

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NORTH CAROLINA  
SOUTHERN DIVISION  
Civ. No.7:08-CV-57-H

D. T. M., a minor child, by his mother Penny )  
McCartney, E. C., a minor child, by his )  
mother Selena McMillan, and K. T., a minor )  
child, by her father Greg Tipton, individually )  
and on behalf of all others similarly situated, )

Plaintiffs, )

v. )

LANIER M. CANSLER, Secretary, North )  
Carolina Department of Health and Human )  
Services, in his official capacity, )

Defendant. )  
)  
)  
)

**SETTLEMENT AGREEMENT**

## SETTLEMENT AGREEMENT

NOW COME D. T. M., a minor child, by his mother Penny McCartney; E. C., a minor child, by his mother Selena McMillan; and K. T., a minor child, by her father Greg Tipton (“Plaintiffs”) and Lanier Cansler, in his official capacity as Secretary of the North Carolina Department of Health and Human Services (“Defendant”) (collectively referred to hereinafter as “the parties”) and enter into the following Settlement Agreement (“Agreement”).

### RECITALS

**WHEREAS**, on April 7, 2008, this case was filed in the United States District Court for the Eastern District of North Carolina, now styled, D. T. M. et al v. Lanier Cansler, No. 7:08-CV-57-H;

**WHEREAS**, Plaintiffs seek declaratory and injunctive relief against Defendant pursuant to 42 U.S.C. § 1983 for alleged violations of the Due Process Clause of the United States Constitution, U.S. Const. amend. XIV, and the Medicaid Act, 42 U.S.C. § 1396a(a)(3);

**WHEREAS**, Plaintiffs filed a motion for class certification on June 6, 2008;

**WHEREAS**, on July 2, 2008, Defendant filed a motion to dismiss alleging, among other things, that the Eleventh Amendment barred plaintiffs’ suit;

**WHEREAS**, on August 11, 2008, Defendant filed a second motion to dismiss alleging mootness;

**WHEREAS**, on March 16, 2009, the District Court denied Plaintiffs’ motion for class certification without prejudice and denied both of Defendant’s motions to dismiss;

**WHEREAS**, on March 30, 2009, Defendant filed his Answer;

**WHEREAS**, on April 14, 2009, Defendant appealed the Eleventh Amendment ruling to the Fourth Circuit Court of Appeals;

**WHEREAS**, on April 23, 2009, the District Court ordered all proceedings at the District Court stayed pending the outcome of the Defendant's appeal;

**WHEREAS**, on June 11, 2010, the Fourth Circuit Court of Appeals affirmed, *per curium*, this Court's Order of March 16, 2009 and issued the mandate on July 6, 2010;

**WHEREAS**, on July 21, 2010, the District Court ordered the stay previously entered be lifted;

**WHEREAS**, on August 16, 2010, the parties filed a joint Rule 26(f) report and on August 17, 2010, the Court entered a scheduling order;

**WHEREAS**, on August 24, 2010, upon joint motion of the parties, the Court entered a thirty day stay of all proceedings;

**WHEREAS**, the parties recognize that this case involves legal issues that may take a prolonged time to fully litigate and resolve and further recognize that continued litigation would be an expensive, lengthy and time-consuming matter;

**WHEREAS**, the parties agree that neither entering into this Agreement nor the terms of this Agreement shall be deemed as an admission by any of the parties to this Agreement;

**WHEREAS**, the parties share a mutual interest in seeing that appropriate due process is provided to Medicaid recipients; and

**WHEREAS**, the parties wish to enter into a contingent Settlement Agreement as is fully set forth herein;

**NOW THEREFORE**, the parties have decided to resolve this matter in the manner set forth below.

#### **DEFINITIONS**

"Defendant," as used herein, refers to the Secretary of the North Carolina Department of

Health and Human Services, in his official capacity, and his successors in office.

“Prior authorization” or “prior approval,” as used herein, refers to the process by which payment may be authorized for a requested service for a Medicaid recipient. Prior authorization of a Medicaid service for a discrete time period shall expire at the end of the stated authorization period.

