

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

**PARENTS' LEAGUE FOR
EFFECTIVE AUTISM SERVICES
(PLEAS)**

Case No. 2:08-cv-421

AND

X.C., a minor, by and through
his parent, **A.C.**;

Judge Graham

Magistrate Judge King

AND

W.G., a minor, by and through
his parent **K.G.**;

AND

K.W., a minor by and through
his parent **A.W.**,

**AMENDED COMPLAINT FOR
INJUNCTIVE AND DECLARATORY
RELIEF**

Plaintiffs,

vs.

Helen Jones-Kelley, in her official capacity as
Director of the Ohio Department of Job and
Family Services

AND

Sandra Stephenson, in her official capacity as
Director of the Ohio Department of Mental Health,

AND

Kerry Weems, in his official capacity as Acting
Administrator, Centers for Medicare & Medicaid
Services,

Defendants.

**AMENDED COMPLAINT FOR
INJUNCTIVE AND DECLARATORY RELIEF**

INTRODUCTION

Plaintiffs are made up of an association of parents and families as well as individual parents and their children who have a diagnosis of a developmental disability on the autism spectrum. Plaintiff children are Medicaid eligible. They currently receive medically necessary services funded through Medicaid from Step By Step Academy (SBSA) in Worthington, Ohio. Defendant Jones-Kelley, in her official capacity as Director of the Ohio Department of Job and Family Services, and Defendant Stephenson, in her official capacity as Director of the Ohio Department of Mental Health, have promulgated rules that govern the Medicaid program in Ohio. These rules 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 children will lack the authority, capacity and funds necessary to provide ongoing, intensive community based services to the Plaintiff children. Plaintiffs seek injunctive and declaratory relief to prevent the loss or reduction of medically necessary services to which they are entitled under federal law.

JURISDICTION AND VENUE

1. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 which provides for original jurisdiction over civil suits arising under the Constitution, laws or treaties of the United States and against Defendants acting under color of state law pursuant to 42 U.S.C. § 1983.
2. This Court also has jurisdiction under 28 U.S.C. §§ 1343(3) and (4) which provide for original jurisdiction of the Court in all suits authorized by 42 U.S.C. § 1983. Plaintiffs seek to enforce the rights guaranteed them under the United States Constitution and the federal Medicaid laws, 42 U.S.C. §1396 et. seq. and the implementing federal regulations.

3. In addition, this Court has jurisdiction over the Plaintiffs' claims for declaratory relief pursuant to 28 U.S.C. §§ 2201 and 2202 and Rule 57 of the Federal Rules of Civil Procedure.
4. Venue is proper in the Southern District of Ohio, Eastern Division, because the defendants are located in this district within the meaning of 28 U.S.C. § 1391(b) and because the events, acts and omissions giving rise to the Plaintiffs' claims occurred in this district.

PARTIES

PLAINTIFFS

5. Plaintiff Parents' League for Effective Autism Services (PLEAS) is an association of parents and families and children who receive services from Step By Step Academy under Medicaid. Membership of PLEAS includes both named Plaintiffs and other parents, families and children not individually named in this complaint.
6. Plaintiff PLEAS children face losing or having a severe reduction of medically necessary services when the rules promulgated by Defendants become effective on July 1, 2008.
7. Without these services, PLEAS children are at risk of a regression in skills and an increase in unwanted behaviors. Further, PLEAS children will have an increased chance of being placed in a segregated special education classroom or institution.
8. PLEAS parents face loss of funding for these medically necessary services when Defendants' rules become effective. PLEAS parents and families will not be able to afford these necessary services for their children.
9. Plaintiff A.C. is the parent and natural guardian of Plaintiff X.C.
10. Plaintiff X.C. is a six year old boy who was diagnosed with autism spectrum disorder at eighteen months old.
11. X.C. and his parent A.C. live in Logan, Ohio.

