

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION

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PARENTS' LEAGUE FOR  
EFFECTIVE AUTISM SERVICES  
(PLEAS), et al.,

Case No. **2 : 08 cv 421**

U.S. DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
EAST. DIV. CLEVELAND, OHIO

Plaintiffs,

Judge: **JUDGE GRAHAM**

Magistrate Judge: **MAGISTRATE JUDGE KING**

vs.

Helen Jones-Kelley, et al.,

Defendants.

**PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER**

Federal Medicaid law entitles eligible children in Ohio to receive medically necessary treatment, including mental health and behavioral therapies. Children who are eligible for Medicaid are entitled to any federally authorized Medicaid service, whether or not those services are included in the State's Medicaid plan. 42 U.S.C. § 1396(d)(r)(5). Under the federal Early and Periodic Screening, Diagnosis and Treatment (EPSDT) mandate, all states must furnish appropriate medically necessary treatment to correct or ameliorate defects and physical and mental illnesses and conditions. 42 U.S.C. § 1396d(r)(5). Medicaid-eligible individuals under the age of 21 who are screened and diagnosed with physical, behavioral, emotional or psychiatric disabilities must receive medically necessary preventive, corrective and rehabilitative treatment.

Plaintiffs are made up of parents and families and children. Plaintiff children are Medicaid eligible and have been diagnosed with a developmental disability on the autism spectrum. Plaintiff children currently receive medically necessary community mental health services from Step By Step Academy (SBSA) under Ohio's Medicaid program. Plaintiffs have not found any other provider that offers a program of similar scope, duration and intensity to that


offered by SBSA. Defendants have promulgated rules, effective July 1, 2008, which govern the Medicaid program in Ohio and will change the provisions related to community mental health services, O.A.C. §§ 5101:3-27-02 and 5122-29-17. The changes will reduce the services that are currently provided to Plaintiff children. Once these rules are effective, Plaintiff children will be denied medically necessary services in violation of the federal EPSDT mandate.

Pursuant to Rule 65(b) of the Federal Rules of Civil Procedure and S.D. Ohio Civ. R. 65.1, Plaintiffs through undersigned counsel respectfully move this Court for a temporary restraining order enjoining Defendants from enforcing their proposed rules and from restricting the services provided under Medicaid based on Defendants' limited definition of 'rehabilitative' services. Counsel acknowledges that the Court ordinarily does not grant motions for a temporary restraining order until after the Court holds a preliminary conference with the parties; therefore, plaintiffs request, in the alternative, that the Court schedule a preliminary conference with the parties pursuant to S.D. Ohio Civ. R. 65.1.

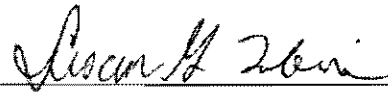
Plaintiffs will suffer immediate and irreparable harm if a temporary restraining order is not granted because they will be denied necessary services, most likely suffer a decline in progress and an increase in unwanted behaviors and face unnecessary institutionalization.

In support of this Motion, Plaintiffs rely upon their Memorandum in Support of Plaintiffs' Motion for a Temporary Restraining Order and the attached declarations which are attached to and made part of this Motion.

Respectfully submitted,



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**PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR TEMPORARY  
RESTRAINING ORDER**

**I. Background and Facts**

Plaintiff children are all Medicaid eligible and are under the age of twenty-one. Plaintiff children have all been diagnosed with a developmental disability on the autism spectrum. Autism is a medical disorder characterized by an inability to interact socially, repetitive behavior and language dysfunction. *Hummel v. ODJFS*, 164 Ohio App. 3d 776 (Ohio Ct. App. 2005). It is a complex neurodevelopmental disability that generally appears during the first three years of life which impacts the normal development of the brain, resulting in impairments of social interaction, verbal and non-verbal and communication, leisure or play activities, learning and most often if untreated results in lifelong mental retardation. (Ex. 1, Mulick Decl. ¶ 7). Autism is now seen as a spectrum disorder, "Autism Spectrum Disorder" (ASD). (Ex. 1, Mulick Decl. ¶ 9). Autistic disorder, the full-blown condition, is one of five disorders falling under the umbrella of "Pervasive Developmental Disorder" (PDD). (Ex. 1, Mulick Decl. ¶ 9). PDD also includes the disorders commonly diagnosed as Asperger's Disorder, Rett Syndrome, Childhood Disintegrative Disorder and PDD-Not Otherwise Specified (PDD-NOS). (Ex. 1, Mulick Decl. ¶

