

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

MELANIE CHISHOLM, on behalf of
minors C.C. and M.C. et al.,

PLAINTIFFS

VS.

KATHY KLIEBERT, Secretary of
Louisiana Department of Health
and Hospitals,

DEFENDANT

* CIVIL ACTION NO. 97-3274
*
* SECTION J
*
* JUDGE BARBIER
*
* DIVISION 5
*
* MAGISTRATE JUDGE CHASEZ
*
*
* CLASS ACTION

STIPULATED ORDER

This case has been certified as a class action on behalf of all current and future recipients of Medicaid in the State of Louisiana under age 21 who are now or will in the future be placed on the MR/DD waiver waiting list.

On February 20, 2001, the Court entered Findings of Fact and Conclusions of Law in this case (Rec. Doc. 118), in which it found that Defendant had violated federal Medicaid law by not providing class members with autism sufficient access to community-based behavioral and psychological services rendered by licensed psychologists. The Court ordered the parties to confer and jointly submit a proposed remedy. The parties reached agreement upon a proposed remedy. On June 27, 2001, the Court entered an order containing terms agreed to by the parties (Rec. Doc. 124, hereafter referred to as "the 2001 Remedial Order"). Defendant was subsequently found in contempt of the 2001 Remedial Order, and the Court entered a contempt

order on June 17, 2002 (Rec. Doc. 140, hereafter referred to as “the 2002 Contempt Order”). On May 21, 2013, the Court granted Plaintiffs’ motion to modify the 2002 Contempt Order (Rec. Doc. 380, hereafter referred to as “the 2013 Contempt Order”).

The parties have jointly moved that this Court VACATE its 2002 Contempt Order (Rec. Doc. 140) and its 2013 Contempt Order (Rec. Doc. 380), and MODIFY the 2001 Remedial Order (Rec. Doc. 124). Finding good cause for the relief requested, the motion is GRANTED. The 2002 Contempt Order and 2013 Contempt Order are VACATED, and the 2001 Remedial Order is MODIFIED such that its provisions are superseded by and replaced with the provisions in this Order. It is hereby ORDERED as follows:

1. Defendant, Kathy Kliebert, in her official capacity as Secretary of the Louisiana Department of Health and Hospitals (“DHH” or “the Department”), will make available all necessary psychological and behavioral services described in 42 U.S.C. § 1396d(a), including diagnostic services and treatment, to correct or ameliorate defects and physical and mental illnesses and conditions, whether or not such services are covered under the state plan, as required by 42 U.S.C. § 1396d(r), to class members who qualify for them and meet any of the following criteria:

- a) The child has an Autism Spectrum Disorder (ASD) as defined in the fifth edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-5);¹ or

¹ The parties use “Autism Spectrum Disorder” to reflect current clinical terminology. Use of this term is not intended to exclude any class members who would have been covered by the 2001 Remedial Order as having “Pervasive Development Disorder” from receiving

- b) The child has an impaired functional status that can be addressed by psychological or behavioral treatment, validated on an instrument or other assessment of individual functioning that is appropriate for individuals with developmental disabilities; or
- c) The child engages in behaviors so disruptive or dangerous that harm to others is likely (e.g., hurts or tries to hurt others, such as hitting, biting, throwing things at others, using or threatening to use a weapon or dangerous object). Behaviors are recurrent, not a single instance; or
- d) The child engages in behaviors that have resulted in actual physical harm to the child him/herself, such as bruising, lacerations, or other tissue damage, or would result in the same if the child were not physically restrained. Behaviors are recurrent, not a single instance. Behaviors are not the result of clinically suicidal intent; or
- e) The child does not meet any of the above criteria but one or more of the services addressed in this Order is determined to be medically necessary by a qualified health care professional.

2. Medical assistance provided under this Order, including but not limited to Applied Behavior Analysis (ABA) therapy, shall be furnished with reasonable promptness to all eligible class members, as required by 42 U.S.C. § 1396a(a)(8). Payments to providers rendering services under this Order shall be consistent with efficiency, economy, and quality of care and shall be sufficient to enlist enough

services under this Order.

providers so that care and services described in this Order are available at least to the extent that such care and services are available to the general population in the geographic area, as required by 42 U.S.C. § 1396a(a)(30). If necessary to improve access to services described in this Order, DHH shall:

