

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

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|--|---|---------------------------------|
| |) | |
| A.J., a minor child by and through |) | |
| his mother, Donnell Creppel; G.M., a |) | |
| minor child by and through his mother, |) | |
| Jessica Michot; B.W., a minor child by |) | |
| and through his mother, Kodi Wilson; |) | |
| B.C., a minor child by and through his |) | |
| mother, Sarah Washington, |) | CIVIL ACTION NO. 19-324-BAJ-RLB |
| |) | |
| <i>Plaintiffs</i> |) | JUDGE JACKSON |
| |) | |
| v. |) | MAGISTRATE JUDGE BOURGEOIS |
| |) | |
| REBEKAH GEE, in her official |) | CLASS ACTION |
| capacity as Secretary of |) | |
| Louisiana Department of Health, and |) | |
| the LOUISIANA DEPARTMENT |) | |
| OF HEALTH |) | |
| |) | |
| <i>Defendants.</i> |) | |
| |) | |

SETTLEMENT AGREEMENT

I. Introduction

The parties mutually desire to settle all of the claims asserted by the Plaintiffs without the need for further litigation and have therefore agreed to enter into this Settlement Agreement.

It is, therefore, ORDERED, ADJUDGED, AND DECREED:

1. This Court has jurisdiction over Plaintiffs’ claims against the Defendants as set forth in the Complaint.

2. The class is defined as:

All current and future Medicaid recipients under the age of twenty-one (21) in Louisiana who are certified in the Children’s Choice Waiver, the New Opportunities Waiver, the Supports

Waiver, or the Residential Options Waiver who are also prior authorized to receive extended home health services or intermittent nursing services which do not require prior authorization but are not receiving some or all of the hours of extended home health services or intermittent nursing services as authorized by the Defendants.

II. Definitions

3. For the purposes of this Settlement Agreement, the following definitions shall apply unless a contrary meaning is indicated by the text:

a. The term “1915(c) Waiver” refers to Medical Assistance programs under Louisiana Medicaid approved by the Secretary of the U.S. Department of Health and Human Services that provide payment for home or community-based services, other than room and board, pursuant to a written plan of care to individuals with respect to whom there has been a determination that but for the provision of such services, the individual would require the level of care provided in a hospital or a nursing facility or intermediate care facility for the intellectually or developmentally disabled, the cost of which could be reimbursed under the Louisiana Medicaid State Plan.

b. The term “Defendants” refers to the Louisiana Department of Health (LDH) and Secretary Rebekah Gee in her official capacity as Secretary of the Louisiana Department of Health.

c. The term “extended home health (EHH)” refers to any Louisiana Medicaid State Plan service in which it is determined medically necessary for either a registered nurse (RN) or a licensed practical nurse (LPN) currently licensed to practice in Louisiana, to provide a minimum of three continuous hours per day of nursing services, as defined in the Louisiana Nurse Practice Act, pursuant to a written plan of care outside of an institutional setting. This term also refers to

shift nursing care in the home and/or, as described in 42 U.S.C. § 1396a(d)(8) and 42 C.F.R. § 440.80, private duty nursing services for the purpose of caring for Class Members.

d. The term “intermittent nursing (IN)” refers to the state plan Medicaid service that allows for the provision of a daily nursing visit lasting less than 3 continuous hours. This service does not require prior authorization.

e. The term “Plaintiffs” refers to the individuals described in Paragraph 2 of this Agreement.

f. The term “plan of care” refers to the written plan for services as required by 42 U.S.C. § 1396n(c), that identifies medically necessary services and supports for Medicaid participants in home or community-based 1915(c)Waiver services. This written plan for services is created through a participant-centered process involving a person-centered planning team comprised of the participant, participant’s family, direct service providers, medical and social work professionals, and the support coordinator and other members as chosen by the participant and is approved by the Defendants.

g. The term “prior authorized” refers to the request for Medical Assistance services submitted by a health care provider participating in Louisiana Medicaid on behalf of the participant to Defendants, and determined to be medically necessary in accordance with generally accepted evidence-based medical standards prior to the delivery of the particular service.

h. The term “support coordination services,” also referred to as “case management,” means those services furnished by a support coordinator to assist participants in a 1915(c) Waiver under Louisiana Medicaid who reside in a community setting or are transitioning to a community setting, in gaining access to needed medical, social, education, and other services in

accordance with 42 C.F.R. §§ 441.18 and 440.169. The assistance that support coordinators provide in assisting eligible participants is set forth in 42 C.F.R. §§ 440.169(d) and (e).