9). It is estimated that nearly thirty children who will be diagnosed with some form of autism spectrum disorder are born every year in Franklin County, Ohio. (Ex. 1, Mulick Decl. ¶ 12).

Previously, parents of children with autism were encouraged to place their child into institutional care to spare the family the stress and heartache of attempting to raise their child. (Ex. 1, Mulick Decl. ¶ 10). Research demonstrates that by providing the child with autism appropriate services and supports at appropriate developmental levels, significant gains in most life areas can be achieved. (Ex. 1, Mulick Decl. ¶ 11). Research also shows that almost half of the children that receive applied behavior analysis (ABA) treatment will become “indistinguishable among their peers” and can be mainstreamed back into the regular school environment and that children maintain these outcomes post therapy and into their teens. (Ex. 8, LaMarche Decl. ¶ A). ABA uses a one-on-one teaching technique that relies on reinforced practice of various skills. (Ex. 1, Mulick Decl. ¶ 21). Children with autism need a highly structured, consistent environment that is rich in planned reinforcement of targeted skills and behaviors. (Ex. 5, Christiansen Decl. ¶ 11). ABA is highly effective form of behavioral treatment in virtually all cases of autism. (Ex. 1, Mulick Decl. ¶ 21).

Plaintiff children receive medically necessary services at Step by Step Academy (SBSA) located in Worthington, Ohio under Ohio’s Medicaid program. SBSA is a nationally accredited and state certified community mental health agency dedicated to providing mental health services to children with autism. Services provided by SBSA include: full day, year round, center-based ABA, psychological assessments and diagnosis, parent advocacy and resource information, home outreach services including 1:1 and lead trainer services, school transition and consultation services and parent and professional trainings. By receiving these services from SBSA, Plaintiff children have experienced a reduction in their developmental disabilities and

restoration toward their best possible functional level. (Ex. 5, Christiansen Decl. ¶ 13; Ex. 9, Rosner Decl.). Plaintiffs have not found any other provider which offers services of similar scope, duration and intensity. (Ex. 2, A.C. Decl. ¶ 22; Ex. 3, K.G. ¶ 16; Ex. 4, A.W. Decl. ¶ 21).

Plaintiff Parents' League for Effective Autism Services (PLEAS) is an association of parents and families and children who receive services from SBSA under Medicaid. Membership of PLEAS includes both named Plaintiffs and other parents, families and children not individually named in this complaint.

If Plaintiff PLEAS children do not receive intensive, one-to-one or small group ABA based intervention program they will likely regress and withdraw further into their world of autism by resorting to their earlier patterns of maladaptive, stereotyped behaviors. (Ex. 5, Christiansen Decl. ¶¶ 7-8; Ex. 9, Rosner Decl.). PLEAS children will most likely have a difficult time acquiring new skills with the absence of one-to-one, ABA based intervention. (Ex. 5, Christiansen Decl. ¶ 9; Ex. 9, Rosner Decl.). PLEAS children will suffer an increase in inappropriate or dangerous behaviors which could result in injury to themselves or others. (Ex. 5, Christiansen Decl. ¶ 8; Ex. 9, Rosner Decl.). If the court does not grant their request for a TRO, Plaintiff PLEAS parents and families face a loss or reduction in funding of these services and will be unable to afford these medically necessary services for their children. Individually named children face similar harm.