“OAH appeal,” as used herein, refers to an appeal of a decision to deny, terminate, or reduce payment authorization for a Medicaid service to the N.C. Office of Administrative Hearings and the hearing conducted by the administrative law judge (“ALJ”) in such appeal.

“Implement” or “implementation,” as used herein, means adopting and distributing written policy, changing procedures, amending contracts as necessary, training staff and providers, monitoring, and taking corrective action as necessary.

“Agency staff,” as used herein, refers to employees of the N.C. Division of Medical Assistance Behavioral Health and EPSDT Clinical Programs and Policies Section and to employees of the Division of Mental Health, Developmental Disabilities, and Substance Abuse Services who perform utilization review functions on behalf of DMA.

## **AGREEMENT**

**I. Scope of Agreement:** This Settlement Agreement shall apply solely to the services at issue in this lawsuit, i.e., Medicaid-reimbursable behavioral health and/or developmental disabilities services which are subject to prior approval.

**II. Specified Actions:** With the expectation that the contingencies set forth herein will be satisfied, within the scope of this agreement specified in Section I above, Defendant will implement the following procedures and requirements. Plaintiffs’ counsel’s agreement or court approval will be required for any material changes to the forms and instructions attached hereto

as Exhibits A and B prior to the date of dismissal of this action, unless such changes are required by law.

**A. Notices:**

1. Adverse decisions on requests for prior approval shall be made in writing and mailed to the Medicaid recipient or to his/her parent or legal /guardian, using the applicable notice forms attached hereto as Exhibit A. Documentation of Defendant's compliance with this provision is achieved by Defendant's counsel providing to Plaintiffs' counsel the following information: Written verification from Defendant's counsel to Plaintiffs' counsel that agency staff, ValueOptions, Inc. or its RFP successor, and Local Management Entities (LMEs) under contract to provide utilization review for the Department (to exclude 1915(b)/(c) waivers) have implemented this paragraph.

2. The N. C. FAST system will be changed so that notices are sent to the last known address of the parent or guardian of any Medicaid recipient who is a minor and to the legal guardian of any Medicaid recipient who has been adjudicated incompetent. Documentation of Defendant's compliance with this provision is achieved by Defendant's counsel providing to Plaintiffs' counsel the following information: Written verification from Defendant's counsel to Plaintiffs' counsel that agency staff, ValueOptions, Inc. or its RFP successor, and LMEs under contract to provide utilization review for the Department (to exclude 1915(b)/(c) waivers) have implemented this paragraph.

**B. Discouragement:**

1. Prior to the decision on a request for prior approval, contacts with the requesting provider or recipient (including telephone and email contacts) will be limited

as needed to obtain more information about the service request and/or to provide education about Medicaid-covered services. During said contact, the provider or recipient will not be asked to withdraw or modify a request for prior approval of Medicaid services in order to accept a lesser number of hours, or less intensive type of service, or to modify a SNAP score or other clinical assessment.

2. The language attached as Exhibit B, paragraph III.G. hereto shall be read or provided in writing at the beginning of contacts with a provider or recipient about a prior approval request which occur prior to making the decision on the request.

3. Defendant and his agents shall not provide material misinformation to or intimidation of providers or recipients that has the foreseeable effect of significantly discouraging requests for Medicaid services, continuation of Medicaid services, or the filing or prosecution of OAH appeals.

4. Nothing in this section shall be construed to prevent clinical or treatment discussions.

5. Documentation of Defendant's compliance with this provision is achieved by Defendant's counsel providing to Plaintiffs' counsel the following information: Written verification from Defendant's counsel to Plaintiffs' counsel that agency staff, ValueOptions, Inc. or its RFP successor, and all LMEs under a stand alone contract to provide utilization review for the Department (to exclude LMEs with 1915(b)/(c) waivers) have implemented paragraphs II.B.1 through 5, and have instructed other LMEs to comply with these provisions.

