

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

S.J., by and through her next friend, S.S.;)
Et al.,)

Plaintiffs.)

v.)

Civil Action No. 20-cv-4036

ROBERT KNODELL, in his official)
capacity as Acting Director of Missouri)
Department of Social Services, and)
MISSOURI DEPARTMENT)
OF SOCIAL SERVICES,)

Defendants.)
_____)

STIPULATION OF DISMISSAL

Pursuant to Federal Rule of Civil Procedure 41(a)(1)(A), the parties hereby stipulate that this action is dismissed pursuant to their settlement agreement, which is attached hereto as Exhibit A. This settlement agreement fully and finally resolves all claims pending in this case.

Respectfully submitted,

/s/ Joel Ferber
Joel Ferber # 35165
Lisa J. D'Souza # 65515
Jamie Rodriguez # 64323
Legal Services of Eastern Missouri
4232 Forest Park Avenue
St. Louis, Missouri 63108
(314) 534-4200
jferber@lsem.org
ljsouza@lsem.org
jlrodriguez@lsem.org

ERIC S. SCHMITT
Attorney General

/s/ Ashley Ray

Ashley Ray # 67894
Assistant Attorney General
P.O. Box 899
Jefferson City, MO 899
(573) 751-0652
Ashley.Ray@ago.mo.gov

Attorney for Defendants

/s/ Jane Perkins

Jane Perkins (*admitted pro hac vice*)
Sarah Grusin (*admitted pro hac vice*)
Catherine McKee (*admitted pro hac vice*)
M. Geron Gadd (*admitted pro hac vice*)
Arielle Linsey (*admitted pro hac vice*)
National Health Law Program
1512 E. Franklin Street, Suite 110
Chapel Hill, NC 27514
(919) 968-6308
perkins@healthlaw.org
grusin@healthlaw.org
mckee@healthlaw.org
gadd@healthlaw.org
linsey@healthlaw.org

Counsel for the Plaintiffs

Settlement Agreement

This Settlement Agreement (the “Agreement”) resolves the claims asserted in *S.J., et al. v. Knodell, et al.*, No. 2:20-cv-04036-MDH (W.D. Mo.). Plaintiffs’ Complaint in this action included factual allegations to support claims that Defendants are violating federal statutes prohibiting disability discrimination (the Americans with Disabilities Act and Section 504 of the Rehabilitation Act) and the Medicaid Act (EPSDT), and sought declaratory and injunctive relief on those claims. This Agreement, which is intended to resolve Plaintiffs’ claims based on those allegations, is made by and among Plaintiffs S.J., by and through her next friend, S.S.; P.W., by and through her next friend, A.W.; S.E.S., by and through her next friend, J.L-S.; T.S, by and through his guardian, M.S.; S.A., by and through her next friend, M.A.; B.B., by and through her next friend C.B.; I.B., by and through her next friend, A.B.; and the Caring for Complex Kids Coalition, and Defendants Robert Knodell and the Missouri Department of Social Services (collectively, the “Parties”).

Section 1. Purpose and Goals of Agreement

1. The Parties enter into this Agreement for the purposes and to achieve the goals enumerated below:

a. To implement changes to Defendants’ policies, procedures, and practices that will bring more timely relief to Plaintiffs, who are not receiving private duty nursing (“PDN”) services that they have been authorized to receive, than a litigated resolution of this dispute would yield;

b. To ensure that children authorized to receive PDN receive as much of the services authorized as possible;

c. To ensure the service and crisis planning needed to ameliorate the risk of unnecessary institutionalization faced by Plaintiffs, who do not receive all medically necessary services that they need to safely remain in the most integrated setting appropriate to their needs; and

d. To avoid delay and expense and conserve judicial resources, as the parties recognize that this case involves legal issues that may take a prolonged time to fully litigate and resolve and further recognize that continued litigation would be expensive, lengthy, and time-consuming.

Exhibit A

Section 2. Definitions

2. For purposes of this Agreement, the following terms shall have the meaning specified below.

“Case Management Services” means those services furnished to assist children eligible under the Missouri Medicaid State Plan who reside in a community setting or are transitioning to a community setting, in gaining access to needed medical, social, educational, and other services in accordance with 42 U.S.C. § 1396n(g)(2); 42 C.F.R. §§ 440.169, 441.18, 441.62. The assistance that case managers provide is set forth in 42 C.F.R. § 440.169(d), (e).

