

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

NIKITA PETTIES, et al.,)
)
 Plaintiffs,)
)
 v.) Civil Action No. 95-0148 (PLF)
)
 THE DISTRICT OF COLUMBIA, et al.,)
)
 Defendants.)

**REPORT AND RECOMMENDATION OF THE SPECIAL MASTER
REGARDING CHANGES TO THE PAYMENT ORDER
DATED NOVEMBER 8, 2004**

The Court's Payment Order of November 8, 2004 sets forth procedures to insure the timely and appropriate payments to those who provide special education and related services to Petties class members. In the fall of 2008, the parties began discussions regarding changes to 2004 Payment Order. Some of the changes under discussion were necessitated by establishment of the Office of the State Superintendent of Education ("OSSE") in 2007 and the increased role of that agency in the payment of special education and related services costs. Other possible changes were suggested based on the experience of the parties under the 2004 Order. Negotiation waned during the first part of 2009 but at a March 10, 2009, hearing before the Court, the parties described their intention to continue the negotiations on a new Payment Order.

The parties did resume negotiations and the special master met with the parties on May 7, 2009. At that time, several matters remained unresolved and the parties continued to negotiate. By mid-June all terms had been agreed upon, with the exception of two provisions. The first provision in dispute (Issue #1) concerned the specific wording regarding the required

content of invoices; the second provision in dispute (Issue #2) related to the window of time for filing a dispute with the Special Master.

On June 18, 2009, the Special Master asked each party to provide brief written position statements regarding the contested provisions. The statements of the defendant and class counsel are attached as Attachment 1 and 2, respectively. The positions of the parties are summarized briefly with comments regarding their persuasiveness.

Issue #1: Section III (e) of the Proposed Order

In order to increase the defendants ability to recover Medicaid funds from the federal Department of Health and Human Services, Centers for Medicare and Medicaid Services, the parties have agreed that special education and related service providers will be required to submit additional information if they expect to benefit from the guarantee of payment within thirty days of invoicing. The parties have agreed to the following four requirements:

- Date of service of delivery
- Type of services, e.g., Speech, O/T, P/T, counseling, psychology, etc.
- Duration, e.g., 40minutes, 60 minutes, etc.
- Therapy modality, e.g., group or individual

The last requirement in the list of information needed for Medicaid recovery involves the description of the student's progress. The defendant suggests the following language:

Dated and signed notes that document the degree of measurable progress toward student treatment goals and objectives.

The plaintiffs suggest:

Dated and signed higher level descriptive notes that indicate whether the student has made measurable progress toward treatment goals and objectives.

As the defendant notes, “Defendants and plaintiffs appear to share a similar goal, which is to explain as clearly as possible the kind of information the District needs for reimbursement of Medicaid expenses.” (Attachment 1 at p. 1). In the view of the defendant, the clearest explanation is one that tracks language already released to providers in a memorandum dated May 6, 2009. (See Attachment 3, Official Notification to all Special Education Service Providers Effective June 5, 2009 “May 6 Memorandum”).¹ This approach, according to the defendant, would minimize misunderstandings by providers which might view the plaintiffs’ language as creating new or different obligations for documentation.

Class counsel notes that both parties share a concern about “the disclosure of confidential student information in violation of privacy laws.” (Attachment 2 at p.1). However, plaintiffs note that the defendant had initially sought the submission of full progress notes and plaintiffs’ believe that the provision in the Order needs to remind providers that the notes should not be detailed, but should include “higher level” documentation only.²

The defendant’s argument regarding the tracking of language is persuasive. Although perhaps unlikely, it is possible that some providers might misinterpret this language or be confused by the new term. However, the result sought by the plaintiff can easily be achieved by other means, that is, not by changing terms used, but by the simple addition of another phrase used in the May 6 memorandum. Accordingly, the language in the proposed order attached reads: “Dated and signed notes, *of one to two sentences in length*, that document the degree of measurable progress toward student treatment goals and objectives.”

¹ The defendant’s submission refers to the May 6 Memorandum as “official notification” to providers, as does the memorandum itself. The endorsement of the language suggested by the defendant for the Payment Order should not be construed to sanction superseding the current and still operative November 2004 Payment Order *e.g.*, late payments to providers who have failed to follow the “official notification.” [See Report and Recommendation of the Special Master in the matter of Diagnostic Consultants, LLC (July 1, 2009, Dkt 1661)].

² The plaintiffs’ note that the May 6 Memorandum states that the content of the notes should “extrapolate at a higher level information about a student’s progress (or lack thereof) and should not include the detail or depth required in the case notes.”(Attachment 3 at p. 3.)

Issue #2: Section VI (a)

The parties have retained the structure of the dispute procedure. However, the plaintiff seeks to change in the window of time allowed providers to bring a dispute before the Special Master. The current section provides:

If a provider is not fully satisfied with the defendants' final administrative decision, the provider may file a request for proceeding to determine findings of fact and recommendations for resolution with the Office of the Special Master. Such a request must be filed within ten (10) business days of receipt of the final administrative decision.

The plaintiffs' seek to increase this window to *fifteen (15) business days*.

The defendant suggests that the time frames of the proposed order should remain the same as there is no evidence of any necessity for the change based on the experience under the 2004 Payment Order.

Plaintiffs suggest that a larger window would permit more time for the parties to resolve disputes before filing an official request for a hearing with the Special Master.

If an increase of five business days, or one week, would make resolution at an earlier stage more likely, it would be well worth the change in language. Experience suggests, however, that time is not the impediment here. Instead, it is often the case that the time and attention of necessary personnel is commanded only when an administrative dispute hearing has been requested. This is not meant as a reflection on the capability and diligences of the staff who are involved in the payment process. Instead, it is simply human nature to attend the most demanding issues first, and there are many issues competing for attention. Inasmuch as the defendant does not agree to the change, and it does not appear that any change would significantly improve the efficiency of the resolution process, the proposed order leaves the language untouched.

It is important to note that the parties were able to reach agreement on the most fundamental changes in the order but that the basic structure of the dispute resolution process has not been changed.

Respectfully submitted,

Elise T. Baach
Special Master

Date: July 3, 2009.