releases given in Section III, Paragraphs B and C of this

Agreement, or any other term of this Agreement, the following claims of the United States and the State of Illinois are specifically reserved and are not released:

1. Any liability arising under Title 26, U.S. Code (Internal Revenue Code) or Chapter 35 of the Illinois Compiled Statutes or any regulations promulgated under the authority of any statute contained therein;
2. Any criminal liability;
3. Except as explicitly stated in this Agreement, any administrative liability, including mandatory exclusion from Federal health care programs;
4. Any liability to the United States (or its agencies) or the State of Illinois for any conduct other than the Covered Conduct;
5. Any liability based upon obligations created by this Agreement;
6. Any liability of individuals; or
7. Any liability for personal injury or property damage or for other consequential damages arising from the Covered Conduct.

F. **Characterization of Settlement Amount:** Nothing in this Agreement constitutes an agreement by the State of Illinois concerning the characterization of the Settlement Amount or any other payment under this Agreement for purposes of Chapter 35 of the Illinois Compiled Statutes or any regulations promulgated under the authority of any statute contained therein. Nothing in this paragraph or any other provision of this Agreement constitutes an agreement by the United States or the State of Illinois concerning the characterization of the Settlement Amount for purposes of the Internal Revenue laws, Title 26 of the United States Code or any regulations promulgated under the authority of any statute contained therein.

G. **BCBS's Waiver as to the United States and the State of Illinois:** BCBS waives and shall not assert any defenses BCBS may have to any criminal prosecution or administrative action relating to the Covered Conduct that may be based in whole or in part on a contention that, under the Double Jeopardy Clause in the Fifth Amendment of the Constitution, or under the Excessive Fines Clause in the Eighth Amendment of the Constitution, this Agreement bars a remedy sought in such criminal prosecution or administrative action.

H. **BCBS's Release as to the United States and the State of Illinois:** BCBS fully and finally releases the United States and the State of Illinois, and their agencies, employees, servants, and agents from any claims (including attorney's fees, costs, and expenses of every kind and however denominated) that BCBS has asserted, could have asserted, or may assert in the future against the United States and the State of Illinois, and their agencies, employees, servants, and agents, related to the Covered Conduct and the United States' and the State of Illinois's investigation and prosecution thereof.

I. **Medicaid and Settlement Amount:** The Settlement Amount shall not be decreased as a result of the denial of claims for payment now being withheld from payment by any Medicaid or state payer, related to the Covered Conduct; and BCBS agrees not to resubmit or cause to resubmit to any Medicaid or state payer any previously denied claims related to the Covered Conduct, and agrees not to appeal any such denials of claims.

J. **Unallowable Costs:**

1. **Unallowable Costs Defined:** All costs (as defined in the Federal Acquisition Regulation, 48 C.F.R. § 31.205-47; and in Titles XVIII and XIX of the Social Security Act, 42 U.S.C. §§ 1395-1395kkk-1 and 1396-1396w-5; and the regulations and official program directives promulgated thereunder) incurred by

or on behalf of BCBS, its present or former officers, directors, employees, shareholders, and agents in connection with:

- i. the matters covered by this Agreement;
- ii. the United States' and the State of Illinois's audit(s) and civil investigation(s) of the matters covered by this Agreement;
- iii. BCBS's investigation, defense, and corrective actions undertaken in response to the United States' and the State of Illinois's audit(s) and civil investigation(s) in connection with the matters covered by this Agreement (including attorney's fees);
- iv. the negotiation and performance of this Agreement; and
- v. the payment BCBS makes to the United States and the State of Illinois pursuant to this Agreement.

2. **Future Treatment of Unallowable Costs:** Unallowable Costs shall be separately determined and accounted for by BCBS, and BCBS shall not charge such Unallowable Costs directly or indirectly to any contracts with the United States or any State Medicaid program, or seek payment for such Unallowable Costs through any cost report, cost statement, information statement, or payment request submitted by BCBS or any of its subsidiaries or affiliates to the Medicare, Medicaid, TRICARE, or FEHBP Programs.

3. **Treatment of Unallowable Costs Previously Submitted for Payment:** BCBS further agrees that within 90 days of the Effective Date of this Agreement it shall identify to applicable Medicare and TRICARE fiscal intermediaries, carriers, and/or contractors, and Medicaid and FEHBP fiscal agents, any Unallowable

Costs (as defined in this Paragraph) included in payments previously sought from the United States, or any State Medicaid program, including, but not limited to, payments sought in any cost reports, cost statements, information reports, or payment requests already submitted by BCBS or any of its subsidiaries or affiliates, and shall request, and agree, that such cost reports, cost statements, information reports, or payment requests, even if already settled, be adjusted to account for the effect of the inclusion of the unallowable costs. BCBS agrees that the United States, at a minimum, shall be entitled to recoup from BCBS any overpayment plus applicable interest and penalties as a result of the inclusion of such Unallowable Costs on previously-submitted cost reports, information reports, cost statements, or requests for payment. Any payments due after the adjustments have been made shall be paid to the United States pursuant to the direction of the Department of Justice and/or the affected agencies. The United States reserves its rights to disagree with any calculations submitted by BCBS or any of its subsidiaries or affiliates on the effect of inclusion of Unallowable Costs (as defined in this Paragraph) on BCBS or any of its subsidiaries or affiliates' cost reports, cost statements, or information reports.

4. Nothing in this Agreement shall constitute a waiver of the rights of the United States to audit, examine, or re-examine BCBS's books and records to determine that no Unallowable Costs have been claimed in accordance with the provisions of this Paragraph.