“Care Manager” or “Case Manager” or “Service Coordinator” means a person qualified to perform case management services.

“Child” and “Children” mean individuals under age 21 enrolled in the Missouri Medicaid program who have been authorized by Defendants, their agents, or other contractors to receive PDN services.

“Effective Date” means the business day following the date that the Agreement is fully executed by all Parties to the Agreement.

“EPSDT Services” means Early and Periodic Screening, Diagnostic and Treatment services, a benefit of the Missouri Medicaid program that provides comprehensive, screening, diagnostic, and treatment services to eligible children under the age of 21, as specified in 42 U.S.C. §§ 1396a(a)(10)(A), 1396a(a)(43), 1396d(a)(4)(B), 1396d(r); and 13 CSR 70-25.110.

“Family” or “Families” means a Child’s or Children’s parents, guardians, caregivers, and legally responsible adults.

“MO HealthNet” or “MHD” means the division of the Missouri Department of Social Services responsible for administration of the Missouri Medicaid program, with the exception of determination of eligibility for the program.

“Missouri Medicaid State Plan” or “State Plan” means the plan the State of Missouri has submitted to HHS in accordance with Title XIX of the Social Security Act, 42 U.S.C. §§ 1396-1396w-5, in effect as of the Approval Date, including any subsequent amendments thereto.

“Managed Care Organization” (MCO) means an entity or organization under contract with the State of Missouri to manage, coordinate, and provide health care services for Medicaid enrollees.

“Personal Care Services” or “PC Services” mean those home and community based services provided pursuant to 42 U.S.C. § 1396d(a)(24); 42 C.F.R. § 440.167, and 13 CSR 70-91.010 to a Child that include a range of assistance to allow a Child to accomplish activities of daily living or instrumental activities of daily living.

“Private duty nursing,” or “PDN,” means shift nursing services provided by a registered nurse (RN) or licensed practical nurse (LPN) to a Medicaid enrollee under 21 years of age who requires more individual and continuous care than is routinely provided by the nursing staff of a hospital or skilled nursing facility, as required by 42 U.S.C. § 1396d(a)(8) and implementing regulations and guidelines, including 13 CSR 70-95.010.

Section 3. Defendants’ Obligations

3. **No Admission of Liability.** Defendants do not, by their entry into this Agreement, admit any liability in connection with Plaintiffs’ claims.

4. **Maintenance of Effort.** Defendants will maintain the changes made to DSS and DHSS policies, procedures, and practices regarding PDN adopted since the initiation of this lawsuit, including any adopted pursuant to the Preliminary Agreement, ECF No. 106, or the Implementation Plan, ECF No. 199. Nothing in this Agreement will prohibit Defendants from making future program changes that are designed to increase the amount of PDN provided to children relative to the amount of PDN authorized for them.

5. **Incorporation of Prior Agreements.** The Parties incorporate herein the provisions set out in Paragraphs 1 and 9 of the Preliminary Agreement (ECF No. 106), and Paragraphs 13-33 and 42 of the Implementation Plan (ECF No. 199).

6. **Continued Good Faith Exploration of Innovations that Will Increase the Availability of Private Duty Nursing (“PDN”) to Children.** Pursuant to the Implementation Plan, Defendants will continue to explore the feasibility and adoption of a medical daycare model, as well as expanded use of telemedicine for virtual care management. In addition, Defendants will explore health homes for medically fragile children and crisis support teams to address the acute needs of children not receiving PDN. All of these potential innovations will promote the receipt of PDN by children at authorized levels.

7. **Implementation of FY2023 Rate Increases and Expectation that Rate Increases be Passed to Private Duty Nurses.** Defendants will take all action(s) necessary to implement increased Medicaid reimbursement rates for PDN services enacted by the Missouri Legislature in HB 3010. Defendants also will publish a bulletin or notice to PDN

agencies stating Defendants' expectations that rate increases will pass through to nurses directly providing care.