III. Actions Required of Defendants

Defendants shall take the following actions to ensure that extended home health and intermittent nursing services are provided to Plaintiffs.

A. Assessment and Reports

4. Within 60 days of the date that the Court approves this agreement, Defendants shall develop and implement a plan for assessing and reporting on the availability of extended home health and intermittent nursing services for class-members. At a minimum, the plan shall include the following:

- a. Defendants shall issue monthly reports for the first nine months of the agreement and quarterly thereafter to Plaintiffs' counsel identifying:
 1. The number of EHH hours prior authorized per week to each Class member;
 2. The number or percentage of EHH hours per week provided to each class member;
 3. The home health agency or agencies assigned to each Class member;
 4. The support coordination agency assigned to each Class member;
 5. The identity of every Medicaid participating home health agency offering IN services in the state during the previous month;
 6. An unduplicated count of class members requesting IN services from each Medicaid participating home health agency;
 7. An unduplicated count of class members whose request for IN services are being fully provided;

8. An unduplicated count of class members denied EHH, but referred to IN services, the previous number of EHH hours prior authorized before the current denial, and the number of IN services billed during the reporting period; and
9. The number of class members referred to the Crisis Response Team once the Crisis Response is established as set forth in section B, *infra*.
 - b. The first report shall be provided to Plaintiffs' counsel no later than 120 days from the date that the Court approves this agreement.
 - c. Within 180 days of the date that the Court approves this agreement, and continuing every 6 months thereafter, Defendants shall provide Plaintiffs' Counsel with a report that includes the following information regarding any class member eligible for the crisis response team as defined in section B, but who is not receiving the number of hours prior authorized:
 1. The reasons, if known, which are reported to the crisis response team, for any shortfall in hours provided (including whether the shortfall was due to actions on the part of the class member not to accept services offered); and
 2. The actions taken by Defendants to obtain EHH, including any referral to the Crisis Response Team; and
 3. For cases referred to the Crisis Response Team, the report shall describe the actions taken by LDH and the result achieved.

B. Crisis Response Team and Services to Named-Plaintiffs

6. Defendants shall, within 30 days of the date that the Court approves this agreement, take all necessary steps to provide the named Plaintiffs with all medically necessary EHH or IN services.

7. Defendants shall, within 120 days of the date that the Court approves this agreement, establish a Crisis Response Team whose primary responsibility shall be arranging for EHH or IN services when such services are unavailable through existing Medicaid home health agencies within their administrative region. Between the Court's approval and the 120 day period, Defendants shall accept referrals from Plaintiffs' counsel for class member's requiring crisis response services. Defendants shall take all necessary steps to provide the referred class members with all medically necessary EHH or IN services within 30 days. Defendants shall provide updates to Plaintiffs' counsel on the status of referred class members upon request.

a. The Crisis Response Team shall have the following responsibilities with regard to any class member who, after making reasonable efforts to receive EHH or IN services, have received less than 90% of their medically necessary EHH or IN services for at least two consecutive weeks, or who have been unable to locate a provider in their LDH region, or are facing serious risk of institutionalization, due to lack of EHH or IN services.

1. The Crisis Response Team shall return any class member's and/or support coordinator's request for assistance by telephone or e-mail within 3 business days.
2. Support coordinators shall promptly make referrals to the Crisis Response Team when the Support Coordinator learns the class member has not

received some or all of their EHH or IN services for two consecutive weeks, has been denied enrollment by all regional providers, or is otherwise facing serious risk of institutionalization due to lack of EHH or IN services. Individual class members may also contact the Crisis Response Team directly without a referral.