Plaintiff X.C. is a six year old boy who was first diagnosed with autism at eighteen months old. (Ex. 2, A.C. Decl. ¶ 2). X.C. lives in Logan, Ohio. (Ex. 2, A.C. Decl. ¶ 2). He receives 35-40 hours per week of one-to-one intensive behavioral therapy from SBSA. (Ex. 2, A.C. Decl. ¶ 4). Socially, X.C. was withdrawn and did not acknowledge others when they talked to him and he avoided peers. (Ex. 9, Rosner Decl.). X.C. has a history of inattention, tantrums

and dangerous behaviors. (Ex. 2, A.C. Decl. ¶ 9). He continues to be impulsive, aggressive, stubborn and have tantrums. (Ex. 2, A.C. Decl. ¶ 9). During tantrums, X.C. typically screams, kicks, throws objects, bangs his head on the floor and rips blankets with his teeth. (Ex. 2, A.C. Decl. ¶ 13).

Since receiving services from SBSA, X.C. has made progress in cognitive and adaptive behavior goals and has reduced tantrums, aggression and elopement. (Ex. 9, Rosner Decl.). X.C.'s communication skills have greatly improved. (Ex. 2, A.C. Decl. ¶ 16). X.C. now uses his mother's name or taps his mother's shoulder to get her attention. (Ex. 2, A.C. Decl. ¶ 16). When X.C. is not receiving services from SBSA his behaviors worsen, tantrums become more frequent and he regresses in skills. (Ex. 2, A.C. Decl. ¶¶ 17-18). SBSA's center-based program is necessary for X.C. because other service providers have stated that they are not appropriate due to X.C.'s severe behaviors. (Ex. 2, A.C. Decl. ¶¶ 19, 21). X.C. requires the structure of an intensive behavioral program in order to learn new skills and keep unsafe behaviors at a manageable level. (Ex. 9, Rosner Decl.).

Plaintiff W.G. is a six year old boy who was first diagnosed with autism at two years old. (Ex. 3, K.G. Decl. ¶ 2). W.G. lives in Westerville, Ohio. (Ex. 3, K.G. Decl. ¶ 2). He receives 35-40 hours per week of one-to-one intensive behavioral therapy from SBSA. (Ex. 3, K.G. Decl. ¶ 4). W.G. is not afraid of anything, is unaware of potential dangers and has a tendency to wander away. (Ex. 3, K.G. Decl. ¶ 7). If left unattended, W.G. eats non-food items including soap, lotion, play-dough and paint. (Ex. 3, K.G. Decl. ¶ 9). W.G. has many repetitive behaviors including finger flicking, clapping, tapping objects and jumping. (Ex. 3, K.G. Decl. ¶ 11).

W.G. has severe delays in expressive and receptive language. (Ex. 3, K.G. Decl. ¶ 6). Since receiving services from SBSA, W.G. has made progress in his prompted language. (Ex. 3,

K.G. Decl. ¶ 6). When W.G. is not receiving services from SBSA, his behavior regresses and he has a difficult time focusing. (Ex. 3, K.G. Decl. ¶ 12). W.G. will not receive the services he needs in another setting because other settings do not offer the intensity, structure, supervision and individualized services. (Ex. 3, K.G. Decl. ¶¶ 14-15).

Plaintiff K.W. is a seven year old boy who was first diagnosed with autism at two years old. K.W. lives in Westerville, Ohio. (Ex. 4, A.W. Decl. ¶¶ 2-3). He receives 35-40 hours per week of one-to-one intensive behavioral therapy from SBSA. (Ex. 4, A.W. Decl. ¶ 4). He has frequent stubbornness, low frustration tolerance and repetitive and compulsive behaviors. (Ex. 4, A.W. Decl. ¶¶ 12-14). His expressive and receptive language skills are severely delayed. (Ex. 4, A.W. Decl. ¶ 7).