8. Formalize Service Coordinators' Responsibility to Assist with the Arrangement of PDN Services and Other Gap-Filling Services Where PDN is Unavailable.

a. Pursuant to the newly written policy in the DHSS/BSHCN HCY Guidebook, and the terms of this Agreement, Service Coordinators will:

i. **Where appropriate, participate in hospital discharge planning.** Service Coordinators will routinely discuss hospital discharge planning with the Child's Family and document their concerns, expected outcomes, and priorities, when they are made aware of a pending hospital discharge. Service Coordinators also will coordinate with hospital case managers, discharge staff, and PDN provider agencies to arrange in-home PDN services so that children who are medically stable can discharge into community placements with necessary supportive services. Further, Service Coordinators will document their efforts to coordinate in-home PDN and any other necessary supportive services for Children

ii. **Develop and implement a plan to address barriers to PDN, using an updated Home Visit Template and Instructions.** Service Coordinators will document all reasonably foreseeable barriers to the Child's receipt of authorized PDN hours and document all steps that will be taken by Service Coordinators, parent(s), and/or other responsible party(ies) to address barriers to the Child's receipt of all authorized PDN hours. The Home Visit Template and its Instructions will include a plan to address the barriers identified in the Template, as stated in Paragraph 12 of this Agreement. Defendants will collaborate with Plaintiffs' counsel to create the updated Home Visit Template and Instructions. Defendants will include the updated Home Visit Template and Instructions in the ongoing training referenced in Paragraph 15, to ensure that Service Coordinators understand its role in barrier removal, crisis planning, and referrals for additional case management or other services needed by the Child or Family as identified at the Service Coordinator's initial or periodic meetings with the Child and Family. During regular meetings between DSS and BSHCN, the use of the updated Home Visit Template and Instructions will be discussed to determine if it is being successfully utilized.

iii. **Continue to utilize a back-up plan to be included in the Child's record.** When a Child is not receiving all authorized PDN hours and faces imminent hospitalization and/or other institutionalization, the Service Coordinator will work with the Family to refer to and implement the back-up plan. The back-up plan shall also be re-evaluated quarterly to address current crises.

iv. **Refer Families for additional services and take steps to ensure connection to referred entities as set out in the Home Visit Template and Instructions.** The Home Visit Template and Instructions will also set out the process of making referrals and monitoring use of referrals and additional resources. If a Child may benefit from additional services because of a change in their needs or because the Child is not receiving the authorized level of PDN services, Service Coordinators will refer the Child and Family to a provider(s) of medical services, MHD, DMH, or other community resources. Service Coordinators will also review the services they are allowed to authorize when medically necessary, such as Home Health or Personal Care, to determine if adjustments to these services are medically necessary and appropriate, making adjustments if warranted and within program criteria contained in state regulation. The referral process will include, depending upon the needs of the Family and Child, the following: providing information to the families about available providers of medical services, community resources, and MHD and DMH Constituent Services contact information; offering to assist families with connecting to these resources at each quarterly home visit; and following up at each quarterly home visit to see if prior referrals are being used. In the event that the Family or Child is referred to MHD, MHD will be notified by the BSHCN. MHD Constituent Services will contact the Family or Child to assist, if needed.

b. When Service Coordinators become aware of Children not receiving all authorized PDN services, Service Coordinators will:

i. Work with the Child and Family to implement as necessary the plan to address barriers and the back-up plan, each of which will have been incorporated into the Child's record, which is discussed with the family each quarter;

ii. Offer another current provider list;

iii. Reach out to providers through email and/or by phone;

iv. Communicate with Program Managers (PM) and Regional Coordinators (RC) as needed, including when the Service Coordinator's efforts to remove barriers have been unsuccessful. Defendants will collaborate with the BSHCN to include this scenario in policy and in training. Continued training is referenced in Paragraph 15.

v. Use the updated Home Visit Template and Instructions to authorize other services or to refer to the appropriate provider(s), MHD, DMH, or other community resources, as needed and as appropriate for that Child. This may include additional case management if needed. Service Coordinators may provide resource and contact information to the Child and Family and will also generate a referral in writing (via email) to MHD and DMH when referring to them.

vi. Defendants will provide the BSHCN with monthly reports set forth in Paragraph 12 of this Agreement. The BSHCN will provide the reports to Service Coordinators. Service Coordinators will review the monthly reports prior to or during quarterly visits with the Children and Families.