- a) Maintain a telephone call center, staffed by one or more DHH employees or contractors, for class members to call to receive assistance being connected to a provider of services described in this Order.
- b) Make changes to the Board Certified Behavior Analyst (BCBA) provider application and enrollment process, to the extent that changes can reasonably be made that would make it easier for BCBA's to apply and/or enroll as a Medicaid provider. Nothing in this Order requires DHH to implement a provider application and enrollment process that is not in compliance with state or federal law.
- c) Ensure that BCBA's who qualify to enroll as a Medicaid provider are enrolled within 14 days of submitting the requisite information to DHH. In the event the Department uses a managed care entity to manage the delivery of ABA therapy, and BCBA's must therefore be credentialed by that managed care entity, DHH shall ensure that: (1) providers who are already credentialed by the managed care entity for purposes of the managed care entity's other plan(s) (if any) shall not be required to go through a separate credentialing process to receive Medicaid payment for class members; (2) DHH and the managed care entity identify staff

who will be available to answer providers' questions about the credentialing packet and credentialing process; (3) BCBA's with Medicaid members in active treatment who request a credentialing packet from the managed care entity will be reimbursed through single case agreements with the managed care entity for up to 90 days pending the completion of the credentialing process, provided that the BCBA submits a completed credentialing packet within 30 days of receiving it and otherwise cooperates with the credentialing process; and (4) the credentialing process will be completed within 60 days of receipt of a complete credentialing packet from the BCBA. Items (3) and (4) shall not apply to any requirement to re-credential after three years. Nothing herein shall require reimbursement of a BCBA who is unable to establish the requisite credentials for providing ABA therapy in the State of Louisiana.

- d) In the event the Department uses a managed care entity to manage the delivery of ABA therapy, ensure that the managed care entity will complete single case agreements with ABA therapy providers licensed by the State of Louisiana for Medicaid members who are determined to meet medical necessity for ABA therapy but for whom the managed care entity has no contracted ABA therapy providers with capacity to accept the member as a patient in the member's geographic area.

- e) Increase payments to BCBA's providing services under this Order.

Nothing in this Order requires the Department to pay providers rates in

a manner inconsistent with 42 U.S.C. § 1396a(a)(30). The parties note that in January 2014 DHH increased its payment rate to the rate that the State's largest commercial group plan pays BCBA's for providing ABA therapy in Louisiana, and that further adjustments are not contemplated at this time.

- f) Continue outreach efforts to BCBA's, including reaching new practitioners before their practices are at capacity.

3. DHH shall take such other steps as are reasonably in the control of the Department to increase the number of enrolled providers and encourage providers to provide ABA therapy to class members. However, nothing in this Order requires DHH to recruit out-of-state providers to relocate to the State of Louisiana.

4. "Licensed Behavior Analyst" refers to a BCBA licensed by the State of Louisiana to practice in the State.

5. Services described in ¶1 will include:

- a) evaluations necessary for the provision of services described in this Order;
- b) medically necessary ABA therapy provided by BCBA's and Board Certified Assistant Behavior Analysts (BCaBA's) operating under the supervision of a BCBA (including family education and training directed to the needs of the child class member);
- c) medically necessary clinical interventions (individual, group, and family therapy) and other medically necessary services performed by licensed psychologists and other providers of psychological and

behavioral services that are authorized to provide Medicaid services under the State plan.

- d) such periodic follow-up as is required for the individual service based on the treatment plan developed by the qualified health care professional;
- e) medically necessary emergency mental health services in crisis situations to class members who qualify for those services.

6. DHH may provide the services described in ¶5 through the Louisiana Behavioral Health Partnership, provided that the delivery of services complies with:

- a) Medicaid statutory and regulatory requirements;
- b) the Due Process Clause of the 14th Amendment to the United States Constitution;
- c) the provisions of this Order, including (but not limited to) the reasonable promptness and other requirements in ¶2; and
- d) in the absence of an alternative agreement between the parties memorialized in writing, for approvals and actions in determining medical necessity of services, the prior authorization obligations set forth in ¶¶ 10-20 and 22-23 of the Third Stipulation and Order of Dismissal (Rec. Doc. 139), entered on June 7, 2002.

7. Any limitations imposed upon these services to class members will be justified by the fact that services beyond those limits are not necessary to correct or ameliorate their condition, or are not within the services listed in 42 U.S.C. § 1396d(a).