**C. Prior approval procedures:**

The procedures set forth in Exhibit B will be disseminated, implemented, and

followed. Documentation of Defendant's compliance with this provision is achieved by Defendant's counsel providing to Plaintiffs' counsel the following information: Written verification from Defendant's counsel to Plaintiffs' counsel that Defendant has disseminated and ValueOptions, Inc. or its RFP successor and Local Management Entities (LMEs) under contract to provide utilization review for the Department (to exclude 1915(b)/(c) waivers) have implemented this paragraph.

**D. E.C. v. NCDHHS, No. COA10-244**

The parties agree that Defendant shall dismiss the matter docketed in the North Carolina Court of Appeals as E.C. v. North Carolina Department of Health and Human Services, No. COA10-244 within fifteen days of the execution of this Agreement by all parties. Each party shall bear its own costs and attorney fees. The parties further agree that Plaintiffs shall not cite the Superior Court decision in E.C. v. NCDHHS as precedent and shall not argue on behalf of any person not a party to that case that the Superior Court decision binds or collaterally estops the Department in any way.

**III. Contingencies:** In entering into this Agreement, the parties have the expectation that this Agreement shall provide a full and final resolution of the civil action now styled, D. T. M. et al v. Lanier Cansler, No. 7:08-CV-57-H. Plaintiffs' consent to this Agreement is contingent upon implementation of the requirements of Section II, above. In addition, payment of any sum of money specified in this agreement, directly or indirectly, is dependent and contingent upon and subject to the appropriation, allocation, and availability of funds for that purpose to the Department of Health and Human Services. The parties also recognize that this Agreement requires approval of the Court. Therefore, this Agreement is contingent and expressly conditioned upon the occurrence of the following events:

**A. Entry of Order of Approval:** The first contingency is the Court's approval of this Agreement and entry of an Order of Approval. In entering into this Agreement, the parties are aware that, pursuant to Fourth Circuit precedent, e.g., *Shelton v. Pargo*, 582 F.2d 1298 (4th Cir. 1978) (“Pargo”), and Local Rule 17.1 of the Eastern District of North Carolina, the District Court must approve the terms of this Agreement and make certain findings in support of its approval. Attached hereto are the following: a [proposed] Order of Approval of Settlement (Exhibit C, hereto) and a [proposed] Order of Dismissal with Prejudice (Exhibit D, hereto). The parties agree that the Court is not to retain jurisdiction of this matter except as expressly outlined herein. The parties further agree that any Order which modifies or alters the understandings of the parties as set forth herein, or which creates additional obligations upon the parties, will render this Agreement voidable at the election of any party to this Agreement, provided notice of voiding the Agreement is given to opposing counsel within ten (10) business days of notice of any such Order. The parties agree that the terms of this Agreement are not to be incorporated into any Order of the Court and that other than the proposed Orders referenced above, no further Orders shall be necessary to effectuate this Agreement.

**B. Implementation of Agreement:** Upon mutual agreement of the parties, any timelines in this section may be extended. The second contingency is the verification of implementation of Section II, above, which will begin as soon as court approval is obtained. The parties recognize that the specified actions in Section II will not be implemented all at once, but will be implemented over varying time periods. As each of the paragraphs in Section II is implemented, Defendant’s counsel will provide written notice to Plaintiffs’ counsel as described in Section II.



In the event Section II cannot be implemented, this Agreement shall become voidable at the election of either party. In that event, this case shall be returned to active status, this Agreement shall be null and void, and the parties shall not be required to perform further thereunder. Defendant's counsel will notify Plaintiffs' counsel as each paragraph in Section II is implemented. The Court will retain jurisdiction for a period of six months from the date of the notice that the final specified action in Section II has been implemented.