9. Clarification of Written Policies, Procedures, and Practices to Confirm Service Coordinators' Responsibility to Ensure Evaluation of Children for All Medicaid- Reimbursable Services That They Might Need.

a. A written policy and the updated Home Visit Template will direct Service Coordinators to review the potential to authorize Personal Care, and to authorize those services when appropriate, understanding that PC services cannot replace PDN services. PC services may be authorized if they are medically necessary and assist the Child with accomplishing activities of daily living (ADLs). Service Coordinators will refer the need for other services to the appropriate provider(s) or to MHD, DMH, or other community resources as needed.

Pursuant to the newly written policy in the DHSS/BSHCN HCY Guidebook and this Agreement, Service Coordinators will:

i. Routinely discuss addressing barriers and crisis planning with the Child and Family and document their concerns, expected outcomes, and priorities and document all steps Service Coordinators will take in the event that authorized PDN hours are not staffed, including the steps in Paragraph 8(a). above.

ii. Document all reasonably foreseeable barriers to the Child's receipt of authorized PDN hours and all steps that will be taken by Service Coordinators and the Family to address and remove barriers to the Child's receipt of all authorized PDN hours.

b. Defendants will ensure that Children enrolled in the HCY Program and those who receive services through Managed Care are assessed for all Medicaid-Reimbursable Services for which they might qualify, and other services no less frequently than twice annually, and that the assessment, together with the results thereof, are incorporated into Children's records.

c. Defendants will develop an updated Home Visit Template and Instructions that shall be used to identify needs and barriers to Children's receipt of all authorized PDN services, and to facilitate referrals for further case management, other Medicaid-Reimbursable Services, and other services provided by Missouri agencies that would help remove barriers to Children's receipt of all authorized PDN services or help to maintain Children safely in community-based settings where the Children are not receiving all authorized PDN services.

d. Defendants will publish a provider bulletin regarding their policy allowing a Child to receive more than 16 hours of PDN services in unique circumstances, such as certain post-hospitalization circumstances. The bulletin will highlight examples of circumstances where more than 16 hours of PDN may be authorized, such as post hospitalization for a child newly requiring a ventilator, or babies/infants discharged from the hospital with extreme medical complexities.

10. **Updated Rate Study in FY2024.** Defendants will update the Mercer Rate Study following the implementation of the reimbursement rate increases for PDN provided in FY2023 budget legislation.

11. **Updated Provider Surveys.** Defendants will conduct a provider survey, nine months following implementation of the FY2023 reimbursement rate. The survey will ask providers about the availability of PDN services, any barriers to PDN access, and potential solutions to correcting those barriers and/or improving access. This survey will also ask providers the extent to which the rate increase has been passed through to direct care workers. Defendants will collaborate with Plaintiffs' counsel in developing the provider survey. To increase the survey response rate, Defendants will seek assistance from the Missouri Alliance for Home Care and the Missouri Council for In-Home Services, who will be asked to share a survey link with providers and encourage them to respond. Defendants will conduct a second provider survey one year after the first.

12. **Tracking of PDN Hours Authorized and Delivered.** Defendants will work with relevant personnel at the Bureau of Special Health Care Needs and the MCOs to track the amount of PDN authorized for each Child and the amount of PDN received by each Child on a monthly basis. Defendants will use this data to guide efforts to assist medically fragile Children in receiving the full amount, duration and scope of authorized PDN services. Defendants will use this data regarding the disparity between authorized and delivered PDN hours to identify and seek ways to remove barriers to Children's receipt of the full amount of PDN services for which they are authorized.

13. **Quarterly Reporting.** Defendants will provide Plaintiffs' counsel with aggregated information, broken down by county, regarding the number of Children authorized to receive PDN, the amount of PDN authorized, and the amount of PDN delivered to those Children on a quarterly basis. Defendants will also provide Plaintiffs' counsel with quarterly reports on their implementation of other substantive terms of the settlement agreement. Counsel for the Parties agree to meet and confer quarterly and any obligation to meet will expire two years after the execution of this agreement.

14. **Development of Additional Provider Capacity.** MHD will reach out to other state agencies, state universities with nursing programs, the Missouri Community College Association, the Missouri Board of Nursing, PDN agencies, and the Missouri Alliance for Home Care (MAHC) to schedule a collaborative meeting. MHD will propose an agenda with goals for the meeting to include the enhanced ability for PDN providers to recruit and train qualified nurses to provide services to Medicaid-eligible participants authorized to receive PDN. The agenda will include items addressing the types of activities that can help to accomplish these goals. Within 30 days after the meeting described in this paragraph, Defendants will create and publish a list of steps that they will take to attempt to develop provider capacity to deliver PDN services to children. Defendants will report to Plaintiffs' counsel the status of each step listed in Defendants' capacity building action plan at each quarterly meeting.