8. Children with ASD will qualify for services under this Order if the services are medically necessary.

It is further ORDERED that Kathy Kliebert, in her official capacity as Secretary of the Louisiana Department of Health and Hospitals, shall:

9. Make provisions for BCBAs who specialize in ABA therapy to enroll as independent Medicaid providers; to be able to submit claims for their services and for the services of BCaBAs and other qualified support staff; and to be listed as a resource for class members on the Specialty Resource Line and in the brochure distributed to new class members and on DHH's website.

10. Make provisions for BCBAs, the McNeese Autism Program, and other programs and agencies employing BCBAs to be reimbursed by Medicaid for intensive behavior interventions designed and supervised by BCBAs.

11. Submit to the Centers for Medicare & Medicaid Services ("CMS") a state plan amendment, effective February 1, 2014, to cover ABA therapy as an EPSDT benefit pursuant to 42 U.S.C. § 1396d(a)(6), which provides for coverage of services "furnished by licensed practitioners within the scope of their practice as defined by State law." As of the effective date of this state plan amendment, all ABA therapy delivered to class members will be delivered in compliance with that state plan amendment, 42 U.S.C. § 1396d(a)(6), and this Order.

- a) If there is a delay in licensing BCBAs, DHH shall continue to provide ABA therapy to class members through the Children's Choice Waiver or under other appropriate statutory authority, after consultation with Plaintiffs' counsel. Any delay or other problem that may arise in the

State's licensing process will not relieve the Department of its obligation to cover ABA therapy for class members under this Order.

12. Develop and maintain outreach and referral systems to direct class members with an ASD diagnosis to providers who are Licensed Behavior Analysts, for evaluation and treatment.

13. Within 30 days of Plaintiffs' counsel's approval of the notice, individually notice (by mail) all class members with an ASD diagnosis about the availability of ABA therapy. This notice shall be approved by Plaintiffs' counsel. The Department shall provide Plaintiffs' counsel with a proposed draft of this notice within 14 days of the date that this Order is entered. The list of class members with an ASD diagnosis to whom individual notices shall be sent shall be determined by DHH.

14. Arrange for intensive ABA therapy for F.F. and A.B., as long as those services continue to be medically necessary.

15. Within 30 days after submission of the state plan amendment described in ¶11, inform all organizations in the state involved in providing support or services to individuals with autism--including the Louisiana State Autism Society and its regional chapters; Autism Speaks; Unlocking Autism; the Developmental Disabilities Council; Families Helping Families; local governing entities; the Louisiana Department of Education; the Louisiana Department of Children & Family Services--of the availability of services described in this Order and how to access them, and amend the informing and training materials covered by previous stipulations in this case to include these services. All forms of notice will be approved by Plaintiffs' counsel.

16. Within 30 days after submission of the state plan amendment described in ¶11, notify all Medicaid providers of services that are only available to individuals under the age of 21 (including Medicaid screening doctors, Early Steps providers, Service Coordinators, schools, and Early Intervention Centers) about the services described in this Order and how to refer patients to them, as well as once a year in writing.

17. Provide that terminations, reductions, or denials of treatment entitle claimants to appeal through the fair hearing process. Class members will also have the right to a fair hearing if they allege that services are not made available with reasonable promptness. Fair hearing remedies will obligate the Defendant to provide access to behavioral and psychological services improperly terminated, reduced, denied, or delayed.

18. Starting within 45 days of the date that this Order is entered, report to Plaintiffs' counsel on a monthly basis: the names of class members who contacted the call center described in ¶2.a regarding ABA therapy and the status for each (i.e., class member referred to a provider, provider submitted a request for services, class member receiving services) and any other pertinent information.

19. Starting within 60 days of the date that this Order is entered, report to Plaintiffs' counsel every month on the following:

- a) the number of providers, by type of credential, including BCBAAs, enrolled and the locations from which the providers offer services;

- b) the total number and, if available, the dates of birth of class members, with a diagnosis of ASD (whether or not they have been evaluated by a provider), and their parishes of residence;
- c) the number and dates of birth of class members with ASD receiving intensive ABA therapy;
- d) the number and dates of birth of class members with ASD receiving other psychological or behavioral services, and the type of practitioners from whom they are receiving the services;
- e) the amount of Medicaid expenditures for each of these types of services for class members with ASD;
- f) number of class members discontinuing services described in this order, sorted by provider and parish; and
- g) for one year following the date that this Order is entered, the numbers of class members' prior authorization requests for ABA therapy that have been: received; denied; partially denied; approved; denied because of lack of sufficient information on which to base a determination; or pending for over 25 days. After the Department's monthly reporting obligations under this subparagraph have expired (i.e., one year after entry of this Order), the Department shall report the data specified in this subparagraph on a quarterly basis for the next six quarters thereafter.

