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10 Attorneys for Complainant
11 DEPARTMENT OF MANAGED HEALTH CARE

12 BEFORE THE DEPARTMENT OF MANAGED HEALTH CARE
13 OF THE STATE OF CALIFORNIA

14 IN THE MATTER OF:

15 KAISER FOUNDATION HEALTH PLAN,
16 INC.

17 Respondent.

18 ENFORCEMENT MATTER NO. 11-369
19 SETTLEMENT AGREEMENT

20 I.
21 Recitals

22 1. This Settlement Agreement (Agreement) is made and entered into on this 14 day of
23 May 2012, by and between KAISER FOUNDATION HEALTH PLAN, INC. (KAISER or the Plan)
24 and the DEPARTMENT OF MANAGED HEALTH CARE (the Department).

25 2. KAISER asserts that it currently provides coverage to its enrollees for medically
26 necessary Physical Therapy (PT), Speech Therapy (ST), and Occupational Therapy (OT) for health
27 care needs, but not for non-health care purposes such as educational or social purposes.

1 In order to address the needs of KAISER enrollees:

2 A. It is understood and agreed that neither party is waiving its right to assert in any
3 other dispute, enforcement matter, litigation, mediation, arbitration or in any other forum, any
4 contention that may or may not be consistent with this Agreement.

5 B. The parties further understand and agree that, except for purposes of enforcing
6 the terms of this Agreement, this Agreement shall not be admitted into evidence or used for any other
7 purpose in any current or future litigation or dispute resolution forum.

8 II.

9 Agreement

10 WHEREAS, this Agreement is entered into based on the Recitals set forth above, which are
11 incorporated into this Agreement by this reference.

12 WHEREAS, the parties desire to enter into this Agreement and thereby resolve the disputed
13 issues raised in the pending Enforcement Matters.

14 WHEREAS, the parties desire to enter into this Agreement to address the needs for all current
15 and future KAISER enrollees regarding coverage for PT, ST, and OT.

16 WHEREAS, by entering into this Agreement, KAISER does not admit any liability or
17 violation of the Act or any other law or regulation. However, the parties agree that it is in the best
18 interests of KAISER enrollees to enter into this Agreement, and thereby, with the exception of
19 Paragraph P below, settle the Cease and Desist Order filed February 27, 2012, Enforcement Matter
20 11-369, as to the issues relating to coverage of PT, ST, and/or OT, and all issues, accusations, and
21 claims that the Department has or may have against KAISER, including any alleged violation of the
22 Act relating to or arising from KAISER'S actions regarding coverage or claims for PT, ST, and OT
23 that occurred on or before the date this Agreement is executed.

24 WHEREAS, by entering into this Agreement, KAISER agrees to cover PT, ST, and/or OT for
25 all current and future KAISER enrollees as described in this Agreement and the law.

1 (v) In providing reimbursement for the out-of-pocket expenses, KAISER will not
2 consider the medical necessity of the underlying service, except to the extent that the SUBJECT
3 ENROLLEE is requesting reimbursement of a service that has not been reviewed in KAISER's
4 grievance process or in the Department's complaint processes.

5 (vi) The SUBJECT ENROLLEE's/Subscriber's submission of information pursuant to
6 paragraph B.(ii) above, including the SUBJECT ENROLLEE's/Subscriber's failure to provide adequate
7 documentation shall be treated by KAISER as a grievance under Health and Safety Code section 1368,
8 and the Plan will respond to the SUBJECT ENROLLEE/Subscriber as set forth in Health and Safety
9 Code section 1368.