At any time prior to dismissal, Plaintiffs' counsel may submit information to Defendant's counsel suggestive of substantial non-compliance. Defendant will promptly investigate the information and his counsel will meet and confer with Plaintiffs' counsel regarding his findings within 45 days of the date Plaintiffs' counsel submits the information. Thereafter, Plaintiffs' counsel will inform Defendant's counsel within fourteen (14) days whether they are satisfied with the information provided. If not, then in good faith Plaintiffs' counsel may assert substantial non-compliance as a breach of the Agreement. Prior to doing so, Plaintiffs' counsel will give Defendant's counsel twenty (20) days' prior written notice which details with specificity the matters alleged to be substantially out of compliance and the facts and information upon which Plaintiffs base their allegations of substantial non-compliance to enable Defendant to attempt to cure the alleged substantial non-compliance. Either party may then request a conference with a magistrate assigned by the court for the purpose of attempting to resolve the dispute through mediation. If such efforts at mediation fail, this settlement agreement shall become void and the litigation shall resume. Nothing herein gives any party a right to attempt to hold Defendant in contempt of court.

**IV. Payment of Attorneys Fees:** Within thirty days of approval of this settlement agreement by the Court at the hearing, Defendant shall deliver to the National Health Law

Program as trustee a check in the amount of \$250,000 for expenses, costs and attorneys fees. These funds are not immediately disbursable to plaintiffs' counsel and shall be held in trust in an interest bearing trust account until the Order of Dismissal, Exhibit D, is entered by the Court. At that time the trustee shall cause these funds to be disbursed in a manner agreed upon by plaintiffs' Counsel. Alternatively, should the Order of Dismissal not be entered by the Court then the trust shall remit the sum of \$250,000, together with interest paid thereon, to the North Carolina Department of Health and Human Services.

**V. Case Status Pending Implementation of Agreement:** Attached hereto is the parties' Joint Motion and Incorporated Memorandum For Approval of Settlement Agreement ("Joint Motion") (Exhibit E, hereto). The parties will request that this case be removed from the active docket while the Court and parties wait to see if the contingencies outlined in the Agreement occur.

**VI. Release:** If this Agreement is approved by the Court and the case is subsequently dismissed with prejudice, upon entry of the Order of Dismissal every party hereby releases all others, their officials, employees, agents and representatives, from any and all liability that has arisen or might arise out of the civil action now styled, *D. T. M. et al v. Lanier Cansler*, No. 7:08-CV-57-H. This dismissal will not release Defendant from any claims or potential claims by the individual Plaintiffs which may occur or arise subsequent to the order of dismissal.

**VII. Court Approval and Hearing:** In the Joint Motion, the parties request the following: (1) that the Court set a date for a hearing, (2) that this case be removed from the active docket while the Court and parties wait to see if the contingencies outlined in the Settlement Agreement occur (3) that pursuant to *Pargo* and Local Rule 17.1 of the E.D.N.C., the

Court approve the Settlement Agreement and enter an Order to that effect, and (4) that at the appropriate time, the Court enter a Dismissal with Prejudice pursuant to the terms of this Agreement. Upon execution of this Agreement, counsel will submit to the Court the Joint Motion together with the proposed orders (which are attached to this Agreement as exhibits).

The parties will request the Court to expedite the scheduling of the fairness hearing, and counsel will work together to facilitate the fairness hearing. All counsel will use their continued and best efforts to obtain court approval of the Agreement and the above-referenced orders.

**VIII. Dismissal With Prejudice or Reactivation of Case:** Counsel for Defendant shall notify the Court when the case is ready for final dismissal. Within ten (10) business days of service upon Plaintiffs' counsel of this notification, Plaintiffs' counsel shall notify the Court of their concurrence or objection to final dismissal. Unless this agreement has become void pursuant to Section III.B. above, this matter shall be dismissed with prejudice by the Court's entry of the Final Order of Dismissal.

**IX. Jurisdiction:** Except as expressly provided herein, by entering into this Agreement and submitting it for judicial approval, Defendant does not consent to the jurisdiction of the District Court or waive any objection to jurisdiction that he has raised in this action. The parties agree that execution of this Agreement by Defendant and/or approval of the same shall not operate in any manner to confer jurisdiction or to waive Defendant's objections to jurisdiction, except as expressly provided herein.

