UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DEREK WASKUL, *et al.*,

Plaintiffs,

v.

WASHTENAW COUNTY COMMUNITY MENTAL HEALTH, *et al.*,

Defendants.

No. 2:16-cv-10936-PDB-EAS
Hon. Paul D. Borman
Hon. Elizabeth A. Stafford

PLAINTIFFS' AMENDED MOTION FOR APPROVAL OF SETTLEMENT AGREEMENT, DECLARATION OF BINDING EFFECT ON RULE 65(D) ENTITIES, AND FOR STAY

Nicholas A. Gable (P79069)
Kyle Williams (P77227)
DISABILITY RIGHTS MICHIGAN
Attorneys for Plaintiffs
4095 Legacy Pkwy
Lansing, MI 48911-4264
(517) 487-1755
ngable@drmich.org
kwilliams@drmich.org

Edward P. Krugman
NATIONAL CENTER FOR LAW AND ECONOMIC JUSTICE
Attorneys for Plaintiffs
50 Broadway, Suite 1500
New York, NY 10004-3821
(646) 680-8912
krugman@nclej.org

January 10, 2024

MOTION

Plaintiffs hereby move for an order:

1. Approving and incorporating the terms of the Settlement Agreement ("the Agreement") attached hereto as Ex. 1,[1]
2. Assuming continuing jurisdiction as set forth in the Agreement,
3. Declaring the Agreement binding on Defendants CMHPSM and WCCMH and enjoining them to carry out its terms, and
4. Staying this action until the "Sunset Date" as set forth in Section A(2)(a) of the Agreement, subject to the exceptions set forth in Sections A(2)(b) and A(4).

The State Defendants concur in points 1, 2, and 4 above and take no position on point 3. Meet-and-confers with the Local Defendants were held on November 27 and December 5, and the Local Defendants declined to concur in the relief sought herein.

Declarations pursuant to 28 U.S.C. § 1746 in support of approval are submitted by each of the individual Plaintiffs (Exs. 4-7), by Plaintiff WACA (Ex. 8), and

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1 Citation to the Settlement Agreement herein will frequently be by Section number only (*e.g.*, § A(1)).

by several other members of the I/DD community in Washtenaw County and the other counties comprised by Defendant CMHPSM.[2]

Background

1. This action was filed in March 2016 and has been aggressively litigated since.

2. It has, among other things,

- generated two published Sixth Circuit decisions (979 F.3d 426 (2020) and 900 F.3d 250 (2018));
- involved various dispositive motions (*e.g.*, ECF##129-131);
- involved contested motions for injunctive relief (ECF##8, 147), amendment (ECF#69), consolidation (ECF#68), and abstention (ECF#186); and involved substantial discovery and litigation about discovery (569 F.Supp.3d 626 (2021) and ECF## 260, 269).

3. The scope of discovery has been staggering: the parties have collectively produced and reviewed over 2,500,000 pages of documents, taken around twenty depositions, and issued over thirty subpoenas.

4. Before the parties entered court-ordered mediation, discovery had mostly concluded, with the exception of two remaining depositions of Plaintiffs and around six expert depositions (expert reports and rebuttal reports, however, were served before mediation began).

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[2] Mary Lay, mother and guardian of Sam Harman (Ex. 9); Barbara Rank, mother and guardian of Taylor Rank (Ex. 10); John Madakacherry, father and guardian of John Madakacherry (Ex. 11); and Crystal Jackson, mother and guardian of Daniel Avram (Ex. 12).

5. Pursuant to the Court's January 17, 2023 Mediation Order (ECF#279), this action was referred to mediation under the aegis of the Hon. Phillip Shefferly.

6. The first mediation session was held in Detroit on February 21, 2023, and two additional in-person sessions were held on April 12 and 13, 2023.

7. On June 23, 2023, following these three full days of in-person mediation, the parties continued the mediation in a Zoom meeting. All parties to the lawsuit were present, including CMHPSM and WCCMH.

8. Given certain positions that had been taken, the parties discussed with the mediator in the Zoom meeting whether it made sense to continue or terminate the mediation. Plaintiffs and MDHHS wanted to continue the mediation; the Local Defendants did not. The Local Defendants both announced that they would no longer participate in the mediation and that they would also oppose any further stay of the lawsuit.

9. Following the Local Defendants' voluntary departure, Plaintiffs and MDHHS agreed on a schedule for subsequent written responses to one another, and they scheduled an additional mediation session with Judge Shefferly on August 22, 2023.

10. The Local Defendants were not excluded from the subsequent mediation sessions. They chose not to participate because they expressly stated in the June 23 Zoom meeting that they would not agree to any settlement that was based on the

terms that were under discussion at the three previous in-person sessions. Neither of the Local Defendants ever requested to resume their participation in the mediation.

11. Because Defendants CMHPSM and WCCMH did not consent to extending the litigation stay past July 20, Plaintiffs, with the consent of MDHHS, moved to continue the stay (ECF#288). The Court granted Plaintiffs' motion (ECF#293) and subsequently granted a second motion that stayed the action until October 31, 2023 (ECF#299).

12. After the August 22, 2023 mediation, Plaintiffs and MDHHS continued to exchange drafts and check in with each other and Judge Shefferly every week or two, and they participated in another full-day mediation session with Judge Shefferly on October 5, 2023.

13. After October 5, 2023, Plaintiffs and MDHHS exchanged additional drafts and met again with Judge Shefferly on October 17 and 18. Plaintiffs then met separately with Judge Shefferly on October 29; Plaintiffs, MDHHS, and Judge Shefferly all met on October 30.

14. On November 1, 2023, the stay having expired, Chambers inquired as to status (Ex. 2). Plaintiffs responded as follows:

> The Plaintiffs and the State Defendants have not yet settled but believe they are very close and hope to be able to execute a settlement agreement this week or (more likely) next week. Obviously, nothing is done until it is done. If an agreement is executed, it will require Judge Borman's approval, and Plaintiffs will move to reinstate the stay pending the filing (within 30 days) and determination of the approval motion.

> The motion to reinstitute the stay, if made, will contain a detailed description of how this litigation will have changed as a result of the settlement.
>
> As of now, all parties are aware that the stay has expired and are planning for resumed discovery if necessary. Plaintiffs hope (and believe) that it will not be necessary, but we understand Judge Borman's last order and will not move to reinstitute the stay unless and until there is an actual, signed settlement agreement on file with the Court. (*Id.*)

WCCMH indicated that it would oppose reinstitution of the stay (*id.*).

15. Plaintiffs and MDHHS exchanged further drafts of the settlement agreement on November 1, 2, 7, 18, and 19.

16. On Friday, November 17, Chambers inquired as to any updates on status (*id.*).

17. On Monday, November 20, counsel for MDHHS informed counsel for Plaintiffs that the State's negotiation team had approved Plaintiffs' most recent draft and that there was a deal, subject only to final signoff from senior State officials, which the negotiation team expected to receive (*id.*). Plaintiffs thus responded to Chambers' November 17 update request as follows (*id.*):

> I am pleased to report that that I have been informed that the State's negotiation team intends to circulate our draft to senior State officials for final, up-the-line approval. Anything can happen, of course, but I am further informed that the State's negotiation team does not anticipate changes in the draft as a result of the approval process.
>
> The approval process, I am told, might take up to two weeks in light of the Thanksgiving holiday. On filing of the final, executed document, Plaintiffs will move to reinstate the stay of this action pending final approval of the settlement. Until that is resolved, Plaintiffs do not intend

either to conduct or to defend any of the theoretically ongoing discov-
ery.

18. On November 21, WCCMH noticed the Homan and WACA depositions for December 6 and 7, respectively (Ex. 3; *see also* ECF##301-2, 301-3).

19. Throughout the mediation, Plaintiffs and MDHHS were represented by experienced counsel who negotiated in good faith, at arms length, and always with the participation of Judge Shefferly.

The Agreement

20. The Agreement resolves all claims between Plaintiffs and the State Defendants. Pursuant to the Agreement, Plaintiffs will receive substantially all of the relief they have sought against the State in this action.

21. The Agreement must, of course, be read in its entirety, but certain key provisions make clear its breadth and scope.

The Minimum CLS Rate

22. Subject to certain contingencies (§ D(1))—approval by the Michigan Legisature and the federal Medicaid authorities (CMS) and execution of an appropriate contract amendment by CMHPSM—not only Plaintiffs but all self-determination CLS recipients under the Michigan Habilitation Supports Waiver will have their CLS services budgeted and paid for at the the rate of $31 per service hour. (Ex. 1 § C(2)).