When K.W. is not receiving services from SBSA his behaviors escalate and become more frequent. (Ex. 4, A.W. Decl. ¶ 17). He will self-stimulate more often, have a shorter attention span and pick up items and watch them fall with more frequency. (Ex. 4, A.W. Decl. ¶ 17). Prior to attending SBSA, K.W. was in a classroom in Worthington City Schools. (Ex. 4, A.W. Decl. ¶ 18). There was not a one-to-one aide to engage him in learning activities, and as a result K.W. was often left alone if he was not causing distraction or exhibiting dangerous behaviors and he did not have any interaction with others. (Ex. 4, A.W. Decl. ¶ 19). Returning to Worthington City Schools is not appropriate and would be unsafe for K.W. because he cannot call out for help when needed, he will follow anyone anywhere regardless of the situation, he does not understand personal space which could lead to confrontations with peers and he cannot follow simple directions to go to a specific destination without someone in attendance. (Ex. 4, A.W. Decl. ¶¶ 15, 20).

Defendant Helen Jones-Kelley is the Director of Ohio Department of Job and Family Services (ODJFS). ODJFS is the single state agency for the Medicaid program in Ohio and is required, pursuant to O.R.C. § 5111.01 and O.A.C. § 5101:1-37-01, to provide medical assistance in accordance with the federal Medicaid statute, Title XIX of the Social Security Act, 79 Stat. 286 (1965).

Defendant Sandra Stephenson is the Director of Ohio Department of Mental Health (ODMH). Defendant Stephenson is responsible for adopting rules that establish standards for services provided by community mental health facilities.

As directors, Defendant Jones-Kelley and Defendant Stephenson entered into an inter-agency agreement between ODJFS and ODMH for the purpose of establishing a sub-recipient relationship between the entities to implement 42 C.F.R. § 431 Part M and to provide behavioral health services to people who are eligible for Ohio Medicaid benefits under Title XIX of the Social Security Act. *Interagency Agreement Between ODJFS and ODMH*, Article I, Section A (Attached as Ex. 12). ODMH is a sub-recipient of federal funding from ODJFS.

Defendants, acting in their official capacities, promulgated rules which govern the Medicaid program in Ohio. The rules promulgated by Defendants, O.A.C. §§ 5101:3-27-02 and 5122-29-17, are effective July 1, 2008. These rules require that community mental health services including community psychiatric support treatment services be rehabilitative in nature. §§ 5101:3-27-02(A) and 5122-29-17(A) (eff. 7/1/08) (Attached as Ex. 6 and Ex. 7 respectively). Defendants' define rehabilitative services more narrowly than contemplated under federal law. O.A.C. §§ 5101:3-27-02(A) and 5122-29-17(A) (eff. 7/1/08).

As explained more fully in section II of this memorandum, Defendants have decided to limit the services to be paid for by Medicaid in violation of federal law. As a result, providers



authorized by the state to deliver intensive behavioral health services to Medicaid-eligible children will lack the authority, capacity and funds required to provide medically necessary, ongoing, intensive community-based services to the Plaintiff children.

Due to the Defendants' failure to comply with federal Medicaid provisions Plaintiff children, who have serious developmental and behavioral disabilities, will lose the community mental health services that they currently receive and will face the possibility of unnecessary confinement in residential facilities or other costly institutions even though their medical conditions have been successfully addressed in the community under the soon to expire Ohio Medicaid rules.

## II. Argument

Under Fed. R. Civ. P. 65(b), this court can grant a temporary restraining order *ex parte* if the plaintiffs present "specific facts shown by affidavit" that they will suffer irreparable harm during the time it would take to notify the defendants and hold a hearing. *First Technology Safety Systems, Inc. v. Depinet*, 11 F. 3d 641, 649-652 (6th Cir. 1993).

This Court must consider four factors in determining whether to grant a temporary restraining order: (1) the likelihood that the plaintiffs will succeed on the merits; (2) whether there is threat of irreparable harm to plaintiffs; (3) the probability that granting the temporary restraining order will cause substantial harm to others; and (4) whether the public interest is advanced by the issuance of the temporary restraining order. These are "factors to be balanced, not prerequisites that must be met." *In re DeLorean Motor Co. v. DeLorean*, 755 F. 2d 1223, 1229 (6th Cir. 1985).