12. X.C. is Medicaid eligible. He receives community mental health services through Medicaid from Step By Step Academy in Worthington, Ohio.
13. X.C. receives 35-40 hours per week of one-to-one intensive behavioral services year round from SBSA to correct and ameliorate his autism.
14. These services are medically necessary for X.C.
15. He is at risk of losing or having a severe reduction of these medically necessary services after June 30, 2008 when the rules promulgated by Defendants are scheduled to become effective.
16. Without these services, X.C. faces a regression in skills and an increase in aggressive and dangerous behaviors. Additionally, X.C. will have an increased chance of being placed in a segregated special education classroom or institution.
17. Plaintiff K.G. is the parent and natural guardian of Plaintiff W.G.
18. Plaintiff W.G. is a six year old boy who was diagnosed with autism spectrum disorder at age two.
19. W.G. and his parent K.G. live in Westerville, Ohio.
20. W.G. is Medicaid eligible. He receives community mental health services through Medicaid from Step By Step Academy in Worthington, Ohio.
21. W.G. receives 35-40 hours per week of one-to-one intensive behavioral services year round from SBSA to correct and ameliorate his autism.
22. These services are medically necessary for W.G.
23. He is at risk of losing or having a severe reduction in these medically necessary services after June 30, 2008 when the rules promulgated by Defendants are scheduled to become effective.

24. Without these services, W.G. faces a regression in skills and an increase in dangerous behaviors. Additionally, W.G. will have an increased chance of being placed in a segregated special education classroom or institution.
25. Plaintiff A.W. is the parent and natural guardian of Plaintiff K.W.
26. Plaintiff K.W. is a seven year old boy who was diagnosed with autism spectrum disorder at age two.
27. K.W. and his parent A.W. live in Westerville, Ohio.
28. K.W. is Medicaid eligible. He receives community mental health services through Medicaid from Step By Step Academy in Worthington, Ohio.
29. K.W. receives 35-40 hours per week of one-to-one intensive behavioral services year round from SBSA to correct and ameliorate his autism.
30. These services are medically necessary for K.W.
31. He is at risk of losing or having a severe reduction in these medically necessary services after June 30, 2008 when the rules promulgated by Defendants are scheduled to become effective.
32. Without these services, W.G. faces a regression in skills and an increase in dangerous behaviors. Additionally, W.G. will have an increased chance of being placed in a segregated special education classroom or institution.

DEFENDANTS

33. Defendant Helen Jones-Kelley, as director of Ohio Department of Job and Family Services (ODJFS), is responsible for the administration of the Medicaid program in Ohio.

34. ODJFS is the single state agency for the Medicaid program in the State of 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).
35. As the executive head of ODJFS under O.R.C. § 5101.02, Defendant Jones-Kelley is responsible for the supervision and operation of the Medicaid program in Ohio in accordance with the applicable federal Medicaid statutes and regulations.
36. Defendant Jones-Kelley is also responsible for ensuring that other state and county agencies and subdivisions with whom ODJFS contracts to administer the Medicaid program comply with all applicable Medicaid laws and policies pursuant to O.R.C. § 5111.01.
37. Defendant Jones-Kelley has acted and continues to act at all times relevant hereto in her official capacity and under color of state law.
38. Defendant Sandra Stephenson is the Director of Ohio Department of Mental Health (ODHM).
39. As chief executive and administrative officer of ODMH under O.R.C. § 5119.01, Defendant Stephenson is responsible for adopting rules that establish standards for services provided by community mental health facilities. Defendant Stephenson has the authority to enter into contracts and other agreements.
40. 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.

41. ODMH is considered the sub-recipient of the federal funds received from ODJFS, and mental health service providers are considered sub-recipients of the funds received from ODMH.
42. ODJFS, in consultation with ODMH, promulgates the Ohio Administrative Code rules that govern the Medicaid program.
43. Defendant Stephenson has acted and continues to act at all times relevant hereto in her official capacity and under color of state law.
44. Defendant Kerry Weems is the Acting Administrator of the Centers for Medicare & Medicaid Services (CMS), an agency within the United States Department of Health and Human Services which is responsible for, *inter alia*, administering the Medicaid program and, more specifically, providing the federal portion of payment for Medicaid services.
45. Medicaid is a federal program administered by the states in which the federal Medicaid authority pays a portion of the cost (known as federal financial participation or "FFP") and that portion is "matched" by the participating state.
46. Defendant Weems and CMS currently provide Ohio with approximately 60% federal financial participation as its share of Ohio's Medicaid costs.
47. Defendant Weems is joined as a necessary party under Fed. R. Civ. 19(a) pursuant to this Court's Order dated June 20, 2008.
48. Defendant Weems is sued in his official capacity only.