23. This $31 rate is more than a 50% increase over the the current rate in Washtenaw County of approximately $20.50/hour.

24. The Agreement's rate for Overnight Health, Safety, and Support ("OHSS") is 70% of the CLS rate and is also significantly in excess of the current OHSS rate in Washtenaw County.

25. These statewide rate increases are expected, in one fell swoop, to resolve the hiring and employment crisis for self-determination CLS under the HSW, which is the subject matter of this action.

26. According to the report of the State's expert, Christopher Petit (ECF#301-4 (exhibit excerpted from report)), this rate increase represents an annual additional expenditure of $22.1 million, a 34.7% increase over the base year (FY2021) expenditure of $63.1 million.

27. This is a five-year deal, expiring in September 2029 (§ E(6)). The State has further agreed to adjust the $31/hour base rate for inflation. (§ C(10)).

28. Assuming implementation by the start of Fiscal Year 2025 in October 2024, the additional spending mandated by the agreement just for CLS will exceed $110 million. The additional OHSS spending will increase this amount.

The "Costing Out" Alternative

29. Of course, it is possible that the contingencies will not be met. The Legislature could refuse to appropriate (although the State Defendants have informed us

that they believe this to be unlikely), CMS could refuse to approve (highly unlikely), or the Local Defendants could refuse to execute contract amendments (more likely).

30. The Settlement Agreement provides for that: if the contingencies are not met by the "Drop Dead Date" (eighteen months after execution of the settlement), then "Attachment C" will come into effect. And until the Drop Dead Date, the individual plaintiffs will receive the $31 budget and funding, so they will not be prejudiced by any delay in statewide implementation. (§ A(5)).

31. "Attachment C" implements the "costing out" requirement of the HSW that was the principal relief sought in both the Complaint and the Amended Complaint (*see*, *e.g*., ECF#146 ¶¶ 59, 106-108, 466(c), "Relief Requested" ¶¶ B-D). Plaintiffs made the economic judgment that $31/hour, with escalation for inflation, was a sufficient rate to obviate the need for "costing out," but if the $31 rate never comes into effect, then "costing out" will be needed, and under Attachment C it will happen.

Additional Procedural Requirements

32. The Agreement also provides certain procedural relief in the process of ensuring that the Michigan Fair Hearing system has (and knows it has) the authority to grant effective relief in cases involving budget or service authorization disputes. (§ C(8)).

33. Additional procedural relief relates to forming Individual Plans of Service ("IPOSs") and their related budgets. Some of that relief is effected through DHHS's agreement to adopt certain formal policies; other relief is to be effected via contract amendments:

(a) ***Policy Adoption***:

(i) Clarification of "medical necessity." (§ C(9)(a) & Attachment B).

(ii) Requiring granular discussion during the person-centered-planning process of a beneficiary's specific needs and the ways in which those needs might be met. (*id*. § C(9)(b)).

(iii) Protections against entities such as WCCMH abdicating their responsibility to engage directly in person-centered planning around budgets. (*id*. § C(9)(c)).

(iv) Protections against unwarranted termination of self-determination arrangements. (*id*. §§ C(9)(d), C(8)(d)).

(b) ***Contract Amendments Requiring that CMHPSM and WCCMH***:

(i) Comply with Orders issued by Administrative Law Judges in Medicaid Fair Hearings. (*id*. § C(9)(e).

(ii) Offer recipients the option to self-determine. (*id*. § C(7)).

(iii) Provide meaningful notice of budget or service reductions.

(*id*. § C(9)(f, g)).

34. In the event that CMHPSM refuses to sign a contract with the terms set forth in Paragraph 33(b)(ii), (iii), MDHHS will take the necessary steps to make those terms Policy.

Declaration of Binding Effect

35. Plaintiffs seek a declaration that the Local Defendants—managed care entities who contract with MDHHS, the State Medicaid agency— are bound by the Settlement Agreement or, in the alternative, an injunction against the Local Defendants directing them to carry out the substantive terms of the Settlement Agreement.

WHEREFORE, Plaintiffs respectfully request that the Court grant their motion and issue an order

- approving, as fair, reasonable, and adequate, the terms of the Settlement Agreement ("the Agreement") attached hereto as Exhibit 1,
- incorporating the terms of the Agreement into the order of approval,
- assuming continuing jurisdiction as set forth in the Agreement,
- declaring the Agreement binding on Defendants CMHPSM and WCCMH or, in the alternative, enjoining them to comply with the conduct required of them therein, and
- staying this action to the Sunset Date, subject only to the exceptions for enforcement specified in the Agreement.

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STATEMENT OF QUESTIONS PRESENTED

1. Whether the proposed Agreement should be approved?

- Plaintiffs answer, "yes."
- The State Defendants answer, "yes."
- The Local Defendants answer, "no."

2. Whether the proposed Agreement should be declared binding on the Local Defendants?

- Plaintiffs answer, "yes."
- The State Defendants answer, "no position."
- The Local Defendants answer, "no."

3. Whether this action should be stayed to the Sunset Date, subject only to the exceptions for enforcement specified in the Agreement?

- Plaintiffs answer, "yes."
- The State Defendants answer, "yes."
- The Local Defendants answer, "no."

MOST APPROPRIATE AUTHORITY

Pedreira v. Sunrise Children's Services, Inc., 802 F.3d 865 (6th Cir. 2015)

Tennessee Ass'n of Health Maintenance Organizations Inc. v. Grier, 262 F.3d 559 (6th Cir. 2001)

United States v. Michigan, 2021 WL 2253270 (E.D. Mich. June 3, 2021)

INTRODUCTION

For nearly eight years, four individuals with serious intellectual and developmental disabilities ("I/DD") and a community organization devoted to serving such persons have fought to receive the Community Living Support ("CLS") services to which they are entitled. The First Amended and Supplemental Complaint (ECF #146), which was sustained by the Sixth Circuit, alleges that a 2015 change in budgeting procedure for self-determination ("SD")[3] CLS implemented by the Washtenaw Community Health Organization, a predecessor to Defendant WCCMH, caused Plaintiffs to be unable to pay for the staff and other CLS services provided for in their Individual Plans of Service ("IPOSs"). The change and its consequences—which have only gotten worse over time—are asserted to violate the Habilitation Supports Waiver ("HSW"); several provisions of the Medicaid Act (42 U.S.C. §§ 1396a(a)(8), (a)(10), 1396n(c)(2)(A), (C)); the "Integration Mandate"[4] under the Americans with Disabilities Act, 42 U.S.C. §§ 12131 *et seq*., and the Rehabilitation Act, 29 U.S.C. § 794; Defendants' contracts among themselves; and the Michigan Mental Health Code, MCL 330.1001 *et seq*.

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[3] Under "self-determination," participants have substantial control over matters, such as hiring and paying staff to assist them, that otherwise would be handled by the Medicaid agency or its designated contractors. Here (§ B(18)), "'Self Determination'" includes both (1) participant direction of services as described in Appendix E of the HSW, and (2) "'self direction'" as that term is used in DHHS's Self-Direction Technical Requirements."

[4] *See Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999).

Plaintiffs and the State Defendants have now reached a settlement that gives not just the Plaintiffs, but all HSW self-determination CLS recipients statewide, an hourly CLS rate that makes it possible to fully implement their IPOSs. That mandated hourly rate is subject to Michigan legislative and federal regulatory approval. Absent such approval, the settlement establishes a detailed procedure for "costing out" the various components of CLS services, in accordance with the HSW, to ensure that CLS recipients can fully implement their IPOSs.

That alone would be a major victory, comprising substantially all of the financial relief against the State sought in this action. The settlement, however, accomplishes even more. It implements a parallel minimum fee schedule for the related Overnight Health and Safety ("OHSS") service; it fixes longstanding due process issues related to Michigan's Medicaid Fair Hearing system; it significantly protects and advances CLS beneficiaries' right to self-determination; it helps ensure that CLS recipients receive services in the most integrated setting; it protects CLS recipients against many of the Local Defendants' bad practices; and it clarifies the scope of CLS services and the medical necessity criteria that apply to them.