**A. Because Defendants' rules violate federal Medicaid law by reducing medically necessary services to children, Plaintiffs have a substantial likelihood of success on the merits.**

Every participating Medicaid state is required to provide Early, Periodic Screening, Diagnosis and Treatment (EPSDT) services to Medicaid eligible children under the age of 21. See *Frew v. Hawkins*, 540 U.S. 431, 433 (2004); 42 U.S.C. § 1396a(a)(10)(A), 42 U.S.C. § 1396d(a)(4)(B). The federal requirements of EPSDT mandate that states provide services whether or not such services are covered under the state plan. 42 U.S.C. § 1396d(r)(5). Under EPSDT, states must provide all the services listed in 42 U.S.C. § 1396d(a) when needed to correct or ameliorate a psychiatric, behavioral or emotional condition. A district court in Louisiana found that the “failure to make behavioral and psychological services available to all EPSDT recipients who need them violates the requirement of 42 U.S.C. 1396d(r)(5) that the defendant provide all necessary services within the scope of 42 U.S.C. 1396d(a) necessary to correct or ameliorate health conditions of EPSDT recipients.” *Chisholm v. Hood*, 133 F. Supp. 2d 894, 901 (E.D. La. 2001).

Services currently being provided to children enrolled at SBSA, in conjunction with their Medicaid waiver and/or education services, result in the maximum reduction of their physical and mental disabilities, and restoration of their best possible functional level. (Ex. 5, Christiansen Decl. ¶ 13; Ex. 9, Rosner Decl.).

The services provided by SBSA have resulted in numerous benefits to Plaintiff children, including increased IQ levels, reduction in developmental disabilities, decrease in behavioral outbursts, increase in on-task behaviors, decrease in self-stimulation behaviors, increased communication skills, increased daily living skills such as toileting, dressing, food preparation, and a decreased chance of being placed in segregated special education classrooms or institutional settings. (Ex. 5, Christiansen Decl. ¶¶ 7-9; Ex. 8, LaMarche Decl.; Ex. 9, Rosner Decl.; Ex. 2, A.C. Decl. ¶¶ 15-16; Ex. 3, K.G. ¶ 6).

SBSA has received Medicaid reimbursement for services provided to Plaintiff children under current rule O.A.C. § 5122-29-17 (eff. 8/23/07) which provides community psychiatric supportive treatment (CPST). (Attached as Ex. 10). These services focus on the “individual’s ability to succeed in the community; to identify and access needed services; and to show improvement in school, work and family and integration and contributions within the community.” O.A.C. § 5122-29-17(A). Activities of CPST include “mental health interventions that address...behaviors, thought processes, etc., that assist an individual in eliminating barriers to seeking or maintaining education...” O.A.C. § 5122-29-17(B)(9). Additionally, O.A.C. § 5101:3-27-02(A)(1) provides that “behavioral health counseling and therapy services” are currently reimbursable as Medicaid community mental health services. O.A.C. § 5101:3-27-02 (eff. 6/1/07) (Attached as Ex. 11).

In contrast to the current rules, O.A.C. § 5101:3-27-02, promulgated by Defendants and effective July 1, 2008, lists services that are required to be rehabilitative in nature in order to be reimbursable as Medicaid community mental health services. “Rehabilitative services” are defined in O.A.C. § 5101:3-27-02(A)(eff. 7/1/08) as services that “provide for the maximum reduction of mental illness and are intended to restore an individual to the best possible functional level.” Listed among the services that are required to be rehabilitative is community psychiatric supportive treatment (CPST) service. O.A.C. § 5101:3-27-02 (eff. 7/1/08). “CPST service is a rehabilitative service intended to maximize the reduction of symptoms of mental illness in order to restore the individual’s functioning to the highest level possible.” O.A.C. § 5122-29-17(A) (eff. 7/1/08). The proposed rules will significantly narrow the definition and eligibility for CPST services. The rules require that the recipient have a “mental illness” and “have the cognitive ability to be able to participate and benefit from the service”. O.A.C. § 5122-

29-17(A), (B)(1) (eff. 7/1/08). Additionally the rule states that services should “restore” an individual. O.A.C. § 5122-29-17(A) (eff. 7/1/08). Similarly, proposed rule O.A.C. § 5101:3-27-02 (eff. 7/1/08) will require that “community mental health services” be “rehabilitative” and provide “for the maximum reduction of mental illness.”