FACTS

49. Title XIX of the Social Security Act, 79 Stat. 286 (1965), (“the Medicaid Act”), at 42 U.S.C. Sections 1396 et seq., was enacted as a joint obligation by the federal government and participating states to provide medical assistance to low income and needy individuals who would otherwise be unable to pay for necessary health care. States are not required to participate, but once a state elects to participate in the program, it is bound by the federal law and regulations set forth in the Social Security Act and its implementing regulations.
50. Title XIX of the Social Security Act lists twenty-seven services to be provided to individuals who meet the qualifications listed in 42 U.S.C. § 1396d(a)(i)-(xiii).
51. 42 U.S.C. § 1396a(a)(43) requires participating states to include in their State Medicaid Plan a provision for the Early, Periodic Screening, Diagnosis and Treatment (EPSDT) of all Medicaid eligible children under the age of twenty-one.
52. The federal requirements for EPSDT are specifically detailed and require states to provide “such other necessary health care, diagnostic services, treatment, and other measures to correct or to ameliorate defects and physical and mental 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).
53. The State of Ohio participates in the Federal Medicaid program, including the EPSDT provisions.
54. Ohio’s EPSDT program is operated under the name “Healthchek” and is codified at O.A.C. §§ 5101:3-14-01 to 5101:3-14-22.
55. Plaintiff children are Medicaid eligible individuals under age twenty-one who are eligible for EPSDT services set forth under the federal Medicaid Act, 42 U.S.C. § 1396a(a)(43) and

42 U.S.C. § 1396d(r) and Ohio's Healthchek Program set forth at O.A.C. §§ 5101:3-14-01 through 5101:3-14-22.

56. Plaintiff children have all been diagnosed with a developmental disability on the autism spectrum.
57. Autism is now seen as a spectrum disorder, "Autism Spectrum Disorder" (ASD). Autistic disorder, the full-blown condition, is one of five disorders falling under the umbrella of "Pervasive Developmental Disorder" (PDD), a category of neurodevelopmental disorders. PDD includes the disorders commonly diagnosed as Asperger's Disorder, Rett Syndrome, Childhood Disintegrative Disorder, and PDD - Not Otherwise Specified (PDD-NOS).
58. Autism is a complex neurodevelopmental disability that generally appears during the first three years of life. It impacts the normal development of the brain, resulting in impairments of social interaction, verbal and non-verbal and communication, leisure or play activities, and learning. Most often if untreated it results in lifelong mental retardation.
59. Plaintiff children receive medically necessary services, such as community mental health services, from Step By Step Academy (SBSA) located in Worthington, Ohio under Ohio's Medicaid program.
60. SBSA is a nationally accredited and state certified community mental health agency dedicated to providing mental health services to children with autism.
61. Services provided by SBSA include full day center-based applied behavior analysis (ABA), psychological assessments and diagnosis, parent advocacy and resource information and home outreach services including one-to-one services.
62. Plaintiff children benefit from receiving these medically necessary services from SBSA. Benefits include 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.