The Agreement is obviously fair, reasonable, and adequate, and it should be approved (Point I below).

In addition, entering into the Agreement was a policy matter that is committed to the State—and ***only*** the State—to determine. It is the law of this Circuit that the

State's determination to settle Medicaid litigation on specific terms binds local subordinate agencies to follow those terms. *Tennessee Ass'n of Health Maintenance Organizations Inc. v. Grier*, 262 F.3d 559 (6th Cir. 2001). The Local Defendants do not see it that way, however, and there is thus "a case of actual controversy" within the jurisdiction of this Court, for which declaratory relief is appropriate. 18 U.S.C. § 2201(a).

A declaration that the Local Defendants are bound by the settlement (or, what is in these circumstances equivalent, an injunction directing them to carry out the terms of the Settlement Agreement[5]) will ensure that Plaintiffs can enforce the Agreement against the entities directly responsible for the provision of their services. Such a declaration and/or injunction would resolve Plaintiffs' claims against the Local Defendants in this litigation and therefore conclude the entire action (Point II below). Plaintiffs believe it would be prudent—in light of the Local Defendants' history of recalcitrance when it comes to their Medicaid obligations—to take the extra step and actually enjoin the Local Defendants to carry out the terms of the Settlement. The Local Defendants are within the scope of "persons bound" under Fed.R.Civ.P. 65(d)(2)(B), (C) by the injunctive relief effected by the Settlement.

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[5] For practical purposes, the only difference between declaratory and injunctive relief in this context is that an injunction is directly enforceable and does not require a prior motion to enforce under 28 U.S.C. § 2202.

STATEMENT OF FACTS

The factual background and history of this action are laid out in the comprehensive decision of the Sixth Circuit sustaining the Amended Complaint. *Waskul v. WCCMH*, 979 F.3d 426 (6th Cir. 2020). The structure and effect of the Settlement Agreement are set forth in the Agreement itself (Ex. 1) and in the Motion to which this Brief is appended.

ARGUMENT

I. The Agreement Should Be Approved

A. Standards for Approval

The Sixth Circuit requires Court approval for a settlement agreement that contains injunctive terms requiring Court incorporation, oversight, and enforcement. *Pedreira v. Sunrise Children's Services, Inc.*, 802 F.3d 865 (6th Cir. 2015). The Settlement Agreement here requires such incorporation and contains such enforcement terms (*see* §§ A(1), A(3), A(4), E(6)).

All such agreements must be approved as "fair, adequate, and reasonable, as well as consistent with the public interest," 802 F.3d at 872, and anyone affected must be allowed to present evidence and have their objections heard, *Tenn. Ass'n of Health Maint. Orgs. v. Grier*, 262 F.3d 559, 566–67 (6th Cir. 2001). But affected parties are not "entitled to hold consent decrees hostage and require a full-blown trial in lieu of a fairness hearing." The Court may limit the fairness hearing "to whatever

is necessary to aid it in reaching an informed, just and reasoned decision." *Id.* at 567

The Court evaluates seven factors to determine whether a proposed agreement is fair, adequate, and reasonable. *United States v. Michigan*, 2021 WL 2253270 (E.D. Mich. June 3, 2021) (Borman, J). Those factors are:

- the plaintiffs' likelihood of ultimate success on the merits balanced against the amount and form of relief offered in the settlement;
- the complexity, expense and likely duration of the litigation;
- the stage of the proceedings and the amount of discovery completed;
- the judgment of experienced trial counsel;
- the nature of the negotiations;
- the objections raised by class members; and
- the public interest.

Here, each of the seven factors relevant to this determination favors approval.

B. Notice

Notice to affected parties is required. *Grier*; *United States v. Michigan*, 2021 WL 2253270, at *3. Concurrently with the filing of this motion, Plaintiffs are initiating discussions with the other parties as to form, content, and recipients of the notice and a schedule heading up to the fairness hearing. Plaintiffs will report to the Court with either a consent notice order or a litigated motion when that process is complete.

C. Application of the Standards

1. Plaintiffs' likelihood of ultimate success on the merits balanced against the amount and form of relief offered in the settlement

The "most important of the factors to be considered in reviewing a settlement is the probability of success on the merits." *Does 1–2 v. Déjà Vu Services, Inc.*, 925 F.3d 886, 895 (6th Cir. 2019). "In determining whether the relief offered in a settlement outweighs the Plaintiffs' chances of ultimate success on the merits, the Court recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs inherent in taking any litigation to completion." *Michigan*, 2021 WL 2253270, at *4. The Court is not tasked with determining "whether one side is right or even whether one side has a better of these arguments . . . The question rather is whether the parties are using settlement to resolve a legitimate legal and factual dispute." *Id*. (quoting *Int'l Union, United Auto., Aerospace, and Agric. Implement Workers of Am. v. Gen. Motors Corp.*, 497 F.3d 615, 632 (6th Cir. 2007)). Consent decrees represent compromises, so the Court's main focus is on the *bona fides* (or lack thereof) of the parties' legal dispute. *Id*. at *5; *Int'l Union*, 497 F.3d at 631.

Here, Plaintiffs have achieved virtually complete success on their claims against the State—now for the Named Plaintiffs (because of their interim payments) and no later than the Drop Dead Date for the other members of WACA and, indeed, statewide. This first and most important factor virtually *by itself* demands approval.

2. Complexity, expense, and likely duration of the litigation

Approval is favored in cases where, as here, the settling parties would otherwise face long, complex, and resource-intensive litigation. Absent approval, the parties would face completing additional resource-intensive fact and expert depositions; cross-motions for summary judgment; a likely trial; and even more likely appeals regardless of the outcome.

This is a case about the medically necessary services of some of society's most vulnerable members. Those services have hung in the balance since well before this action was filed in March 2016. The Agreement gives Plaintiffs the CLS rates necessary to implement their plans of services, and it gives them a return to the pre-May 2015 budget methodology that is at the heart of this action. To go to trial in an effort to move the needle from 95% to 100% would make no sense.

3. Stage of the proceedings and amount of discovery completed

The purpose of this factor is to ascertain whether sufficient information has been exchanged "to permit the plaintiffs to make an informed evaluation of the merits of a possible settlement." *Michigan*, 2021 WL 2253270, at *5; *Moeller v. Week Publications, Inc.*, 649 F.Supp.3d 530, 543 (E.D. Mich. 2023).

This action has been pending for nearly eight years, and the scope of discovery has been staggering. The parties have collectively produced and reviewed over 2,500,000 pages of documents, have taken around twenty depositions, and have

issued over thirty subpoenas to third parties. The length of this action and enormous amount of discovery completed leaves no doubt that the parties are sufficiently informed to assess the merits of their positions and the desirability of settlement.

4. Judgment of experienced trial counsel

Where a settlement agreement is negotiated "after significant litigation and with full knowledge of the relative strengths and weaknesses of their legal positions," and where there is no evidence of collusion, the Court "should defer to the judgment of experienced counsel who has competently evaluated the strength of his proofs." *Michigan*, 2021 WL 2253270, at *5.

Both Plaintiffs and MDHHS are represented by experienced counsel who have devoted years to this litigation. They are well-positioned to assess the merits of their cases and the value of the proposed settlement. There is no evidence of collusion,[6] so counsel's judgment is entitled to "significant weight" and supports the fairness of the Agreement. *IUE-CWA v. General Motors Corp.*, 238 F.R.D. 583, 597 (E.D. Mich. 2006); *In re Flint Water Cases*, 571 F.Supp.3d 746, 780 (E.D.Mich. 2021).

Each of the Plaintiffs has submitted a declaration in support of approval (Exs. 4-8), and several other CLS recipients have declarations as well (Exs. 9-12).

[6] "Courts presume the absence of fraud or collusion unless there is evidence to the contrary." *In re Flint Water Cases*, 571 F.Supp.3d at 780.

5. Nature of the negotiations

The proposed Agreement is the product of arms-length negotiations conducted over the course of nearly ten months. All settlement negotiations were overseen by Hon. Phillip Shefferly of JAMS, and there is “no better evidence of [a truly adversarial bargaining process] than the presence of a neutral third party mediator,” *In re Flint Water Cases*, 571 F.Supp.3d at 780.