Plaintiffs' counsel may request records on class members for whom services have been denied or for whom insufficient information has been submitted to reach a decision as

to medical necessity, or whose requests have pended for more than 25 days, and DHH shall provide such records, subject to necessary confidentiality guarantees.

20. For the period before the obligations under paragraph ¶19 go into effect, DHH shall continue to provide monthly reports to class counsel as to:

- a) the number of BCBAAs or equivalently-qualified providers of ABA therapy enrolled in Medicaid and their locations;
- b) the number of class members diagnosed with ASD and their locations;
- c) the number of class members with ASD receiving intensive ABA therapy;
- d) the number of class members with ASD receiving other psychological or behavioral services, and the type of practitioners from whom they are receiving the services; and
- e) the amount of Medicaid expenditures on each of these types of services for class members with ASD.

The reporting obligations described in this paragraph shall terminate once DHH has begun to provide the reports described in paragraph ¶19.

21. Conduct an annual written survey of a sample of the class members with ASD who have sought ABA therapy, or their caretakers, to determine their access to and satisfaction with treatment, using a Consumer Assessment of Healthcare Providers and Systems (CAHPS) survey instrument and protocol or other instrument and protocol, selected after consultation with Plaintiffs' counsel. Plaintiffs' counsel will receive a copy of these surveys.

It is further ORDERED that

22. This Order shall be enforceable only by motion filed with the Court, subject to the following rules:

- a) Except as provided in ¶22.b-c, no less than 45 days prior to filing such a motion the moving party shall notify the non-moving party of any alleged noncompliance with the Order and request a meeting for the purpose of attempting to resolve the alleged noncompliance. Should the parties fail to resolve the problems raised in the initial request for a meeting, either party may file a motion with the Court seeking a judicial determination regarding compliance with the Order.
- b) Expedited enforcement. If it is more likely than not that alleged noncompliance with this Order will cause a class member to suffer serious, irreparable injury within 45 days, Plaintiffs' counsel shall notify the Department and provide the Department with seven (7) days to resolve the issue. If the alleged noncompliance and the risk of serious, irreparable harm remain seven (7) days after Plaintiffs' counsel gives notice to the Department, Plaintiffs' counsel may file a motion to enforce the Order.
- c) Emergency motion. If it is more likely than not that alleged noncompliance with this Order will cause a class member to suffer serious, irreparable injury within 10 days, Plaintiffs' counsel shall notify the Department and provide the Department with 48 hours to resolve the issue. If the alleged noncompliance and the risk of imminent, serious and irreparable harm remain 48 hours after Plaintiffs'

counsel gives notice to the Department, Plaintiffs' counsel may file an emergency motion to enforce the Order.

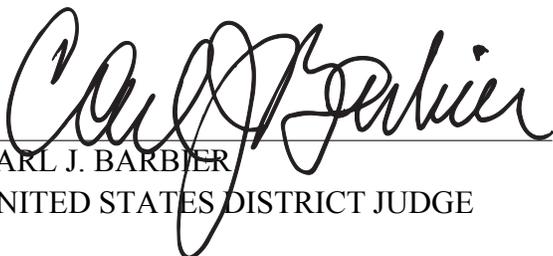
23. No sooner than 30 months from the date of this Order, Defendant may move to vacate this Order on the grounds that the Defendant has achieved and maintained compliance for a sufficient period of time to warrant relief under Federal Rule of Civil Procedure 60(b). Plaintiffs reserve the right to oppose the motion.

24. Twenty-four (24) months from the date of entry of this Order, counsel for the parties shall meet and confer about the status of compliance.

25. The Department recognizes that medically necessary ABA therapy provided by a Licensed Behavior Analyst is a 42 U.S.C. § 1396d(a)(6) service that the Medicaid statute requires the Department to cover for children as part of the EPSDT benefit, independent of its obligations under this Order.

26. The period of time for Plaintiffs to file any motion for costs, under Local Rule 54.3, and for attorney's fees, under Rule 54(d)(2)(B) of the Federal Rules of Civil Procedure, is extended to 90 days from entry of this Order.

SIGNED this 31st day of March, 2014, at New Orleans, Louisiana.



CARL J. BARBIER
UNITED STATES DISTRICT JUDGE