Defendants are impermissibly and categorically limiting the availability of Medicaid services to otherwise eligible children by disability label and functioning level by limiting the scope of rehabilitative services to those that reduce mental illness. These rules fail to incorporate additional federal requirements under EPSDT to provide medically necessary treatment to “correct or ameliorate defects and physical and mental illnesses and conditions” as required under 42 U.S.C. § 1396d(a). (Emphasis added). If proper services are provided to children with autism, those children are able to achieve a higher functioning level, including increased IQ levels. Autism spectrum disorders are coded under Axis I, the axis used to diagnose clinical disorders, in the *Diagnostic and Statistical Manual of Mental Disorders*, 4th edition, 1994 (DSM IV). Diagnoses under Axis I indicate that symptoms of these disorders can be ameliorated and functioning can be increased with intervention unlike diagnoses under Axis II which are long term and not expected to respond to treatment. The state definition of rehabilitative services is clearly more restrictive than federal provisions.

The more expansive federal definition of rehabilitative services includes “any medical or remedial service recommended by a physician or other licensed practitioner of the healing arts, within the scope of his practice under state law for maximum reduction of physical or mental disability . . . .” 42 C.F.R. § 440.130(d) (Emphasis added). Defendants should be enjoined from limiting the definition of rehabilitative services with regard to Plaintiff children as it violates federal EPSDT requirements.

Plaintiff children require these services as recommended by their physician or other licensed treatment provider. The medical opinion and diagnosis of a patient's treating physician are entitled to substantial, if not complete, deference in determining medical necessity. *Holman v. Ohio Dept. of Human Serv.*, 143 Ohio App. 3d 44, 48 (Ohio Ct. App. 2001), citing *King v. Heckler*, 742 F. 2d 968, 973 (6th Cir. 1984). Defendants have previously and unsuccessfully argued that ABA is not a medical service and therefore not a medically necessary service covered under Ohio Medicaid. *Hummel v. ODJFS*, 164 Ohio App. 3d 776 (Ohio Ct. App. 2005).

Additionally, the evidence shows that the services provided to Plaintiff children are clearly rehabilitative in nature and are medically necessary. Intensive behavioral therapy represents the treatment modality that provides the maximum reduction of physical and mental disability to achieve autistic children's best possible functional level. (Ex. 1, Mulick Decl. ¶ 35). Intensive behavioral therapy is a rehabilitative service, with both medical and remedial components under 42 U.S.C. §1396d(a)(13). The Medicaid Act gives Plaintiffs an enforceable right to intensive behavior therapy services.

Ultimately, it is irrelevant whether Defendants exclude the services provided to the Plaintiff children from their overly restrictive definition of "rehabilitative services" as long as the services fall within the scope of federal Medicaid. The Eighth Circuit has held that, reading 42 U.S.C. §§ 1396a, 1396d(a) and 1396d(r) together, a state plan need not specifically list every treatment service conceivably available under EPSDT mandate, but the state plan must pay part or all of cost of treatments to ameliorate conditions discovered by the screening process when those treatments meet definitions set forth in 42 U.S.C. § 1396a. *Pediatric Speciality Care, Inc. v. Ark. Dept. of Human Serv.*, 293 F. 3d 472 (8th Cir. 2002). Thus, pursuant to the requirements of EPSDT, Plaintiff children are entitled to continue receiving intensive behavioral services

provided by SBSA through Ohio's current Medicaid rules until such time as Defendants promulgate rules that comply with federal law. If this court does not enjoin Defendants from implementing Ohio's new rules, Plaintiff children will not be able to secure medically necessary services to which they are entitled under federal law.

**B. The issuance of the Temporary Restraining Order will prevent irreparable harm to Plaintiffs.**

Because the Defendants will no longer provide Medicaid funds for year round, center-based, one-to-one, ABA therapy for 35-40 hours per week, Plaintiff children will lose medically necessary services which they currently receive.