6. Objections raised by class members

As no objections have yet been made, this factor is neutral. *Moeller*, 649 F. Supp.3d at 543. Furthermore, because this is not a class action, this factor does not apply as it would in a class action, where absent class members are legally bound by a settlement and forfeit their right to individual adjudication at a later time. *Does 1-2*, 925 F.3d at 900; Fed.R.Civ.P. 23(e)(1)(B).

7. Public interest

There is a strong public interest in settling complex actions like this, which are “notoriously difficult and unpredictable, and [whose] settlement conserves judicial resources.” *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 530 (E.D.Mich. 2003). More particularly, subject to certain contingencies (§ D(1)), not only Plaintiffs but ***all self-determination CLS recipients under the Michigan Habilitation Supports Waiver*** will have their CLS services budgeted and paid for at the rate of $31 per service hour. (§ C(2)). This is is a 51% increase over the current rate in

Washtenaw County of approximately $20.50/hour, and it amounts to well over $100 million in additional expenditures over five years. This statewide rate increase is expected, in one fell swoop, to resolve the hiring and employment crisis for self-determination CLS that is the subject matter of this action.

The individual Plaintiffs will obtain the desperately needed relief they have been seeking for eight years, in an action where the systemic and structural remedial measures sought could take significant time to implement after judgment. For its part, MDHHS will achieve certainty of settlement. *See In re Flint Water Cases*, 571 F.Supp.3d at 784.

Perhaps most importantly, the Agreement clearly furthers the public objectives of the Medicaid Act, the Americans with Disabilities Act, Section 504 of the Rehabilitation Act, Michigan's Habilitation Supports Waiver, and the Michigan Mental Health Code. As such, the Agreement is "consistent with the public objectives sought to be attained by Congress." *Michigan*, 2021 WL 2253270, at *6. Specifically:

- The Minimum Fee Provisions, or, in the absence of those provisions, Attachment C, ensure that CLS recipients will receive suitable medically necessary services with reasonable promptness and in sufficient amount, scope, and duration, pursuant to the Medicaid Act, 42 U.S.C. § 1396a(a)(8) and (a)(10), and the Michigan Mental Health Code;
- Attachment C implements the "costing out" requirements of Appendix E of the Habilitation Supports Waiver;
- Receipt of medically necessary services in sufficient amount, scope, and duration will avoid CLS recipients being subjected to unnecessary

risk of institutionalization or unjustified isolation at home, in accordance with the Americans with Disabilities Act and Section 504 of the Rehabilitation Act, 42 U.S.C. § 12131 *et seq*. and 29 U.S.C. § 794;

- The provisions concerning the person-centered-planning process and Michigan's Medicaid Fair Hearing System ensure that recipients receive the notice and hearing to which they are entitled under the United States Constitution and the Medicaid Act, 42 U.S.C. § 1396a(a)(3); and
- The provisions aligning the local Defendants' behavior with federal and state law 1) ensure that CLS recipients will receive the services to which they are entitled, and that the Local Defendants cannot retaliate against self-determination recipients and/or target high-cost services, and 2) ensure accountability and consistency in Michigan's Medicaid program, in accordance with the Medicaid Act's "single State agency" requirement and its implementing regulations.

II. The Agreement Should be Declared Binding on the Local Defendants

A. Standard

In a case of actual controversy, such as this one, the Court, "upon the filing of an appropriate pleading,[7] may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C § 2201. "Further necessary or proper relief based on a declaratory judgment or decree may be granted . . . against any adverse party whose rights have been determined by such judgment." 28 U.S.C § 2202.

[7] "Appropriate pleadings" for purpose of the Declaratory Judgment Act include motions for declaratory judgment. *See, e.g., Suggs ex rel. Posner v. General American Life Ins. Co.*, 2006 WL 1109270 (E.D. Mich. April 24, 2006).

Two "principal criteria" inform a District Court's decision to issue a declaratory judgment: "(1) when the judgment will serve a useful purpose in clarifying and settling the legal relations in issue, and (2) when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding." *Grand Trunk Western R. Co. v. Consolidated Rail Corp.*, 746 F.2d 323, 326 (6th Cir. 1984). Only when the declaration would serve neither purpose should the court decline to award declaratory relief. *Id*.

The *Grand Trunk* factors have been further explicated by the Sixth Circuit via the five "*Scottsdale*" factors:

1. whether the declaratory action would settle the controversy;
2. whether the declaratory action would serve a useful purpose in clarifying the legal relations in issue;
3. whether the declaratory remedy is being used merely for the purpose of "procedural fencing" or "to provide an arena for a race for res judicata";
4. whether the use of a declaratory action would increase friction between our federal and state courts and improperly encroach upon state jurisdiction;[8] and
5. whether there is an alternative remedy which is better or more effective.

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[8] The fourth factor has three sub-factors: "(1) whether the underlying factual issues are important to an informed resolution of the case; (2) whether the state trial court is in a better position to evaluate those factual issues than is the federal court; and (3) whether there is a close nexus between underlying factual and legal issues and state law and/or public policy, or whether federal common law or statutory law dictates a resolution of the declaratory judgment action." *United Specialty Ins. Co. v. Cole's Place, Inc.*, 936 F.3d 386, 396 (6th Cir. 2019).

Scottsdale Ins. Co. v. Flowers, 513 F.3d 546, 554 (6th Cir. 2008); *Esurance Prop. & Cas. Ins. Co. v. Lawson*, 2022 WL 7454219, at *4 (E.D. Mich. October 13, 2022) (Borman, J.). "The relative weight of the underlying considerations of efficiency, fairness, and federalism will depend on facts of the case," with the essential question being "whether a district court has taken a good look at the issue and engaged in a reasoned analysis of whether issuing a declaration would be useful and fair." *Western World Ins. Co. v. Hoey*, 773 F.3d 755 (6th Cir. 2014).

B. Because the Binding Effect of the Settlement Agreement Is Purely a Legal Issue, Declaratory Relief Is Particularly Appropriate Here

As the Sixth Circuit held in *Nat'l Rifle Ass'n of Am. v. Magaw*, 132 F.3d 272, 290 (6th Cir. 1997), a case in which the basis for the declaratory judgment "presents purely legal issues" is particularly "fit" for declaratory relief. That is certainly true here. Although the underlying facts bear on the first two *Grand Trunk* factors (need for and usefulness of declaratory relief), the ***basis*** for the relief sought is purely legal, being premised (as shown in the next section) on circuit precedent, the legal nature of the three Defendants and their relationship to each other under federal Medicaid law, and the Defendants' contractual obligations amongst themselves.

C. The Local Defendants Are Bound by the Settlement

Settling Defendant MDHHS is the "single State entity" required by 42 U.S.C. § 1396a(a)(5). As set forth in the implementing regulation, only the single State agency has "authority to supervise the plan or to develop or issue policies, rules, and

regulations on program matters." 42 C.F.R. § 431.10(e). Accordingly, it is the law of this Circuit that local managed care Medicaid agencies, such as the Local Defendants here, are bound by consent decrees that the State Medicaid agency enters into, where 1) the local entities agree in their contracts with the State agency to be bound with respect to the subject matter of the consent decree, and 2) the agents are generally subject to the control of the "single State agency" responsible for the administration of the Medicaid program. *Grier*, 262 F.3d at 565.

Grier stands on three independent but related legs:

- the "single State agency" requirement;
- the parties' contractual relationships implementing that requirement; and
- Fed.R.Civ.P. 65(d)(2)(B), (C), which specifies which related entities are bound by an injunction entered against a party to litigation.

Grier, 262 F.3d at 565; *accord K.C. ex rel. Africa v. Shipman*, 716 F.3d 107 (4th Cir. 2017). Each of these separate legs applies here, and in the same way it did in *Grier.* Just as the Tennessee managed care entities in *Grier* were bound by the settlement of Medicaid litigation by Tennessee's single State agency, so too are the Local Defendants here bound by the Settlement Agremeent entered into by Michigan's.

1. The Local Defendants Are Bound, Both Contractually and by Federal Medicaid Law, by the "Policy" Embodied in the Settlement Agreement

As noted, only the single State Medicaid agency may set "policy." And both the Settlement Agreement (§ B(17)) and the Michigan Medicaid Provider Manual

itself designate the Manual as the official compendium of MDHHS "policy." *See* MDHHS website (Manual "contains coverage, billing, and reimbursement policies"); Ex. 40 (chapters identified as by the "policies" contained). Here, the Local Defendants must be bound by MDHHS's policy determinations as implemented or to be implemented in the Manual, lest they be negating the policy set by MDHHS.