3. The Crisis Response Team shall make all reasonable efforts to ensure EHH or IN services are able to be provided to the class member within 10 business days of a referral. Failure to provide EHH or IN by the 10th business day shall not relieve the Crisis Response Team from its obligation to continue all reasonable efforts.
4. Defendants shall notify all class members and support coordinators of the existence of the crisis response team by publishing contact information for the crisis response team on LDH's website and requiring support coordination agencies to provide the information to the class members they serve.
5. The Crisis Response Team shall operate in addition to, and shall not replace the responsibilities of the existing class member's support coordinator.

C. Rate Modifiers

8. Within 14 days of the date that the Court approves this agreement, Defendants shall publish an updated Home Health Fee Schedule (and related internal processes) that includes modifiers with enhanced rates for situations in which two recipients are cared for simultaneously, for children in EHH with high medical needs, for overnight shifts for EHH, for weekend shift for EHH, for holiday shifts for EHH, and for EHH services in rural areas. Within 10 days of issuing

any revisions to the Home Health Fee schedule, Defendants shall also provide written notification to the MCOs and Medicaid participating home health agencies of all changes to the fee schedule.

a. Defendants shall explore the addition of a rate modifier for overtime hours for EHH services and report the results to Plaintiffs' counsel by November 1, 2019. If, on December 1, 2019 more than 10% of EHH recipients are eligible for the Crisis Response Team services, Defendants will seek budgetary authority during the next regular legislative session and will only implement the overtime modifier if it receives legislative appropriation for such implementation.

D. Case Management

9. Within 60 days of the date that the Court approves this agreement, Defendants shall train class member's support coordination agencies on the following:

a. Support coordination provider agencies shall document in the class member's progress notes all approved EHH or IN services and whether those EHH or IN services are provided, as reported by the family, including whether the family refused offered services and, if so, the basis for the refusal.

b. Defendants shall conduct mandatory annual training for all support coordinators who serve class members. The training may be conducted online, but shall provide ample time for questions and answers. This training shall, at minimum, explain:

1. The process for notifying Defendants when a class-member is eligible for the Crisis Response Team;
2. the referral process for the Crisis Response Team; and

3. all complaint or grievance opportunities available to class members to escalate attention to the problem.

E. Intermittent Nursing Services for Class Members

10. Within 120 days of the date that the Court approves this agreement, Defendants shall take all necessary steps to ensure that IN services which do not require prior authorization are actually available to Plaintiffs, including the following:

- a. Defendants shall bi-annually schedule and participate in a meeting with representatives from at least one Medicaid participating home health agency per administrative region to identify and resolve challenges associated with providing IN services.
- b. Defendants shall add to a class member denial notice denying EHH services the contact information to the Crisis Response Team when they have an identified a need for IN services.
- c. When a need for IN has been identified and a class member is being terminated from existing EHH services and the class member's region does not have a provider for IN services on the date the notice of denial has been sent, Defendants shall immediately refer the class member to the Crisis Response Team, and will begin following the procedure outlined in Section B. In such situations, a reasonable step shall continue to include a reevaluation of whether or not the class member should have been found eligible for EHH services. Defendants shall notify the class member of the referral in the notice of denial.

F. Reimbursement Rate Study

11. Within one year of the date that the Court approves this agreement, Defendants shall complete a study on reimbursement rates for EHH and IN services (“the study”). The purpose of the study shall be to determine the correlation between the current reimbursement rates for EHH and IN services and the unavailability of these services for class members. The Study shall offer recommendations on what reimbursement rates would be necessary in order for all class members to receive their medically necessary EHH or IN services. The study shall determine average hourly nursing rates for LPNs and RNs in Louisiana, as well as the rates for modifiers.

12. Defendants shall retain a qualified third-party provider/vendor to conduct the study.

13. Defendants shall collaborate with Plaintiff’s on the design of the study.

14. Defendants shall seek budgetary authority during the next regular legislative session after the study is complete to implement any recommendation of the study that would increase any EHH or IN rate, or otherwise increase access to EHH or IN services. The Defendants will only implement recommendations from the study if it receives legislative appropriation for any rate increases and the approval of the Centers for Medicare and Medicaid Services

G. Removal of Administrative Barriers

15. Defendants will complete a study of the impact of the licensure of additional home health agencies on the availability of in-home nursing services only after the rate study in Section F is complete and any rate increase for EHH or IN services are implemented and there remains a concern with the availability of class members to receive at least 85% of their EHH or IN services. This study shall be completed within 6 months of the rate study’s implementation.