10 C. KAISER agrees to reimburse all other KAISER enrollees who were not provided PT, ST,
11 and /or OT evaluation and/or services by KAISER and who meet the following conditions:

12 (i) The enrollee previously either requested PT, ST, and/or OT evaluations and/or
13 services from KAISER, or was evaluated for PT, ST, and/or OT between
14 January 1, 2009 and the effective date of this Agreement by KAISER and /or a
15 KAISER provider, and the evaluation and/or services were not provided or
16 covered by KAISER; and

17 (ii) After the Plan did not provide or cover the PT, ST, and/or OT evaluation and/or
18 services, the enrollee secured those services from an appropriately licensed out-
19 of-network provider, and a licensed provider documents in writing that the
20 services were medically necessary; and

21 (iii) The enrollee:

22 a. Previously filed a grievance with the Plan, and the Plan's grievance
23 determination found that the PT, ST, and/or OT evaluation and/or services
24 were not a covered benefit; or

1 E. After the date of this Agreement, KAISER shall also publish a notice in its bulletin
2 Partners in Health. The print version will be mailed to enrollees between July 16 and July 25, 2012
3 and the electronic version will be published and delivered to enrollees between July 8 and July 12,
4 2012. Enrollees will receive the notice in the manner previously selected by the enrollee for receipt of
5 the bulletin. Should any notice not be mailed or published within the above timeframes, the January
6 31, 2013 date for KAISER enrollees to submit a claim for reimbursement shall be extended by a
7 number of days equal to the number of days past the required date for publication and/or mailing that
8 the notice was actually mailed or published (should the extended date fall on a weekend or holiday, the
9 date for KAISER enrollees to submit a claim for reimbursement shall be the next regular business
10 day). However, in no event shall the notice be mailed and/or published later than September 1, 2012.
11 The notice in the bulletin shall inform all other KAISER enrollees that they may be entitled to receive
12 reimbursement of out-of-pocket expenses as set forth in this Agreement, and how to contact KAISER.
13 The notice in the bulletin will inform KAISER enrollees that they have until January 31, 2013 to
14 submit a claim for reimbursement and will include a length- modified version of information required
15 by Health and Safety Code section 1368.02(b), as agreed to in writing by KAISER and the
16 Department.

17 F. Any reimbursement referenced in Paragraphs B or C above will be contingent upon the
18 enrollee's agreement that acceptance of the reimbursement under this Agreement will result in a full
19 and complete resolution only regarding the amount of reimbursement for the expense of out-of-
20 network PT, ST, and/ or OT services the enrollee incurred from January 1, 2009 through January 31,
21 2013. This Agreement shall not act as a bar to any third party who claims a legal right to subrogation
22 or reimbursement for the cost of any services provided to the enrollee.

23 G. To the extent that KAISER has available in-network providers, enrollees remain
24 contractually required to obtain PT, ST, and/or OT services from providers within KAISER'S provider
25 network. If KAISER enrollees are currently receiving PT, ST, and/or OT services from out-of-
26 network providers, KAISER, upon a minimum of thirty (30) calendar days written notice to the
27 enrollee, may develop and implement a transition plan to safely transfer the enrollee's care to
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1 appropriately experienced in-network provider(s) so long as the in-network provider(s) can provide
2 continuity of care and ensure that the PT, ST, and/or OT services are continued in a manner that is
3 consistent with professional standards of treatment consistent with requirements of the Act.

4 H. Pursuant to the terms of KAISER's plan contracts, beginning on the effective date of
5 this Agreement, enrollees will be required to seek care within KAISER's provider network and
6 KAISER and its providers will arrange for and cover enrollees for PT, ST, and/or OT services from
7 providers within KAISER's provider network in a manner that complies with timely access and
8 geographic accessibility requirements as set forth in the Act and regulations. Where KAISER does not
9 or cannot offer an appointment with a qualified in-network provider to occur in compliance with the
10 access requirements of the Act and regulations for an in-plan evaluation for PT, OT and/or ST services
11 or an enrollee's request for those services, KAISER agrees that it will arrange for and cover services
12 from an out-of-network provider in a manner that complies with the timely access and geographic
13 accessibility requirements as set forth in the Act and regulations, and the enrollee will not be required
14 to transition to in-network care pursuant to section G above any sooner than six (6) months of services.
15 Enrollees seeking or receiving these PT, ST and/or OT services are entitled to all rights under their
16 plan contracts and the Act.