But one need not rely on inferences (strong though they be) to make this point. General Condition Q.1.a of the contract between MDHHS and CMPHSM expressly obligates CMHPSM (and through it, WCCMH) to "***implement any necessary changes in policies and procedures as required by the State"*** (Ex. 13). Entirely apart from any declaration of this Court, therefore, the Local Defendants will become contractually bound by the newly implemented Policies as they roll in following approval of the Settlement Agreement (*see* § E(1)).

Local Defendants' efforts (in response to Plaintiffs' motion to stay and for a protective order) to avoid *Grier* and the express contractual language entitling Plaintiffs to precisely the relief they seek here are unavailing. Astonishingly, both Local Defendants ***omit*** the key language in Section Q(1)(a) of the PIHP contract. That provision does ***not*** "only require[] CMHPSM to abide by applicable federal and state 'laws, statutes, regulations, and administrative procedures'" (CMHPSM Resp. at 9; WCCMH Resp. at vii, 7); it ***also*** requires them to "***implement any necessary changes in policies and procedures as required by the State***" (ECF#305-8 PageID

#8436). The Local Defendants' elision of the very language on which Plaintiffs rely is fundamentally dishonest.

2. The Local Defendants Are Bound to the Settlement Agreement by Rule 65(d)(2)(B), (C), as Both "Agents" and Persons "in Active Concert or Participation" with MDHSS

The Order approving the Settlement, when entered, is to incorporate the terms of the Settlement Agreement (§ A(1)), and the Agreement itself contains specific provisions for Court oversight and enforcement (§§ A(3), A(4), E(6)). Under, *Pedreira v. Sunrise Children's Services, Inc.*, 802 F.3d 865, 871-72 (6th Cir. 2015), the Settlement Agreement is thus the functional equivalent of a "consent decree" and calls into play the provisions of Rule 65 of of the Federal Rules of Civil Procedure governing injunctions.

(a) The Local Defendants Are "Agents" of MDHHS for Purposes of Rule 65(d)(2)(B)

Defendants CMHPSM and WCCMH are MDHHS's Medicaid contractors and sub-contractors, respectively. MDHHS, as Michigan's single state agency, is responsible for the administration of Michigan's Medicaid program, and it "has supervisory and policymaking authority over" Defendants CMHPSM and WCCMH. *Waskul v. WCCMH*, 979 F.3d 426, 436 (6th Cir. 2020). As such, the local Defendants are subject to the control of MDHHS, the single State Medicaid agency.

Defendant CMHPSM's contract with MDHHS likewise makes clear that the local Defendants are subject to the control of MDHHS. CMHPSM must:

- "comply with all State and federal laws, statutes, regulations, and administrative procedures ***and implement any necessary changes in policies and procedures as required by the State***." (Ex. 13, § Q.1.a);
- operate programs under the HSW, including the CLS services at issue in this litigation, and "[c]onform [in the operation of its 1915(c) program] to . . . each . . . waiver" (including the HSW) (*id.* § F.1.c);
- "provide covered . . . 1915(c) services (for beneficiaries enrolled in the [HSW]) in sufficient amount, duration and scope to reasonably achieve the purpose of the service" (*id.* § Q.15.c);
- use "[c]riteria for medical necessity and utilization control procedures that are consistent with the medical necessity criteria/service selection guidelines specified by the State" (*id.* § Q.15.e); and
- "implement person-centered planning in accordance with the MDHHS Person-Centered Planning Policy" (*id.* § E.8.a).

CMHPSM, in turn, passes on its contractual obligations to WCCMH by subcontracting with it (Ex. 14, "Compliance with the MDHHS/PIHP Contract"):

> It is expressly understood and agreed by the parties that this Agreement is subject to the terms and conditions of the Master Contract and signed amendments entered into between the MDHHS and the PIHP. The CMHSP shall comply with all applicable terms and conditions of the MDHHS Master Contract . . . The MDHHS Contracts are incorporated by reference into this Agreement and made a part hereof.

These contractual obligations—in particular Defendant CMHPSM's agreement to "implement any necessary changes in policies and procedures as required by the State"—make clear that the Local Defendants here, just like those in *Grier*, are "subject to the control of the State" and thus are bound by the Agreement as "agents" for purposes of Fed.R.Civ.P. 65(d)(2)(B). *Grier*, 262 F.3d at 565.

In their responses to Plaintiffs' motion to stay and for a protective order, the Local Defendants say that this cannot be true because the PIHP Contract purports to deny an agency relationship. Under the decision of the Michigan Court of Appeals in *Wiesner v. WCCMH*, 340 Mich.App. 572, 583 (2022), however, this is not correct. *Wiesner* held that "[r]egarding [WCCMH's] relationship to the MDHHS, ***an independent contractor can be an agent***,"[9] and that the contract provisions the Local Defendants cite here appear simply to be "an attempt to limit the state's liability for torts committed during the performance of Medicaid services," *id*. Here, the "control" test of *Grier* applies, and so does Rule 65(d)(2)(B).

(b) The Local Defendants Are in "Active Concert or Participation" With MDHHS and Thus Are Bound Under Rule 65(d)(2)(C) as Well.

The Michigan Court of Appeals in *Wiesner* ultimately held that WCCMH "stands in the shoes of the MDHHS for purposes of providing Medicaid services in its service area." 340 Mich.App. at 583. Whether or not CMPHSM/WCCMH are "agents" of MDHHS under Rule 65(d)(2)(B) (and the Court of Appeals indicated that they probably were), "stand[ing] in the shoes" certainly makes them "persons

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[9] *Id*. ("One who contracts to act on behalf of another and subject to the other's control except with respect to his physical conduct is an agent and also an independent contractor") (quoting *Restatement of Agency, 2d*, § 14N (1958)). In any event, the specific language of General Requirement Q.1.a, which expressly requires following newly implemented State "policy," overrides generalizations such as "no power to bind." *Village of Edmore v. Crystal Automation Systems Inc.*, 322 Mich.App. 244, 252 (2017).

. . . in active concert or participation" with MDHHS under Rule 65(d)(2)(C). Under both *Erie*[10] and the doctrine of collateral estoppel,[11] this holding binds the Local Defendants here.[12]

D. The Grand Trunk and Scottsdale Factors Support Declaratory Relief

1. The First Two Factors Are Self-Evidently True

If the terms of the Settlement are binding on the Local Defendants, this case is over. Accordingly, the two "principal criteria" in *Grand Trunk* (that the judgment will serve a useful purpose in clarifying and settling the legal relations in issue, and

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[10] *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

[11] *See*, *e.g.*, *Rambacher v. Commissioner*, 4 F.App'x 221, 223 (6th Cir. 2001) ("Under collateral estoppel or issue preclusion, a prior decision on an issue of law necessary to a judgment, made by a court of competent jurisdiction, is conclusive in subsequent cases involving any party to the prior litigation, even if the new case is based on a different cause of action.").

[12] The cases CMHPSM cites (ECF#307 PageID#8730) to support its theory that *Grier* was somehow "different" are totally inapposite. Neither case concerned the holding at issue here, and instead addressed *Grier*'s holdings concerning notice to interested parties. Thus, the Court in *Su v. Allen*, 2023 WL 6323310, at *4 (W.D. Ky. Sept. 28, 2023), following a discussion of the notice holdings in *Grier*, merely held that it "agrees that those legally affected by the consent judgment have had an opportunity to object—and those whose legal rights are not affected are not entitled to one." And the court in *In re Regions Morgan Keegan Sec, Derivative & Erisa Litig*, No. 2013 WL 1500471, at *4 (W.D. Tenn. Apr. 10, 2013), discussed *Grier* only with respect to the court's holding that, while no authority permitted "a non-class member who will not be bound by a settlement reached among solely private parties to object to the terms of that settlement," there was also "no precedent in this Circuit that forbids a court from hearing such objections in its discretion." Neither case has any bearing on *Grier*'s application to this case.

that it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding) are met. A declaratory judgment would be both "useful and fair," *Western World Ins. Co. v. Hoey*, 773 F.3d 755 (6th Cir. 2014), and would serve the unique "useful purpose" of declaratory judgments of clarifying "legal duties for the future, rather than the past harm a coercive tort action is aimed at redressing." *AmSouth Bank v. Dale*, 386 F.3d 763, 786 (6th Cir. 2004). Under the *Scottsdale* reformulation, the first two factors are equivalent to their *Grand Trunk* counterparts and are likewise self-evidently true.