63. The services provided by SBSA result in maximum reduction of physical and mental disabilities and restoration to the best possible functional level.
64. The services provided by SBSA to Plaintiff children are rehabilitative in nature.
65. The services provided by SBSA are recommended as a medical necessity for Plaintiff children by their physicians and / or other licensed practitioners.
66. In the past, Plaintiff children unsuccessfully tried to get these medically necessary services from other providers.
67. ODJFS requested federal funding for services provided to Plaintiff children by SBSA, but CMS has deferred payment to ODJFS for such claims because, according to CMS, they are not covered by Medicaid.
68. Plaintiff X.C. was told by several service providers that these were not appropriate placements for him and that he should not return due to his severely dangerous and aggressive behaviors.
69. Plaintiff K.W. was in a classroom in the Worthington City School District. If K.W. was being quiet and not acting out, he was left alone. There was not any interaction between K.W. and his teacher or other children.
70. Intensive behavioral intervention is a rehabilitative service with both medical and remedial components under 42 U.S.C. § 1396d(a)(13).

71. The Medicaid Act gives Plaintiff children an enforceable right to intensive behavioral intervention services.
72. Defendants promulgated rules, O.A.C. §§ 5101:3-27-02 and 5122-29-17, to be effective July 1, 2008.
73. O.A.C. § 5101:3-27-02 (eff. 7/1/08) lists services that are required to be rehabilitative in nature in order to be reimbursable under the State Medicaid plan as community mental health services.
74. Community psychiatric supportive treatment (CPST) service is listed as a community mental health service under O.A.C. § 5101:3-27-02 (eff. 7/1/08).
75. O.A.C. § 5101:3-27-02(A) (eff. 7/1/08) states that “[r]ehabilitative services provide for the maximum reduction of mental illness and are intended to restore an individual to the best possible functional level.”
76. O.A.C. § 5122-29-17 (eff. 7/1/08) defines CPST service as a rehabilitative service.
77. Defendants’ rules narrow the definition and eligibility for CPST services by creating an overly restrictive definition of ‘rehabilitative’ in violation of federal Medicaid provisions.
78. Defendants’ rules limit ‘rehabilitative’ services to individuals with “mental illness.” This definition is more restrictive than the federal regulations because it excludes other physical and mental disabilities.
79. Plaintiff children will face a reduction or total loss of the services provided to them by SBSA in violation of 42 U.S.C. §§ 1396a, 1396d(a) and 1396d(r)(5).
80. Plaintiffs have not found nor has the State offered services from an alternative provider.

81. Defendants' rules are contrary to the State's obligation to provide medically necessary services to children that correct or ameliorate conditions under the federal Medicaid requirements of EPSDT.

CLAIM FOR RELIEF

FIRST CAUSE OF ACTION

82. Plaintiffs restate and incorporate by reference paragraphs 1 through 81 as if fully rewritten herein.

83. Defendants have an obligation under 42 U.S.C. § 1396a(a)(10) to provide medical assistance, as defined in 42 U.S.C. §§ 1396d(a), to Plaintiff children.

84. Medical assistance includes payment for EPSDT services. 42 U.S.C. § 1396d(a)(4)(B). EPSDT provides for "such other necessary health care, diagnostic services, treatment, and other measures ... to correct or ameliorate defects and physical and mental 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).

85. Defendants' violated 42 U.S.C. § 1396a(a)(10) by failing to provide for making medical assistance available under the sections cited in this cause of action to all Medicaid-eligible individuals under the age of 21.

86. As a result of Defendants' violation, Plaintiff children will suffer a loss or reduction in medically necessary services provided to them under Medicaid.

87. Plaintiffs bring this action under 42 U.S.C. § 1983 because Defendants Stephenson and Jones-Kelley, acting under color of law, are depriving Plaintiffs of their rights under the laws of the United States by promulgating rules which reduce services that are guaranteed to

children under the EPSDT provisions in accordance with the federal Medicaid Act and implementing regulations.