When children with autism receive intensive behavioral intervention at a young age, they demonstrate significant increases in their I.Q. scores during early childhood, and significant gains in adaptive behavior. (Ex. 1, Mulick Decl. ¶ 26). Even if children with autism do not receive these services until they are older, they can significantly increase their adaptive skills and decrease their self-destructive, aggressive, and other kinds of socially undesirable behavior. (Ex. 1, Mulick Decl. ¶ 27).

If Plaintiff children do not receive these services, they will experience a regression in skills and an increase in unwanted, often dangerous, behaviors. (Ex. 5, Christiansen Decl. ¶¶ 6-10; Ex. 9, Rosner Decl.; Ex. 2, A.C. Decl. ¶ 17; Ex. 3, K.G. Decl. ¶ 12; Ex. 4, K.W. Decl. ¶ 17). Plaintiff children's maladaptive behaviors will likely increase, safety will be difficult or impossible to provide for, and learning will be stunted and perhaps not possible. (Ex. 8, LaMarche Decl. ¶ B). Additionally, Plaintiff children risk the possibility of being segregated from their peers. (Ex. 9, Rosner Decl.). The loss of services currently provided by SBSA to Plaintiff children will not result in the maximum reduction of their developmental disabilities or restoration of their best possible function level, as mandated by 42 U.S.C. §1396d(a)(13).

Plaintiff parents have not found nor have Defendants offered alternative services that will result in the maximum reduction of the Plaintiff childrens' developmental disabilities or restoration of their best possible functional level as mandated by 42 U.S.C. §1396d(a)(13). Nationwide Children's Hospital in Columbus, Ohio offers a program of early intensive behavioral intervention to autistic children up to age 5 or 6, with less intensive follow up thereafter. (Ex. 1, Mulick Decl. ¶ 31). Nationwide Children's Hospital Autism Center currently has a long waiting list and the comprehensive service is costly. (Ex. 1, Mulick Decl. ¶ 32). Nationwide Children's Hospital Autism Center is based on a home and community model of service delivery, and children who require center-based services and out-of-home teaching cannot receive these through the Autism Center. (Ex. 1, Mulick ¶ 33). Often children evaluated at Nationwide Children's Hospital Developmental Evaluation Program are referred to SBSA because they offer center-based behavioral intervention and because they offer a high quality service. (Ex. 1, Mulick Decl. ¶ 34).

Plaintiff parents have been urged to contact their local school districts to attempt to recover lost services through special education. Unfortunately, ABA programs can be expensive and have not been widely adopted by school systems. (Ex. 1, Mulick Decl. ¶ 23). In the past, Plaintiff children did not receive proper services when enrolled in local school district programs. Plaintiff children were not engaged in services, did not have interaction with teachers or peers and exhibited serious dangerous behaviors. (Ex. 5, Christiansen Decl. ¶ 7; Ex. 2, A.C. Decl. ¶ 19; Ex. 4, A.W. Decl. ¶¶19-20).

Once Defendants' new rules become effective, some reduced services may be available to Plaintiff children from other sources and a reduced SBSA program. If the temporary restraining order is not granted, not only will these services will not result in the maximum

reduction of Plaintiff children's developmental disabilities or restoration of their best possible functional level as mandated by 42 U.S.C. §1396d(a)(13), but also, these children will suffer loss of skills, increased negative behavior and irreparable harm.

**C. The threatened injury to Plaintiffs outweighs the little or no harm that maintaining *status quo* through a temporary restraining order would cause Defendants.**

As Defendants' rules are not effective until July 1, 2008, Plaintiffs request only the maintenance of the *status quo*. Allowing the *status quo* to be maintained will not jeopardize any interest of Defendants nor cause any harm to them. In contrast, Plaintiff children face serious harm if the temporary restraining order is not issued. Plaintiff children will lose services that they currently receive. Due to the loss of services, and as extensively documented in the attached declarations, Plaintiff children will experience a regression in skills and an increase in unwanted, often dangerous, behaviors. Additionally, Plaintiff children are at an increased risk of being placed in a segregated special education classroom or costly institutional care. There are no other comparable alternatives from which Plaintiff children could receive services that would result in the maximum reduction of their developmental disabilities or restoration of their best possible functional level. Plaintiffs and their families will suffer great harm if no injunction is granted.