2. Factors Three and Four Are Not Applicable Here

Factors (3) and (4) are not applicable here, because there is no pending, parallel state court proceeding. Thus, there can be no "procedural fencing" or "race for *res judicata*" that would "increase friction between our federal and state courts and improperly encroach upon state jurisdiction." *Scottsdale*, 513 F.3d. at 558, 554.

3. No Alternative Remedy; Need for Relief Is Great

The fifth factor likewise supports declaratory relief, because no other form of relief would attain the result that Plaintiffs seek. There is no pending state action in which Plaintiffs could seek declaratory relief, *id*. at 562, nor is there any other identifiable alternate remedy. The Local Defendants have been parties since this action was filed in March 2016, and the Agreement tracks the relief sought against them:

- The minimum fee schedule provisions give Plaintiffs the CLS rates necessary to fully implement their individual plans of service and

receive services in the most integrated and least restrictive setting suitable to their needs (Amended Cmplt., Relief Requested, ¶¶ B, D, G);

- Attachment C, which becomes effective if the minimum fee schedule provisions do not come into effect or when those provisions sunset, implements the "costing out" methodology at the heart of the complaint and number one on Plaintiffs' list of relief sought against Defendants CMHPSM and WCCMH (*Id*., ¶¶ B, D; Ex. 41, Interrogatory Response, PageID#7114-7115);
- Numerous provisions (Ex. 1 Attachments A and B; §§ C(7), C(8)(d), C(9)(a)-(d) and (f)-(g)) protect, as against the Local Defendants, CLS beneficiaries' right to self-determination and right to receive all medically necessary services (Amended Complt., Relief Requested, ¶ C; Interrogatory Response, PageID#7115); and
- Other provisions (§§ C(8) and C(9)(e, f, g)) protect, as against the Local Defendants, CLS beneficiaries' right to due process (Amended Complt., ¶ E; Interrogatory Response, PageID#7116).

And the need for relief against the Local Defendants is overwhelming. The Local Defendants routinely violate person-centered planning ("PCP") rules —***the*** rules designed to ensure that members of the I/DD community can maintain personal dignity and control over their own lives—by their UM tactics, their attempts to force individuals to accept living situations they don't want, and their efforts to coerce supposedly "voluntary" natural supports out of beneficiaries' families (including family members who themselves are aged or in poor health). WCCMH has a long history of retaliation against individuals who dare to fight back, and it routinely ignores directives from MDHHS.

(a) Person-Centered Planning

The PCP process is the heart of home and community based services like CLS. The Local Defendants are required to comply with the MDHHS's person-centered-planning guidelines, which are incorporated in CMHPSM's contract with MDHHS (Ex. 13 § E.8.A). As MDHHS describes it in the linked guidance in the contract:

> PCP is a way for individuals to plan their life in their community, set the goals that they want to achieve, and develop a plan for how to accomplish those goals. PCP is required by state law, (the Michigan Mental Health Code (MMHC)), and federal law, (the Home and Community Based Services (HCBS) Final Rule and the Medicaid Managed Care Rules), as the way that individuals receiving services and supports from the community mental health system plan how those supports are going to enable them to achieve their life goals. The process is used to plan the life that the individual aspires to have considering various options – taking the individual's goals, hopes, strengths, and preferences and weaving them into plans for the future. Through PCP, an individual is engaged in decision making, problem solving, monitoring progress, and making needed adjustments to goals and supports and services provided in a timely manner. PCP is a process that involves support and input from those individuals who care about the individual doing the planning. The PCP process is used any time an individual's goals, desires, circumstances, choices, or needs change.

Recipients' IPOSs must be "developed through the person-centered planning process,"[13] and the amount, scope, and duration of the services in the IPOS must be determined based on medical necessity criteria.[14] These medical necessity

[13] Michigan Medicaid Provider Manual, Behavioral Health and Intellectual and Developmental Disability Supports and Services Chapter, p 120. The Manual is available online at https://www.mdch.state.mi.us/dch-medicaid/manuals/MedicaidProviderManual.pdf.

[14] *Id*. at 13-14.

determinations themselves must be "based on person centered planning," and they must be "[d]ocumented in the individual plan of service."[15] In other words, the determination of what services beneficiaries receive, as well as how and to what extent they are to receive them, must be made ***within*** the PCP process, with the active participation of the beneficiary and his/her support network.[16]

The HSW makes clear that the IPOS developed within the PCP process and its implementing budget are interdependent:

- The IPOS is implemented through a budget that is developed with the participant using the person-centered planning process. The IPOS and its implementing budget are interdependent and developed in conjunction with one another. Only after the participant's medical needs have been determined can the plan of service be budgeted. (Ex. 15 (HSW Appendix E-2(b)(ii))
- "An individual budget includes the expected or estimated costs of a concrete approach of obtaining the mental health services and supports included in the [IPOS]." (*Id.*)
- "The amount of the individual budget is determined by ***costing out the services and supports in the IPOS***, after an IPOS that meets the participant's needs and goals has been developed. In the IPOS, each service or support is identified in amount, scope and duration (such as hours per week or month). . . ." (*Id.* (emphasis added))

The State Defendants agree that the purpose of costing out is to ensure that the items in the IPOS are accounted for (Ex. 16, 55:15-21)), and that costing out must occur

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15 *Id*. at 14.

16 *Id*. *See also* 42 C.F.R. 441.301(c)(1) (The recipient should lead the PCP process to the greatest extent possible, and it should include people chosen by the recipient. The recipient must have informed choices regarding the services and supports they receive and from whom).

within the PCP process (*id*. at 55:11-14). ***All*** aspects of a service—the amount (number of units), duration (length of the service), and scope (what the service does)—must be determined within the PCP process as part of the medical necessity determination (*id*. at 108:4-9; 112:2-9).[17]

On the CMH side, the HSW permits only the "supports coordinator or other qualified staff chosen by the individual or family" to be involved in the PCP process (Ex. 18 (HSW, Appendix D-1)). The recipient must be given sufficient flexibility and choice to "enable[] the participant to identify who he or she wants to assist with service plan development that meets the participant's interests and needs." *Id*.

(i) WCCHM's Perversion of the PCP Process – Utilization Management

WCCMH has for years perverted the PCP process, making most service decisions via utilization management ("UM"), which lies entirely outside the PCP process.[18] Service authorization decisions are made by UM: by people whom the HSW does not permit to be involved in person-centered-planning, who have frequently

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[17] The former deputy director of MDHHS likewise emphasized that the PCP process should drive the recipient's services (Ex. 17, 80:21-22); the individual budget must reflect the person-centered plan (*id*. 81:1-3; the recipient must be "deeply involved" in medical necessity determinations (*id*. 186:1-5); and the CMH team must very seriously take into account what the recipient and his/her representatives say about the recipient's needs (*id.* 195:12-15).

[18] UM is meant to review and establish general processes concerning services provision. At the individual recipient level, it is meant only to review medical necessity determinations, already made within the PCP process, for compliance with criteria and policy.

never met the beneficiary and know little to nothing about his/her needs, and who apply arbitrary measures as part of a closed and opaque process to determine what services a beneficiary will receive.[19]

In 2019, WCCMH's UM division created a "Traffic Light Committee," which used red/yellow/green flags to review "high utilizers of CLS services" and target them for reduction (Ex. 23 7:16-8:12). The Committee existed within UM and only reviewed cases brought to it by UM personnel, "with the hope of trying to find ways to appropriately decrease CLS" (Ex. 24). Recipients and their support circles were excluded (Ex. 23 9:18-21). It frequently focused on "specialized residential" living options, *i.e.*, licensed group homes, as an alternative to self-determination. (*id*. at 27:24-28:6; Ex. 25 at pp 2, 3, 7, 8, 12, 13, 16); Ex. 26).[20] Licensed group homes are disability-specific settings that are definitionally more restrictive settings than a

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[19] For example, at a recent internal hearing held for Taylor Rank, an HSW self-determination CLS recipient, WCCMH's supports coordinator (the only person actually involved in the PCP process present at the hearing) made it abundantly clear that she had ***nothing to do*** with the decision to reduce Ms. Rank's CLS hours (Ex. 19 at 9:22-10.4, 12:16-17, 16:3-5). UM made the reduction "for school"—which Ms. Rank did not wish to attend and was not obligated to attend—but the supports coordinator ***did not even know that enrollment in school was on the table for consideration*** when she "presented" (*see* Ex. 20) the case to UM after the PCP meeting (Ex. 19, 22:4-8). *Accord*, *e.g*., Ex. 21, 93:21-94:5 (supports coordinators' CLS assessments "go[] to the utilization management team," which then "make[s] the decision as far as how many hours that person will get for CLS"); Ex. 22 (¶¶ 50-52; 57). Recipients or their guardians are excluded from the UM process (Ex. 21., 95:3-6; Ex. 22 ¶ 60).