17 I. As part of this Agreement, the Department will lift the Cease and Desist Order the
18 Department issued against KAISER on February 27, 2012. However, KAISER will nevertheless
19 continue to abide by the terms of that Cease and Desist Order, which by this reference, are hereby
20 incorporated into and made a part of this Agreement. While KAISER may direct an enrollee to an in-
21 network provider as discussed above, the only basis upon which the Plan or its providers may deny an
22 initial request for authorization or a request for additional PT, ST, and/or OT evaluations and/or
23 services or fail to arrange and cover such services where an enrollee has presented for care, are that the
24 services are not medically necessary or are not covered pursuant to express exclusions in the enrollee's

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1 Evidence of Coverage (EOC) as permitted by law. Such denials will be subject to review under the
2 Department's applicable review process, which includes the IMR process. KAISER shall not be
3 responsible for payment of services provided during any period in which an enrollee was not covered
4 under a KAISER plan.

5 J. KAISER or KAISER providers may periodically reassess an enrollee's clinical
6 condition and the enrollee's progress in order to evaluate the medical necessity of services consistent
7 with appropriate professional standards of care as permitted under the enrollee's plan contracts and
8 applicable provisions of the Act, but not more frequently than every six (6) months for an enrollee
9 diagnosed with any Autism Spectrum Disorder and /or Pervasive Developmental Disorder. Any such
10 review(s) shall be performed while the services continue. There shall be no interruption or cessation
11 of services during the review process.

12 K. When reimbursing claims for PT, ST and/or OT services rendered, KAISER agrees that
13 it will not place any unique conditions on providers of PT, ST, and OT services other than those set
14 forth in this Agreement, and except as otherwise required with respect to other providers. KAISER
15 additionally agrees that it will adjudicate complete claims in accordance with the provisions of the Act
16 and regulations. KAISER and its PT, ST, and OT providers may reach more specific agreements
17 regarding claims reimbursement and issues of documentation by contract. However, in no event, shall
18 KAISER request that a provider(s) waive any of its rights under the Act or regulations, and that
19 includes requiring more documentation of a claim than is permissible under the law.

20 L. Any examination, survey, or audit conducted by the Department relating to the
21 provision of PT, ST and OT services to KAISER enrollees will be reviewed in consideration of the
22 terms of this Agreement.

23 M. In the event that KAISER contends that it is relieved of its responsibility to continue to
24 perform under the Agreement based on (1) legislation enacted or regulations adopted by the State of
25 California or federal government which have not been superseded, or (2) a final judgment has been
26 entered by a court of competent jurisdiction that is binding precedent from which no appeal or other
27 judicial review has been taken, or, if appealed, the final judgment has been affirmed by the court of
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1 last resort and is no longer subject to further appeal or review, the process described below shall be
2 followed.

3 KAISER will give written notice to the Department of its contention that there has been a
4 change in the law and shall indicate that such notice is being provided pursuant to this Paragraph M of
5 the Agreement. Such notice shall be sent to the attention of the Director, with a copy to the Chief
6 Counsel of the Department's Office of Enforcement. The parties shall meet and confer in good faith,
7 and if the parties do not reach agreement within sixty (60) days after the Department's receipt of
8 KAISER's written notice referenced above, KAISER may file a declaratory relief action in Superior
9 Court on the question of whether the alleged change in the law relieves KAISER of its responsibility
10 to continue to perform in accordance with this Agreement. Any legal action taken by KAISER shall
11 be venued in Sacramento County Superior Court, and may not be filed by KAISER any sooner than
12 the sixty-first day after the Department receives KAISER's 60-day written notice. KAISER shall
13 continue to perform in strict compliance with this Agreement (1) while the parties are going through
14 the meet and confer process, and (2) during the pendency of any such legal action and/or proceeding,
15 and (3) until a final and enforceable judgment is entered in favor of KAISER (i.e. a final judgment has
16 been entered from which no appeal or other judicial review has been taken, or if appealed, the final
17 judgment has been affirmed by the court of last resort and is no longer subject to further appeal or
18 review). The Department shall retain its full enforcement authority regarding the terms of this
19 Agreement during the pendency of litigation regarding KAISER's contention that a change in the law
20 relieves it of its responsibility to continue to perform in accordance with this Agreement.