K. **Benefit of the Parties:** This Agreement is intended to be for the benefit of the Parties only. The Parties do not release any claims against any other person or entity, except to the extent provided for in Section III, Paragraph L (waiver for beneficiaries paragraph), below.

L. **BCBS's Waiver of Beneficiaries:** BCBS agrees that it waives and shall not seek payment for any of the health care billings covered by this Agreement from any health care beneficiaries or their parents, sponsors, legally responsible individuals, or third party payors based upon the claims defined as Covered Conduct.

IV. **GENERAL PROVISIONS**

A. **BCBS's Notification of Change in Circumstances:** BCBS shall notify the United States and the State of Illinois in writing at least 30 days prior to any proposed change that may affect its compliance obligations under this Agreement, such as dissolution, assignment, sale resulting in the emergence of a successor entity, the creation or dissolution of subsidiaries, or any other change that may affect compliance obligations under this Agreement. A copy of this Agreement shall be given to any successor entity.

B. **Legal Costs and Expenses:** Each Party shall bear its own legal and other costs incurred in connection with this matter, including the preparation and performance of this Agreement.

C. **Jurisdiction:** This Agreement is governed by the laws of the United States. The exclusive jurisdiction and venue for any dispute relating to this Agreement is the United States District Court for the Northern District of Illinois. For purposes of construing this Agreement, this Agreement shall be deemed to have been drafted by all Parties to this Agreement and shall not, therefore, be construed against any Party for that reason in any subsequent dispute.

D. **Authority of Signatories:** The undersigned counsel represent and warrant that they are fully authorized to execute this Agreement on behalf of the persons and entities indicated below. Each party and signatory to this Agreement represents that it freely and voluntarily enters into this Agreement without any degree of duress or compulsion.

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

F. **Severability:** If any portion, clause, phrase, or term of this Agreement is later determined by a court of law to be invalid or unenforceable, for whatever reason, the remaining provisions of this Agreement will remain valid and in effect as to the Parties and will be unaffected by said determination.

G. **Headings and Interchangeability:** The headings of sections contained in this Agreement are merely for the convenience of reference and shall not affect the interpretation of any of the provisions. Whenever the context so requires, the singular shall include the plural and vice versa. All words and phrases shall be construed as masculine, feminine, or gender neutral, according to the context. This Agreement is deemed to have been drafted jointly by the Parties and any uncertainty or ambiguity shall not be construed for or against any Party as an attribution of drafting to such Party.

H. **Binding Agreement:** This Agreement is binding on BCBS's representatives, successors, transferees, heirs, assigns, administrators and executors as the case may be.

I. **Disclosure:** All parties consent to the United States' and State of Illinois' disclosure of this Agreement, and information about this Agreement, to the public.

J. **Entire Agreement:** This Settlement Agreement represents the entire agreement between and among the Parties. All agreements, covenants, representations and warranties,

express or implied, oral or written, of the Parties hereto concerning the subject matters hereof are contained herein and superseded thereby. All prior and contemporaneous negotiations, possible and alleged agreements, representations, covenants and warranties, between and among the Parties, concerning the subject matter hereof are merged herein. It is further understood that the Parties are not relying upon any matters outside the terms of this Settlement Agreement in entering into the Settlement Agreement. This Agreement may not be amended except by written consent of the Parties.

K. **Effective Date of Agreement:** This Agreement is effective on the date of signature of the last signatory to the Agreement (Effective Date of this Agreement). Facsimiles of signatures shall constitute acceptable, binding signatures for purposes of this Agreement.

V. NOTIFICATIONS

All notices issued pursuant to this Agreement shall be issued to the following individuals:

To the State of Illinois:

Paul Gaynor, Chief, Public Interest Division
Carl Bergetz, Chief, Special Litigation Bureau
Ray Threlkeld, Chief, Health Care Bureau
Office of the Illinois Attorney General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601
(312) 814-3000 (telephone)
(312) 814-1154 (facsimile)

To the United States:

Laurie Oberembt
Department of Justice
P.O. Box 261
Ben Franklin Station
Washington, D.C. 20044

and

Linda A. Wawzenski
Assistant United States Attorney
219 South Dearborn Street
Chicago, IL 60604
(312) 353-1994

To BCBS:

Deborah Dorman-Rodriguez, Sr. Vice President, Chief Legal Officer & Corporate Secretary
Tamara L. Meyer, Div. Sr. Vice President, Chief Litigation Counsel
Health Care Service Corporation, a Mutual Legal Reserve Company
300 E. Randolph
Chicago, Illinois 60601
(312) 653-8647 (telephone)
(312) 819-1943 (facsimile)

THE UNITED STATES OF AMERICA

DATED: _____

**PATRICK J. FITZGERALD
United States Attorney**

**By: _____
Linda A. Wawzenski
Assistant United States Attorney
219 South Dearborn Street
Chicago, Illinois 60604**

DATED: _____

**By: _____
Gregory E. Demske
Assistant Inspector General for Legal Affairs
Office of Counsel to the
Inspector General
Office of Inspector General
United States Department of
Health and Human Services**

THE STATE OF ILLINOIS

DATED: _____

LISA MADIGAN
Attorney General of the State of Illinois

By: _____

Carl Bergetz
Bureau Chief, Special Litigation
100 W. Randolph St., 13th Floor
Chicago, IL 60601

BCBS

DATED: _____

BY: _____