16. If Defendants' study demonstrates that additional home health agencies will increase the availability of in-home nursing services, Defendants shall take all necessary steps consistent with LSA-R.S. 40:2116.32(F) to remove barriers for licensing new home health agencies no later than 365 days of the date the study is completed.

H. Recruitment and Training of Nurses

17. Within 365 days of the date that the Court approves this agreement, Defendants shall develop and implement an interagency agreement with other state agencies and relevant entities, including, but not limited to, agencies of the Louisiana Community and Technical College System and home health agencies to recruit and train qualified nurses to ensure that class members have access to EHH or IN services determined to be medically necessary by LDH. The plan shall:

- a. Specify how many nurses must be added to the job pool in order to meet or substantially improve the Plaintiffs' access to the number of EHH or IN hours determined to be medically necessary by LDH;
- b. List the public and private entities with whom Defendants have established collaborative commitments;
- c. Provide a description of and specify a timeline of all activities the Defendants will undertake which could increase the pool of existing nurses that provide EHH or IN services;
- d. Provide a quantitative and qualitative analysis demonstrating how Defendants planned ventures could sufficiently increase the existing pool of nurses who provide EHH or IN services; and

- e. Include online education and resources for home health agencies regarding the provision of ventilator and other services frequently needed by medically complex class members.

I. Requests for Additional Information

18. Plaintiffs' counsel may make reasonable requests for additional information to verify compliance, which shall be granted by LDH. Plaintiffs' counsel shall maintain the confidentiality of all Medicaid recipient identities.

J. Termination

19. Unless otherwise ordered, this Settlement Agreement shall terminate five years after the Court's approval. The Parties, jointly or severally, may file a motion requesting modification or termination of this Settlement Agreement at any time after the approval date and before the Settlement Agreement is terminated.

K. Enforcement

20. In the event that class members seek to enforce this agreement based on the belief that the Defendants have failed to discharge any obligations set forth herein, they will give written notice of such failure to Defendants' counsel, specifying the grounds that demonstrate such failure, and the Defendants will have forty-five days from the receipt of such notice to come into or establish compliance with this agreement. The sole exception to the obligation of class members to provide the written notice required by this paragraph is a circumstance in which an alleged failure to comply with a term of this agreement warrants immediate injunctive relief, in which case Defendants will receive the appropriate notice required when such relief is sought.

21. If class members believe that the alleged failure has not been cured within the forty-five day period (or that extraordinary relief is required), they may seek in this Court

specific performance of this Agreement, together with any attorneys' fees and/or costs recoverable under 42 U.S.C. §1988, but not contempt of court.

22. This Agreement does not operate as an adjudication on the merits of the litigation. Actions taken or to be taken by the Defendants hereunder are not admissions of liability on the part of the Defendants but are undertaken in the spirit of compromise, and no provision of this agreement may be used in support of any claim brought in any proceeding against the Defendants except as necessary to enforce the terms of this agreement.

L. Attorney's Fees

23. Entry of the Settlement Agreement establishes that the plaintiff is the "prevailing party" for purposes of her entitlement to recover reasonable attorney's fees and costs pursuant to 42 U.S.C. §1988.

24. In full and final settlement of this matter, and within 90 days of the execution of this Settlement Agreement, Defendants will issue Plaintiffs a settlement payment in the amount of \$94,500 that will be inclusive of all attorneys' fees and costs incurred in connection with this action, up to and including the date of the entry of this Settlement Agreement.

25. The parties agree that Plaintiffs may recover attorneys' fees under §1988 after final approval of this Settlement Agreement and satisfaction of the initial claim for attorneys' fees referred to in Paragraph 24 above, subject to the provisions of Section L of this Agreement.

26. Such "future" claims for fees are limited to fees and costs for work performed in obtaining Defendants' compliance with the Settlement Agreement; obtaining attorney's fees merited under the Agreement; seeking a modification of the Settlement Agreement over Defendants' objection (if the Court modifies the Settlement Agreement at Plaintiff's Request), and/or opposing a modification requested by Defendants if the Court denies (or denies, in part)

Defendants' request for a modification. If the Court denies Defendants' request for modification in part, Plaintiffs are only entitled to fees for the part(s) denied.