[20] Because Exhibits 24-26 contain the PII and HIPAA-protected information of other beneficiaries, these exhibits have been filed under seal.

recipient's own home.[21] It is, of course, the principal goal of the "Integration Mandate" under *Olmstead* that recipients be placed in the *least* restrictive setting.

So, too, the Traffic Light Committee frequently attempted to force use of "natural supports" (unpaid work by family members) on recipients (*e.g.* Ex. 25, p. 9), notwithstanding that federal law,[22] state law,[23] and the Sixth Circuit's second opinion in this case[24] all mandate that natural supports ***not*** be compelled. WCCMH denied a request for additional CLS hours solely on the basis that natural supports should be used, despite the recipient's mother's unequivocal testimony that she could ***not*** provide natural supports on a routine basis due to her chronic illness (Ex. 27 ¶¶ 66-71). On reviewing material that the mother could only provide care if necessary to protect the recipient, WCCMH's program administrator perversely concluded that "there's actually no question that she's willing and able to provide care" (Ex. 22 at 62-63).[25]

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[21] That the Traffic Light Committee was disbanded shortly after Plaintiffs discovered its existence was surely no coincidence, and WCCMH's *post hoc* assertion that it was disbanded because it had finished reviewing all cases identified on a report (Ex. 23 at 17:16-18:10) is belied by the fact that it reviewed Plaintiff Wiesner's case no fewer than three times, and Plaintiff Ernst's case no fewer than two times. (Ex. 25, pp 1, 2, 20-22; 12, 14).

[22] 42 C.F.R. §§ 441.301(b)(1)(i), (c)(2)(v) (must be provided "voluntarily")

[23] Mich. Medicaid Provider Manual, Behavioral Health and Intellectual and Developmental Disability Supports and Services, p 2 (natural supports must be "willing and able to provide this assistance" and may not be required).

[24] *Waskul v. WCCMH*, 979 F.3d 426, 451-52 (6th Cir. 2020) (citing above requirements and holding that natural supports must be voluntary).

[25] Likewise, When Taylor Rank's mother requested increased CLS hours because she neither could nor was willing to provide the same level of natural

The experience of Plaintiff Schneider further demonstrates WCCMH's warped interpretation of "voluntary," which (according to WCCMH's longterm SD coordinator) includes Mr. Schneider's octogenarian grandmother's providing roughly half of his authorized CLS hours on an unpaid basis because she could not find sufficient paid staff to provide them (Ex. 28 at 152:15-153:15).

WCCMH also frequently tries to require CLS beneficiaries to have roommates, without regard for their needs or desires or the HCBS Final Rule's mandate that recipients be permitted to live alone if they so choose.[26] (*E.g.*, Ex. 22 ¶¶ 56-59; Ex. 25, at 10, 14, 17-18, 22-24, 27-28). In one instance the Committee noted that a roommate "needs to be explored," notwithstanding that the beneficiary's mother was "deliberate regarding him living alone" (*id.* a 24), and in another the Committee noted that the beneficiary's family was "against a roommate" but nevertheless insisted that they "continue to try and explore having a roommate" (*id.* at 25-26).

(ii) PCP—Medical Necessity and Amount/Scope/Duration

WCCMH's practices as to medical necessity are directly contrary to the dictates of MDHHS. Per MDHHS, ***all*** aspects of a service—the *amount* (number of units), *duration* (length of the service), and *scope* (what the service does)—must be

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supports, WCCMH's UM department denied the increase. And WCCMH similarly forced John Madakacherry's septuagenarian parents to provide, on an involuntary basis, substantial overnight natural supports (Ex. 22 ¶¶ 53-56).

[26] 42 C.F.R. § 441.301(c)(4)(ii) (setting must be chosen by the individual with the "option for a private unit in a residential setting").

determined within the PCP process as part of the medical necessity determination (Ex. 16, 108:4-9; 112:2-9). Per WCCMH, however, the ***only*** aspect of medical necessity is the "CLS hours that are authorized"; nothing having to do with CLS in the IPOS other than the hours themselves are medically necessary (Ex. 29, 50:14-15; 56:20-57:5). Thus, per WCCMH, specific actions in Plaintiff Wiesner's IPOS (the "scope," per MDHHS) are merely "interests," so that no activity listed in the IPOS is "medically necessary" (Ex. 30, 19:6-20:10). Mr. Wiesner's getting out into the community five times per week, as his IPOS expressly provides, is *not* medically necessary but merely a choice he can exercise within his budget (*id*. at 24:20-25). The ALJ in Mr. Wiesner's case, however, rejected WCCMH's view and found—in part because Mr. Wiesner was not getting out 5 times per week—that "Petitioner's CLS authorization has been insufficient . . . at least since 2015" (Ex. 31 at p. 10).

(iii) PCP—No Costing Out; Punting Budget Determinations to the Fiscal Intermediary

Under federal Medicaid law, SD recipients cannot directly receive the money in their budgets. That is the role of the "fiscal intermediary," or "FI," a payroll and disbursing agent that pays against timesheets and receipts and handles such matters as withholding and the employer's share of Social Security. The fiscal intermediary is not involved in person-centered planning *at all*, and it takes the IPOS as a given.

At WCCMH, the FI effectively sets the budget, notwithstanding that the IPOS and the budget must be created ***together***, as part of the person-centered planning

process (Ex. 16, 55:11-14). When the "budget" created by multiplying the number of service hours by a uniform, pre-set rate is inevitably *insufficient* to meet the recipients needs, WCCMH sends the recipient to the FI to determine what components of the service (such as staff wages, community activity funds, and transportation) the beneficiary must sacrifice to receive other components of the service (Ex. 28, 123:19-23, 125:23-126:2; Ex. 33, 69:8-9, 145:2-3, 146:1-2). The president of the named Plaintiffs' FI detailed the problems caused by this improper practice (Ex. 34):

- Instead of costing out the specific components of CLS, such as activities, WCCMH provides recipients a "pre-set" rate that is "almost always too low." (*id.* ¶¶ 38-40)
- Resulting concerns are brought to the fiscal intermediary, which, however, is "not responsible for determining the scope of an individual's service." (*id.* ¶ 44)
- When recipients are sent back to WCCMH to address budget shortfalls but are once again sent back to the fiscal intermediary, "frustration and a vicious circle" result. (*id.* ¶ 42)

(c) Forcing Recipients Off SD; Other Retaliation

WCCMH frequently threatens recipients who cannot hire providers on account of WCCMH's own inadequate budget with termination of their self-determination arrangement. For example, when Plaintiff Wiesner had the temerity to bring a Medicaid Fair Hearing challenging the sufficiency of his self-determination budget—and, worse, to actually win that Fair Hearing by obtaining a ruling from the ALJ that "it is apparent from the extensive record in this matter, including past appeals, that Petitioner's CLS authorization has been insufficient for some time, at least

since 2015" (Ex. 31)—WCCMH responded by suggesting *six times* that the Michigan Court of Appeals terminate Mr. Wiesner's self-determination arrangement altogether (Ex. 35 at 2, 22, 25 (3x), 33; *see also* Ex. 30 at, *e.g.*, 26-27). Accordingly, the Agreement requires MDHHS to implement policies protecting against the unwarranted termination of self-determination arrangements (*id*. §§ C(9)(d), C(8)(d)), and to amend its contract with Defendant CMHPSM (or, again, to implement policy if CMHPSM refuses to sign the contract) to ensure that CLS recipients are offered the option to self-determine. (*id*. § C(7)).[27]

WCCMH's enthusiasm for retaliation goes beyond threats to terminate self-determination. WCCMH has retaliated against Plaintiff WACA, for example, on multiple occasions, including by terminating WACA's longstanding (since 1985!) and highly successful, Family Support Subsidy ("FSS") Program contract (Ex. 36 ¶¶ 16-29) and seeking to exclude WACA from a state-sponsored survey program overseen by WACA's parent organization, The Arc of Michigan, on the ground that "advocates" should not be doing such work (*id.* ¶¶ 7-15). *See generally* ECF##265, 269. WCCMH is relentless. In the past three years, it has attempted to reduce Ms. Rank's CLS hours at least ***three times*** by forcing unwanted alternate programming and natural supports, and Ms. Rank has been forced to litigate ***five*** adverse benefit

[27] These protections are also necessary because if self-determination CLS costs more per hour than agency CLS as a result of this settlement, then WCCMH will be additionally incentivized to kick recipients off of self-determination.

determinations—three of which she has won; two remain pending. These examples help explain both why the Agreement's PCP protections must be enforceable directly against WCCMH, and why the Agreement ensures that the Medicaid administrative hearing system functions so as to afford meaningful, enforceable relief when WCCMH violates PCP requirements and unjustly reduces or denies services. (§ C(8)).