21 N. Except for actions for the purpose of enforcing this Agreement, neither the existence of
22 this Agreement nor any of the terms thereof shall be admissible in any legal proceeding of any kind
23 whether against KAISER or against the Department or with any third party relating to the legal
24 obligations of a health care service plan to provide coverage for medically necessary PT, ST and OT.
25 It is understood and agreed that, by entering into this Agreement, neither party is waiving, and each
26 party specifically reserves, any and all rights and defenses in any such actions brought by either party
27 or by any third party. It is also understood and agreed that, by entering into this Agreement, the

1 Department specifically reserves its right to assert in any such actions, that medically necessary PT,
2 ST and OT, must be covered by health plans and KAISER reserves its right to assert that certain
3 services or treatment plans are for educational or other non-health care purposes and therefore are not
4 covered.

5 O. By entering into this Agreement, the parties hereby, with the exception of Paragraph P
6 below, settle the Cease and Desist Order filed February 27, 2012, Enforcement Matter 11-369, and all
7 issues, accusations, and claims that the Department has or may have against KAISER, including,
8 without limitation, any alleged violation of the Act, relating to or arising from KAISER's actions
9 regarding coverage or claims for PT, ST and OT that occurred on or before the date this Agreement is
10 executed arising from KAISER's alleged reliance on KAISER's providers' clinical guidelines referred
11 to in the Cease and Desist Order.

12 P. Nothing in this Agreement is intended to affect or limit a KAISER enrollee's right to
13 file, consistent with the timeframes in the Act, a grievance with KAISER, or a complaint with the
14 Department disputing any of the following:

- 15 (i) KAISER'S transition plan proposing to transfer an enrollee's PT, ST and/or OT
16 services from an out-of-network provider(s) to an in-network provider(s), and/or
17 (ii) KAISER'S past delay, modification, and/or denial of a request for PT, ST
18 and/or OT services, and/or
19 (iii) KAISER'S denial of or improper reimbursement for past PT, ST, and/or OT
20 service claims provided that the enrollee chooses to not avail himself or herself
21 of the benefits of Paragraphs (B) or (C) above.

22 Q. KAISER agrees that if it breaches this Agreement, the terms of this Agreement do not
23 prevent the Department from exercising any and all other aspects of its disciplinary authority to ensure
24 KAISER's compliance with all of its obligations under this Agreement.

25 R. The PARTIES agree that the terms of this Agreement are more than a mere contract
26 and that they are additionally an order of the Director, and the Department may exercise any and all
27 aspects of its enforcement authority to enforce KAISER's compliance with any and/or all of
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1 KAISER'S obligations under this Agreement, and that any remedy available to the Director is not
2 exclusive, and may be sought and employed in any combination with civil, criminal, and other
3 administrative remedies deemed warranted by the Director to enforce this Agreement.

4 IT IS SO AGREED

5 IN WITNESS WHEREOF, the parties hereby execute this Agreement by the signatures of their
6 respective duly authorized officials.

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8 Dated: 5/17/2012

DEPARTMENT OF MANAGED
HEALTH CARE



ANTHONY MANZANETTI
Deputy Director | Chief Counsel
Office of Enforcement

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13 Dated: 5/14/12

KAISER FOUNDATION HEALTH PLAN, INC.



JERRY FLEMING
Senior Vice President
Health Care Reform Implementation and Policy

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20 ATTACHMENT A

21 [List of SUBJECT ENROLLEES]
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