SECOND CAUSE OF ACTION

88. Plaintiffs restate and incorporate by reference paragraphs 1 through 87 as if fully rewritten herein.
89. Pursuant to 42 U.S.C. § 1396a(a)(43)(C), Defendants Stephenson and Jones-Kelley are obligated to arrange for (directly or through referral to appropriate agencies, organizations, or individuals) providing corrective treatment for Plaintiffs.
90. Defendants' rules, effective July 1, 2008, restrict the types of corrective treatment Plaintiffs can receive by narrowing the definition and scope of rehabilitative services that are eligible for payment under Medicaid.
91. As a result of Defendants' violation, Plaintiff children will suffer a loss or reduction in medically necessary services provided to them under Medicaid.
92. Defendants' failure to arrange for corrective treatment for Plaintiffs violates 42 U.S.C. § 1396a(a)(43)(C).
93. Plaintiffs bring this action under 42 U.S.C. § 1983 because these Defendants, acting under color of law, are depriving Plaintiffs of their rights under the laws of the United States by promulgating rules which reduce services that are guaranteed to children under the EPSDT provisions in accordance with the federal Medicaid Act and implementing regulations.

THIRD CAUSE OF ACTION

94. Plaintiffs restate and incorporate by reference paragraphs 1 through 93 as if fully rewritten herein.

95. Defendants are required to furnish medical assistance as defined in 42 U.S.C. § 1396d(a), including but not limited to EPSDT services under 42 U.S.C. §§ 1396d(a)(4)(B) and 1396d(r), with reasonable promptness. 42 U.S.C. § 1396a(a)(8).
96. Plaintiffs will not be receiving these services in a timely and /or reliable manner at all or to the extent necessary to correct or ameliorate their conditions once Defendants' rules become effective July 1, 2008 because the rules limit services that are eligible for payment under Medicaid.
97. As a result of the change in rules, Defendants have failed to provide medical assistance with reasonable promptness in violation of 42 U.S.C. § 1396a(a)(8).
98. Plaintiffs bring this action under 42 U.S.C. § 1983 because Defendants Stephenson and Jones-Kelley, acting under color of law, are depriving Plaintiffs of their rights under the laws of the United States by promulgating rules which reduce services that are guaranteed to children under the EPSDT provisions in accordance with the federal Medicaid Act and implementing regulations.

REQUEST FOR RELIEF

Plaintiffs respectfully request that this Court grant the following relief:

- A. Order Defendants Stephenson and Jones-Kelley to continue to provide and / or arrange for medically necessary services, including 35-40 hours per week of applied behavior analysis, for Plaintiffs as determined by their physicians or other licensed practitioners;
- B. Immediately enjoin Defendants Stephenson and Jones-Kelley from enforcing their proposed rules, O.A.C. §§ 5101:3-27-02 and 5122-29-17, that fail to comply with the requirements of federal Medicaid law which require services to be provided to Plaintiffs;

- C. Declare that Defendants Stephenson's and Jones-Kelley's rules violate Plaintiffs' rights under the federal Medicaid law by as alleged in this Complaint, and by requiring that community mental health services be rehabilitative and limiting the types of services and definition of rehabilitative to reducing symptoms of mental illness;
- D. Declare the Defendants Stephenson's and Jones-Kelley's rules violate Plaintiffs' rights under federal Medicaid law because the rules do not allow medically necessary services to be provided that correct or ameliorate defects and physical and mental illnesses and conditions;
- E. Require Defendants Stephenson and Jones-Kelley to develop rules that comply with federal Medicaid law;
- F. Immediately enjoin Defendant Weems to comply with the orders of this court related to federal Medicaid statutes and to cease all efforts to claim federal financial participation or make findings in regard to Ohio's Medicaid program that would be in conflict with the rulings of this Court, and to further enjoin him to approve payment of federal financial participation for medically necessary services to correct or ameliorate Plaintiff children's defects and physical and mental illnesses and conditions that are provided to Plaintiff children by any certified Medicaid provider chosen by the Plaintiffs or the members of the Plaintiff association;
- G. Grant Plaintiffs' recovery of reasonable attorney's fees and costs in bringing this action;
- H. Grant Plaintiffs any and all other relief to which the Court believes they are entitled.

Respectfully submitted,

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Certificate of Service

This certifies that on June 24, 2008, a true copy of Plaintiffs' Amended Complaint was filed electronically. Notice of this filing will be sent to all registered parties by operation of the Court's electronic filing system. In addition, in accordance with F. R. Civ. P. 4, a copy has been sent by certified mail to the following:

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