(d) Ignoring MDHHS

The Local Defendants have a long history of ignoring MDHHS. Was MDHHS's instruction to reverse the 2015 budget reduction an obligatory directive? WCCMH "didn't give it a thought" (Ex. 33 at 123:16-21; *see also id*. at 124.). Similarly, when Vincent Pinti moved to Michigan in August 2019 to pursue his dream of attending the University of Michigan and was in need of 24/7 care,[28] he was approved for 50 hours per week of vocational rehabilitation services and 79 hours per week of Home Help,[29] but WCCMH refused, contrary to Mr. Pinti's physicians'

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[28] His disabilities include Spinal Muscular Atrophy, with resulting respiratory muscle weakness, spinal curvature, pulmonary complications, orthopedic deformities, and joint contractures. He requires a power wheelchair for mobility, and needs full assistance for everything from turning over in bed to using the bathroom.

[29] Home Help is a direct care service but is different from CLS. Whereas the focus of CLS is assisting beneficiaries to do as much as possible (it may not be much) for themselves, Home Help is intended to do things *for* the invidual that the individual cannot do.

The two services overlap somewhat, particularly in cases requiring 24/7 care, but they are not the same. Crucially, Home Help is paid for directly by the

directives, to authorize more than 21.25 hours per week of CLS, saying that more was not "medically necessary" (Ex. 37). This left a gap of 28.3 hours per week (*id.*). MDHHS explicitly told WCCMH/CMHPSM that these additional 28.3 hours "should be considered medically necessary," but WCCMH continued to refuse to authorize them, even when MDHHS formally told the Local Defendants CMHPSM to provide sufficient CLS for Mr. Pinti to receive 24/7 services (*id.*).[30]

And when an ALJ found in early 2020 that Plaintiff Wiesner's CLS budget "has been insufficient for some time, at least since 2015," and ordered WCCMH to "authorize a sufficient amount of CLS to meet all of the goals in [the] IPOS," WCCMH issued a false "order certification" (rejected by the ALJ) claiming that it had complied with the decision by taking an unrelated action that ***predated*** the decision (Ex. 39), and then declined to comply with the order on the basis that it was "not medically necessary" and that "workforce" problems (*i.e.,* the inability to hire staff at the budgeted amounts) can only be addressed at the state level (Ex. 32).

State, whereas CLS is the responsibility of the Local agency (here, WCCMH), which must pay for it out of the capitation allotment it receives. Who pays for what is the fundamental fact underlying the events concerning Mr. Pinti set forth in text.

[30] WCCMH finally relented only when MDHHS said that it would side against it in litigation—only to once again reduce Mr. Pinti's CLS hours months later. Faced with WCCMH's intransigence and Mr. Pinti's desperate need for the services, MDHHS authorized a Home Help policy exception that allowed Mr. Pinti to use additional Home Help hours as CLS hours by removing certain restrictions attached to Home Help (Ex. 38).

As usual, WCCMH was talking out of both sides of its mouth. The major purpose of the instant Settlement Agreement is to effect a solution to the chronic "workforce problems" in SD CLS under the HSW. WCCMH says that can only be done by the State, but it is claiming the right to ignore precisely what the State has chosen to do about the issue in its policymaking and supervisory capacity.[31]

(e) The Agreement Directly Addresses the Local Defendants' Misconduct.

The Agreement contains multiple provisions specifically addressed to the Local Defendants' PCP practices. MDHHS must adopt policies providing necessary clarifications of the scope of CLS and of "medical necessity" (§ C(9)(a) & Attachments A & B), protecting against entities such as WCCMH abdicating their responsibility to engage directly in person-centered planning around budget setting (*id.* § C(9)(c)), and requiring discussion at a granular level during the PCP process of a beneficiary's specific needs and the ways in which those needs might be met

[31] In another example, Livingston County Community Mental Health (part of CMHPSM's four-county region) had failed to provide a beneficiary with CLS and respite services for nearly two years. The ALJ ordered LCCMH to "provide the approved, medically necessary CLS and respite care services in accordance with the applicable law and policy," *i.e.*, within 72 hours of the decision, 42 C.F.R. § 438.424(a). LCCMH refused to comply, issuing an order certification stating that the expected compliance date was "unknown." The beneficiary therefore had to file a mandamus action to enforce the decision, and the Michigan Court of Appeals directed a determination of damages caused on account of the delay in implementation *C.B. v. LCCMH*, 2023 WL 8482984, -- Mich. App. -- (2023).

(§ C(9)(b)). There must be a contract amendment (or policy implementation if CMHPSM refuses to sign) requiring the provision of meaningful notice of budget or service reductions. (*id*. § C(9)(f, g)). Attachment C establishes the "costing out" procedure required by the HSW, for use if the Minimum Fee Schedule is not in effect.

The one thing the Agreement does not do directly is require WCCMH to adhere to ALJ decisions: the Agreement specifies only that the PIHP contract be amended to achieve that result, and one supposes that CMHSPM might decline to sign.[32] But as the Second Circuit held in *Lisnitzer v. Zucker*, 983 F.3d 578, 588 (2d Cir. 2020), a managed care organization that refuses to abide by a fair hearing decision opens itself up to a lawsuit and an award of attorney's fees, as the obligation is not merely contractual but is also reflected in federal Medicaid guidance.[33]

In short, with the Settlement Agreement in place and held binding on the Local Defendants, many of their arrogant, do-what-I-feel-like practices will become history—or *very* expensive.

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32 But it also *might not* decline. Refusing to execute the contract with MDHHS is not an easy choice for a PIHP, as it risks losing its PIHP status altogether. CMHPSM's Chief Executive Officer swore in an affidavit in other litigation that, on three separate occasions MDHHS "forced" CMHPSM to execute the contract notwithstanding the PIHP's belief that it was fundamentally unfair (Ex. 42 ¶¶ 23-24).

33 *Wiesner*, 340 Mich.App at 582 ("the State Medicaid Manual advises that '[t]he hearing authority's decision is binding upon the State and Local agencies.' State Medicaid Manual, § 2903.3(A), p 2-393").

CONCLUSION AND RELIEF REQUESTED

Plaintiffs respectfully request that the Court 1) issue a preliminary order scheduling a hearing at which any objections can be heard and staying this action for the pendency of this motion; and, after the fairness hearing 2) issue an order:

A) Approving and incorporating the terms of the Agreement, and directing the parties to carry out its terms;

B) Assuming continuing jurisdiction as set forth in the Agreement;

C) Declaring the Agreement binding on Defendants CMHPSM and WCCMH or, in the alternative, enjoining them to carry it out; and

D) Staying this action until the "Sunset Date" as set forth in Section A(2)(a) of the Agreement, subject to the exceptions set forth in Sections A(2)(b) and A(4).

Respectfully submitted,

/s/ Nicholas A. Gable (P79069) /s/ Edward P. Krugman

January 10, 2024

CERTIFICATE OF SERVICE

This 10th day of January, 2024, I filed the foregoing in the Court's electronic filing system, which will effect service on all counsel of record in this action.

Dated: January 10, 2024

/s/ Nicholas A. Gable
Nicholas A. Gable (P79069)
Disability Rights Michigan
Attorney for Plaintiffs