**D. The public interest favors the issuance of a temporary restraining order.**

Public interest favors the preservation of the right of children with disabilities to maintain, without interruption, needed services. Congress amended the Medicaid Act in 1989 to mandate that a state agency must provide EPSDT-eligible children "all reasonably necessary medical care." *Rosie D. v. Romney*, 410 F. Supp. 2d 18, 22 (D. Mass. 2006). The specific language states that Medicaid-eligible children must receive "such other necessary health care to correct or ameliorate defects...illnesses and conditions discovered by the screening services, whether or not such services are covered under the state plan." 42 U.S.C. 1396d(r)(5). In effect



that means that “no Medicaid-eligible child in this country ... will go without treatment deemed medically necessary by his or her clinician.” *Rosie D.*, 410 F. Supp. 2d at 22.

Children who receive appropriate treatment for autism can make significant gains in most areas of their lives. (Ex. 1, Mulick Decl. ¶ 11). After intensive behavioral intervention in early childhood, some children can achieve normal levels of learning and can live and work independently as adults. (Ex. 1, Mulick Decl. 11). Those children who do not receive appropriate care face being institutionalized at a cost which is much higher and of longer duration than treatment. Cost analysis studies show a savings of \$1,000,000 per child over that child’s lifetime by receiving this medically necessary, 35-40 hours per week, one-to-one, early intervention. (Ex. 8, LaMarche Decl. ¶ A).

The changes proposed by Defendants are not necessary for compliance with federal Medicaid rules. The Centers for Medicare & Medicaid Services (CMS), the federal agency which administers Medicaid program, is not requiring Ohio to make changes. Several states, including Pennsylvania and Wisconsin, mandate intensive behavioral intervention programs funded by Medicaid for children with autism through age eleven. (Ex. 1, Mulick Decl. ¶ 28).

At the federal level, Congress has expressed its opposition to similar rehabilitative restrictions. Congress included language imposing a moratorium on the proposed federal regulations on rehabilitative services in two bills on children’s health insurance and the budget bill covering the U.S. Department of Health and Human Services. *See* Pub. L. No. 110-173, 110th Cong. (2008). Recently, the “Protecting the Medicaid Safety Net Act of 2008”, House Bill 5613, which proposes to further extend the moratoria in Public Law 110-173 passed in the

United States House of Representative.<sup>1</sup> A similar bill proposing to further extend the moratoria in Public Law 110-173 was introduced in the United States Senate as S 2819.

The public interest favors the issuance of this injunction.

### III. Security


Rule 65(c) of the Federal Rules of Civil Procedure requires that security be set “in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.”


Defendants cannot state any legitimate cost or damage to be incurred by maintaining *status quo* pending resolution of this case. The Sixth Circuit Court of Appeals has held that district courts have discretion not to require any posting of security. *Moltan Co. v. Eagle-Pincher Industries, Inc.*, 55 F. 3d 1171 (6th Cir. 1995). Moreover, Plaintiffs are Medicaid-eligible, of low income and lack the resources to post bond. This Court should deem the proper sum of security in this matter to be zero.

### IV. Conclusion

For the reasons cited above, Plaintiff requests that this Court grant this instant Motion for Temporary Restraining Order.

Respectfully submitted,

  
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<sup>1</sup> GovTrack.us. H.R. 5613--110th Congress (2008): Protecting the Medicaid Safety Net Act of 2008, *GovTrack.us (database of federal legislation)*, <http://www.govtrack.us/congress/bill.xpd?bill=h110-5613>, (accessed May 1, 2008)

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**CERTIFICATE OF SERVICE**

I hereby certify that on May 2, 2008, I presented the foregoing Motion and Memorandum to the Clerk of Court for the filing and uploading to the CM/ECF system, which will send notification of such filing to the following: Becky Thomas, AAG.

  
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