27. The Parties agree that Plaintiffs are entitled to reasonable attorneys' fees if Defendants are found out of compliance by the Court after Plaintiffs file a motion for judicial enforcement or modification of the Settlement Agreement, provided that Plaintiffs' have given Defendants' notice and an opportunity to come into compliance pursuant to Paragraph 20 of this Settlement Agreement prior to filing their motion.

28. Reasonable attorneys' fees shall be awarded only to counsel of record and/or to any paralegals employed by counsel of record, the Advocacy Center, and/or the National Health Law Program. (The person(s) claiming reimbursement of attorneys' fees shall hereinafter be referred to as "Claimant(s).")

29. Any future claims for attorneys' fees and costs and appropriate documentation supporting the claim shall be presented to counsel for defendants within thirty (30) days of entry of the applicable Judgment or Order, unless the parties agree on, or the Court by order permits, a longer period of time.

30. The evidence accompanying any and all claims for attorneys' fees and costs must expressly show and, if requested by defendants, certify under penalty of perjury, that all costs and hours claimed were incurred in this case and that no cost or hour claimed has been previously reimbursed in this litigation or any other litigation against the State of Louisiana, any of its agencies, officials, and/or employees.

31. If the parties cannot amicably agree on a future claim of attorneys' fees and costs pursuant to paragraph 27 above, it shall be the responsibility to the Plaintiffs to document, via time and date stamped e-mail to defense counsel, the official end to the negotiation.

32. In the event that the parties cannot amicably resolve a future claim for attorneys' fees and costs, Plaintiffs must file a Motion for Attorneys' Fees and Costs within thirty (30) days of the end of the negotiation, as described in paragraph 29 above.

33. Defendants have and reserve their right to question and/or challenge the hours billed by any claimant, exercise of billing judgment by any claimant, and necessity of costs requested by any claimant.

34. Defendants have and reserve their rights to question and/or challenge the reasonableness of the billable hourly rates of any claimant.

35. In light of the five (5) year limit on this Settlement Agreement, and so the State may budget accurately, the parties have agreed to a maximum amount of attorneys' fees and costs that may be awarded during the course of this litigation.

36. The total amount of attorneys' fees that may be awarded in this case after final approval of this Settlement Agreement and satisfaction of the initial claim for attorneys' fees referred to in Paragraph 27 above shall not exceed \$350,000.

37. Counsel for Defendants shall include in each subsequent Receipt, Release, and Indemnity Agreement signed by Plaintiffs' counsel, an accounting of how much has been paid in attorneys' fees and costs up to and including the sum received on that date and the remaining balance on the cap.

M. Construction

38. This agreement may be amended, modified, or supplemented only by an agreement in writing signed by the Parties and approved by the Court.

39. This agreement shall inure to the benefit of and be binding upon the legal representatives of any successor of the Plaintiffs and Defendants.

40. Each undersigned representative of Defendants certifies that he or she is authorized to enter into this agreement and to execute and bind legally Defendants to its terms. Each undersigned representative of Plaintiffs certifies that he or she is authorized to enter into this agreement and to execute and bind legally the Plaintiffs to its terms. Execution of this agreement by signature is a condition precedent to the agreement becoming effective and binding on the Parties. This agreement may be executed in counterparts, each of which will be deemed to be an original and all of which taken together shall constitute a single instrument. This agreement may be executed by a signature via facsimile transmission or electronic mail which shall be deemed the same as an original signature.

41. This agreement resolves and provides the sole and exclusive remedy for all claims and issues arising from this action that were raised or could have been raised by the Class certified by the Court. Defendant shall have no duties or obligations to Plaintiffs or Class Members for claims and issues arising from this action beyond the terms of this Settlement Agreement.

42. The Court shall retain jurisdiction to enforce the terms of the Settlement Agreement until the conditions detailed in Section J (Termination) are met.

SO AGREED:

Dated: October 18, 2019

/s/Amitai Heller
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