15. **Training.** On an annual basis, Defendants will provide training to all DSS and DHSS personnel involved in setting policy for or administration of the Healthy Children and Youth ("HCY") program regarding children's right to receive services in the most integrated setting appropriate to their needs; hospital discharge planning and facilitation; responding to gaps in care and crisis prevention; and service coordination for children who need and/or are authorized to receive PDN and PCA, or other Medicaid-reimbursable services.

Section 4. Plaintiffs' Obligations

16. **Dismissal of Lawsuit.** Upon execution of this Agreement by all Parties, Plaintiffs will prepare a stipulation of dismissal pursuant to Fed. R. Civ. P. 41. This stipulation will note that the Parties have entered into this Agreement, which fully and finally resolves all Plaintiffs' claims in the action.

17. **Written Notification.** Throughout the pendency of the Agreement, Plaintiffs' counsel, upon learning of Plaintiffs' non-receipt of any service or benefit specified in this Agreement, shall provide Defendants written notice of the deficiency to allow Defendants a reasonable opportunity to resolve or otherwise correct the issue.

Section 5. Other Provisions

18. **Discounted Attorney's Fees and Costs.** Defendants will pay \$5,000.00 of Plaintiffs' attorneys' fees and costs.

19. **Agreement is Enforceable Contract.** This Agreement shall be governed by the contract laws of State of Missouri without regard to conflict of law principles.

20. **Term of the Agreement.** This Agreement shall remain in effect for two years following its Effective Date.


21. **Construction of Agreement.** None of the Parties shall be considered to be the drafter of this Agreement for the purpose of any statute, case law, or rule of interpretation or construction would or might cause any provision to be construed against the drafter. This Agreement was drafted with substantial input by all Parties and their counsel.

22. **Entire Agreement.** This Agreement contains the entire agreement between the Parties relating to this Settlement.


23. **Limited Scope.** Nothing in this Agreement shall affect the rights of Plaintiffs or other Children with respect to other Medicaid benefits or services to which they might be entitled.

24. **Applicable Law.** The terms of this Agreement shall be governed by federal law as to the scope of the requirements of Medicaid's Early, Periodic, Screening, Diagnosis and Treatment program, and Defendants' obligations under the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213, and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 , and by Missouri law as to the enforcement of this Agreement.

25. **Execution of the Agreement.** This Agreement may be executed by the Parties in counterparts, and those counterparts shall have the same effect as if the Parties executed the same document, at the same time, in one another's presence.

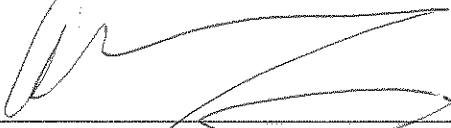
 8/29/22

Joel Ferber # 35165 DATE
Lisa J. D'Souza # 65515
Jamie Rodriguez # 64323
Legal Services of Eastern Missouri
4232 Forest Park Avenue
St. Louis, Missouri 63108
(314) 534-4200
jferber@lsem.org
lidsouza@lsem.org
jlrodriguez@lsem.org

 08-31-2022

Robert Knodell, Acting Director DATE
Missouri Department of Social Services

ERIC S. SCHMITT
Attorney General

 8/31/2022

Ashley Ray # 67894
Assistant Attorney General

Jane Perkins *JP* 8/29/22
DATE

Jane Perkins*
Sarah Grusin*
M. Geron Gadd*
Catherine McKee*
National Health Law Program
M. Geron Gadd*
Arielle Linsey*
National Health Law Program
1512 E. Franklin Street, Suite 110
Chapel Hill, NC 27514
(919) 968-6308
perkins@healthlaw.org
grusin@healthlaw.org
mckee@healthlaw.org
gadd@healthlaw.org
linsey@healthlaw.org

Counsel for the Plaintiffs
**admitted pro hac vice*

P.O. Box 861
St. Louis, MO 63188
(314) 340-7861
Ashley.Ray@ago.mo.gov

Attorney for Defendants