**X. Merger:** The parties agree and acknowledge that this written Agreement sets forth all of the terms and conditions between them concerning the subject matter of this Agreement, superseding all prior oral and written statements and representations, and that there are no terms or conditions between the parties except as specifically set forth in this Agreement.

**XI. No Strict Interpretation Against Draftsman:** The parties have participated in the drafting of this Agreement and have had the opportunity to consult with counsel concerning its terms. This Agreement shall not be interpreted strictly against any one party on the ground that it drafted the Agreement or any part of it.

**XII. Recitals and Headings:** All parts and provisions of this Agreement, including the recitals, paragraph headings, and exhibits, are intended to be material parts of the agreement.

**XIII. Authority to Settle:** The undersigned represent and warrant that they are authorized to enter into this Agreement on behalf of the parties to this Agreement.

**XIV. Facsimile Signatures Binding:** In order to expedite the signing of this Agreement, the parties stipulate and agree that the delivery of an executed signature page by one party to the other via facsimile transmission shall bind the transmitting party to the same extent as service of the original signature page by hand delivery. The parties stipulate and agree that a party that sends a signature page via facsimile transmission shall mail the original to the other party within five (5) business days after the facsimile transmission.

**XV. Binding Effect:** This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective legal representatives (except for Section II.D above), successors and assigns. No provision of this Agreement is enforceable subsequent to the dismissal of this action, and nothing herein shall be construed to abrogate the right to recoup the cost of any medical assistance to a Medicaid recipient pursuant to 42 CFR § 431.230(b).

**IN WITNESS WHEREOF,** the parties have executed three (3) original copies of this Agreement.

THIS SETTLEMENT AGREEMENT **agreed and** executed by the Parties hereto:

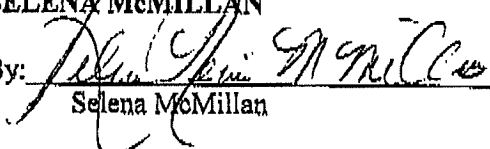
**PLAINTIFF DEVON TYLER McCARTNEY by and through his parent and legal guardian PENNY McCARTNEY**

By: *Penny McCartney*  
Penny McCartney

9-10-10  
Date

THIS SETTLEMENT AGREEMENT agreed and executed by the Parties hereto:


PLAINTIFF ERIC CROMARTIE by and through his parent and legal guardian  
SELENA McMILLAN

By:   
Selena McMillan

9-16-10  
Date

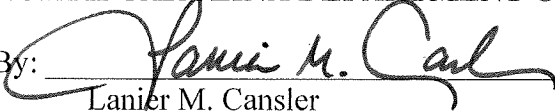
THIS SETTLEMENT AGREEMENT agreed and executed by the Parties hereto:

**PLAINTIFF KATIE TIPTON by and through her parent and legal guardian  
GREG TIPTON**

By:   
Greg Tipton

9-21-10  
Date

**NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES**

By:   
Lanier M. Cansler  
Secretary

10/12/10  
Date



**D.T.M. et al. v. CANSLER**  
**Case No. 7:08-CV-57-H**

**EXHIBITS TO SETTLEMENT AGREEMENT**

- A-1 Notice of Decision on Initial Request for Medicaid Services, DMA 2001
- A-2 Notice of Decision on Initial Request for Medicaid Services, DMA 2001E
- A-3 Notice of Change in Services, DMA 2002-adult
- A-4 Notice of Change in Services, DMA 2002-child
- A-5 Notice of Denial of Service Request, Additional Information Previously Requested and Not Received, DMA 2001A-initial
- A-6 Notice of Denial of Service Request, Additional Information Previously Requested and Not Received, DMA 2002
- B N.C. DHHS: Medicaid Recipient Due Process Rights and Prior Approval Policies and Procedures
- C [Proposed] Order of Approval of Settlement Agreement Pursuant to E.D.N.C. Local Rule 17.1
- D [Proposed] Order of Dismissal With Prejudice
- E Joint Motion and Incorporated Memorandum for Approval of Settlement Agreement