

UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

CHRISTOPHER SCHERWITZ AND JOHN E. FIGURIED, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

1:18-cv-00005-WES-LDA

ERIC BEANE in his official capacity as Secretary of the R.I. Executive Office of Health & Human Services,

Defendant.

_____ /

STIPULATION AND ORDER OF DISMISSAL

WHEREAS, this action was commenced by Plaintiffs pursuant to 42 U.S.C. § 1983 under the Due Process Clause of the Fourteenth Amendment of the United States Constitution and federal statutes and regulations;

WHEREAS, Defendant denies any and all claims of wrongdoing asserted in connection with Plaintiffs' complaint;

WHEREAS, no finding of liability has been made;

WHEREAS, the Parties wish to avoid the expense and disruption of litigation on the issues presented in this litigation, and are prepared to settle their differences without admitting any fault or liability;

WHEREAS, the Parties agree that neither entering into this Stipulation and Order of Dismissal ("Order of Dismissal") nor the terms of this Order of Dismissal shall be construed as an acknowledgment, an admission, or evidence of liability of

Defendant under the Constitution or any federal or state law, and this Order of Dismissal may not be used as evidence of liability in any other administrative, civil or criminal proceeding;

WHEREAS, the Parties share a mutual interest in seeing that due process is provided to individuals who are eligible for or receive Medicare Premium Payment from Rhode Island's Medicaid program;

WHEREAS, nothing herein shall be interpreted to be inconsistent with the requirements of the federal constitution, statutes, and regulations or with the requirements of the Rhode Island state constitution, statutes and regulations;

WHEREAS, the Parties wish to enter into an Order of Dismissal subject to enforcement by the Court as is fully set forth herein;

NOW, THEREFORE, IT IS HEREBY ORDERED, UPON THE ORDER OF DISMISSAL AND AGREEMENT OF THE PARTIES, through their undersigned attorneys for the respective parties here, that this action is settled, subject to the approval of this Honorable Court pursuant to the Federal Rules of Civil Procedure, on the following terms and conditions:

I. DEFINITIONS

1. MPP is the Medicare Premium Payment program.
2. EOHHS is the Rhode Island Executive Office of Health and Human Services.
3. "Timely and Adequate Advance Notice" means written notice that complies with the legal requirements of the Medicaid statute and federal regulations as well as the state regulation, to the extent the state regulation imposes stronger requirements. Timely and Adequate

Advance Notice must (1) be in writing; (2) state the action that the State intends to take; (3) provide the reasons for the intended action; (4) provide the specific regulation, or the change in federal or state law, that supports the intended action; (5) explain the right to a hearing to contest the intended action and the method for obtaining the hearing; (6) explain the circumstances under which MPP benefits are continued if a hearing is requested; and (7) be sent at least fifteen days in advance of the intended action, subject to any changes in the legal requirements of the MPP program. Accordingly, this Order of Dismissal, including Defendant's obligations as described herein, are subject to any applicable changes in legal requirements related to MPP.

II. DEFENDANT'S OBLIGATIONS

4. Defendant agrees to provide Timely and Adequate Advance Notice prior to terminating MPP benefits. The notice need not be provided in "Advance" if EOHHS has information regarding the death of a beneficiary or if another specific exception applies, as set forth in 42 C.F.R. § 431.213.
5. Within eighteen (18) months of the entry of this Order of Dismissal, Plaintiffs' counsel may bring to the attention of Defendant's designee(s), by email at the time the issue arises, those instances in which Plaintiffs' counsel represents that an individual was terminated from MPP benefits without Timely and Adequate Advance Notice. Once Plaintiffs' counsel has provided Defendant with the information necessary to review the case

and any signed releases, if applicable, Defendant will review the matter and respond within five (5) business days.

6. If individuals who receive both MPP benefits and benefits from other programs receive a notice stating that their MPP benefits are being terminated when they are not actually being terminated, those individuals will also receive a communication simultaneously informing them that the MPP benefits are continuing at that time.

III. General Provisions

7. No provision herein shall infringe upon any individual applicant's right to seek to compel Defendant to provide him or her with MPP coverage by way of an administrative hearing, pursuant to the Rhode Island Administrative Procedures Act, R.I. Gen. Laws § 42-35-1 et seq.
8. Except to the extent set forth herein, the terms and conditions of this Order of Dismissal shall become effective upon the entry of an Order by the District Court dismissing this action in accordance with this Order of Dismissal.
9. The Plaintiffs agree that by entering this Stipulation and Order of Dismissal this case will be dismissed under Fed. R. Civ. P. 41(a)(2) and thereby Judgment shall enter and the matter is dismissed with prejudice subject to the enforcement provision of Paragraph 14 below.
10. The Parties recognize and acknowledge that the only consideration for signing this Order of Dismissal are the terms stated herein and no other promise, agreement or representation of any kind has been made to any

party by any person whatsoever to cause any party to sign this Order of Dismissal.

11. This Order of Dismissal constitutes a compromise settlement of disputed and contested matters between the Parties. It shall not be construed as an admission of any sort by any of the Parties, nor shall it be used as evidence in a proceeding of any kind, except as necessary to administer and/or enforce the terms of this Order of Dismissal.
12. The Parties stipulate that this Order of Dismissal constitutes the entire understanding of the Parties with respect to the matters addressed herein and, except as set forth in this Order of Dismissal, no representations, warranties or promises, oral or written, have been made or relied on by the Parties. This Order of Dismissal shall prevail over any prior communications between the Parties or their representatives relative to matters addressed herein. This Order of Dismissal may not be changed unless by further order of the Court pursuant to Paragraph 14 below.
13. The Parties warrant and represent that they have read and understand the foregoing provisions of this Order of Dismissal and that they and their respective signatories are fully authorized and competent to execute this Order of Dismissal on their behalf.

IV. ENFORCEMENT

14. In the event that Plaintiffs or anyone similarly situated through the undersigned Counsel claims that Defendant has systemically breached the Obligations set forth in Paragraphs 4, 5 and 6 this Order of Dismissal,

Plaintiffs may move, when the systematic breach becomes known, for the Court to enforce this Order of Dismissal within eighteen (18) months of the entry of the Order dismissing this case. Prior to bringing any such motion, Counsel below will be required to provide written notice to Defendant detailing any claim of systemic breach. Within fifteen (15) business days thereafter, or within such time remaining before expiration of the eighteen (18) month period, whichever is less, or at such time as counsel mutually agree upon counsel shall confer in an effort to resolve the dispute. If the Parties are unable to resolve the dispute, a motion may be filed with the Court to enforce this Order of Dismissal within eighteen (18) months of the date this Order of Dismissal is entered.

15. That the Court shall retain jurisdiction for the next eighteen (18) months from the date of this Order and for such time as necessary to consider a timely-filed motion for enforcement for the purpose of enforcing the Order of Dismissal should such enforcement be necessary.

V. ATTORNEY'S FEES AND COSTS

16. Within thirty (30) days of approval of this Order of Dismissal and entry of the Order of Dismissal by the Court, Defendant shall deliver to Plaintiffs' counsel Ellen Saideman a check in the amount of \$52,367.75 and to Plaintiffs' counsel Lynette Labinger a check in the amount of \$7,257; these payments constitute accord and satisfaction of any and all attorneys' fees, expenses and costs, without prejudice to Plaintiffs seeking additional

attorneys' fees, expenses, and costs in the event of an enforcement proceeding pursuant to paragraph 14.

17. The sharing of the tribunal-approved award with the American Civil Liberties Union Foundation of Rhode Island is consistent with this Court's decision in *RI Training School v. Martinez*, 465 F. Supp. 2d 131 (D.R.I. 2006) and Rhode Island R.P.C . 5.4(a)(4).¹

Entered as the order of the Court this ____ day of _____ 2019.

By order,

Enter:

United States District Judge

Clerk

Agreed to as to Form and Substance:

Attorneys for Plaintiffs,

/s/ Ellen Saideman
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¹ Defendant does not object to the inclusion of this paragraph in the Stipulation and Order but takes no position on its substance.

/s/ Lynette Labinger
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Cooperating counsel
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF RHODE ISLAND

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