



July 18, 2011

The Honorable Jerry Brown
Governor
State of California
Capitol Building
Sacramento, CA 95814

RE: The DMHC autism settlement with Blue Shield is a sham

Dear Governor Brown,

The California Department of Managed Health Care (DMHC) has been heavily criticized by parents of autistic children and advocates since it changed the way it responds to insurance company denials of autism treatments under the Schwarzenegger administration at the behest of insurance companies. The “settlement” announced by the DMHC with Blue Shield last week is a sham that provides no solution and continues to allow Blue Shield to violate the law. This letter details the main deficiencies in the settlement, which contains such onerous requirements for families with autistic children that it will lead to delays, interruptions and continued denials of treatment.

As detailed below, among other problems, the settlement:

- 1) **Imposes “licensure” of ABA providers and supervisors not required by state law, which leaves autistic children without coverage for ABA services by the most qualified providers.** There is no California license for ABA providers. Licensed Marriage and Family Therapists and social workers, for example, rarely possess the special training necessary to oversee ABA treatments. Nationally certified ABA specialists are not allowed to supervise ABA under the settlement.
- 2) **Does not require insurers to provide either an ABA provider network or access to services.** The settlement waives state laws and regulations requiring Blue Shield to have an adequate network of providers.

- 3) **Gives Blue Shield an unilateral escape clause to cancel the agreement.** Blue Shield is allowed to ignore the settlement as long as it merely asserts that the law has changed.
- 4) **Reasserts incorrect interpretations of the state Knox Keene Act, giving the green light to other insurers to deny ABA services in violation of the Mental Health Parity Act.** The DMHC continues to hold that ABA providers must be licensed, even though no ABA-specific license exists.
- 5) **Includes an overbroad release from prior violations of the Knox Keene Act, letting Blue Shield off the hook for any past denials of autism treatments.** Under the settlement, parents and regulators will be barred from pursuing any claims regarding autism treatment, even if they are not related to the settlement or ABA.
- 6) **Fails to compensate thousands of families for past denials.** The settlement lets Blue Shield off the hook from compensating parents for tens of thousands of dollars that parents have paid out of pocket for ABA while awaiting the DMHC to take action.
- 7) **Allows unreasonably frequent challenges of “medical necessity.”** The settlement allows Blue Shield to challenge continuing ABA coverage every six months, placing a huge burden on parents caring for autistic children.
- 8) **Will likely allow lapses in coverage of ABA with harmful consequences for children.** Delays in care put health and safety of autistic children at risk.

Remarkably, the agreement appears to have been entered into without discussion or consultation with the Department of Insurance (CDI) or the autism providers or advocacy community, and was misleadingly portrayed in a positive light by DMHC officials at a legislative hearing last week held to review DMHC practices. The same DMHC regulators who folded on access to ABA under the pressure of insurance company lobbyists during the Schwarzenegger administration appear to be responsible for negotiating the settlement with Blue Shield. As Consumer Watchdog warned your staff months ago, the governor’s office must be directly involved in establishing the state’s autism policy going forward, and needs to replace the current leadership at the DMHC as soon as possible.

We urge you to stop DMHC from entering into any more settlements with health insurance companies that fail to take into consideration the perspective of parents of autistic children and the consumer advocates who work with them and represent them. A pro-consumer settlement would include consultation with consumers, not just the health insurers.

DMHC’s 2009 policy change

Beginning in March of 2009, the DMHC made a policy change to allow insurance companies to refuse to pay for ABA on the grounds that it is “educational” and not “medically effective,” and paradoxically on the grounds that ABA providers are not “licensed” even though no such state license exists. That change, adopted illegally by the DMHC according to a California court, was lobbied for by health insurance companies looking to boost profits and adopted under the Schwarzenegger administration, well known for its partiality to health insurers. Consumer

Watchdog sued the DMHC, in part, over its requirement that ABA providers must be licensed as a condition to be covered under insurance contracts. The DMHC continues to fight that lawsuit, underscoring its refusal to embrace a systemic fix.

In stark contrast, the CDI, led by Insurance Commissioner Dave Jones and enforcing the same state law as the DMHC – the Mental Health Parity Act – unequivocally requires health insurers it regulates to pay for ABA. The CDI's practice comports with the overwhelming medical literature providing that ABA is the most effective medical treatment for autism, and state law, which does not require that ABA providers be licensed as a condition for coverage under insurance contracts.

SUMMARY OF MAJOR PROBLEMS WITH THE BLUE SHIELD SETTLEMENT

Below is a summary of the major problems with the DMHC settlement with Blue Shield. There are many other loopholes built into the agreement giving Blue Shield the power to cut-off access to care. We look forward to discussing all of these issues with you and your staff. Solving the autism coverage debacle is not only important to families of autistic children: When private insurance companies refuse to pay for an autistic child's care, the financial burden ultimately falls on the public, either through the state Department of Developmental Services Regional Centers or through the school districts.

“Licensure” provisions of the settlement leave parents in no better position than status quo

In an apparent change of position, the settlement provides that Blue Shield will cover ABA services *supervised* by a licensed individual, even if the individual providing the care directly is not licensed. However, other provisions of the settlement negate any advantage to parents:

- For example, under the agreement, licensed providers must supervise and maintain professional liability insurance covering the unlicensed individuals. It is unlikely that licensed clinical social workers, for example, would be willing and able to supervise and pay for liability insurance covering services done by others and outside of the scope of their practice and expertise.
- The alternative, that services be rendered by a licensed provider who personally provides the services, is impossible to satisfy because Blue Shield claims that it has been unable to locate providers who meet this criterion. (pg. 3, ¶ 9.
- Individuals certified by the Behavior Analyst Certification Board (BACB) – expertly trained in the development of ABA treatment plans – may *not* oversee ABA providers under the settlement. In addition, few state licensed individuals also hold a BACB certificate, and thus even if a parent could find a licensed supervisor to oversee the ABA treatments, that supervisor would likely not have the training necessary to provide the care. (The Consumer Watchdog lawsuit seeks a judicial declaration requiring health insurers to cover ABA therapy when such services are administered or supervised by a health care professional who is either licensed by the state *or* certified by the BACB.)

Neither a provider network nor access to services is required

The settlement agreement *relieves Blue Shield of state law and regulatory requirements*, which provide that insurers must have adequate networks of qualified providers and care supervisors for patients with autism. (See e.g., Health & Safety Code §§ 1367 (d) and (e); Code of Cal. Regulations §§ 1300.67.2.2, 1300.67.1-2). The settlement encourages patient abandonment by leaving families to fend for themselves and locate a provider who meets the terms of the settlement agreement, and if providers and supervisors cannot be located, then Blue Shield has *no obligation to pay for services*. (pg. 5, ¶ A. 2, lines 13-14.) It is misleading for the settlement to promise parents that providers will be reimbursed at the “in-network” rate because the terms of the settlement make it likely that parents will be unable to identify a qualified provider at all. (pg. 9, ¶ G.)

Blue Shield only agrees “to assist the Enrollees by providing information regarding Supervising Licensed Providers that *are known to Blue Shield* that will agree to the conditions in Paragraph A.2.” However, the settlement agreement specifies that DMHC and Blue Shield do not agree about whether providers *exist* who meet the settlements terms: “...the Department disputes Blue Shield’s assertion that licensed providers are unavailable to provide ABA services to Plan enrollees.” (pg. 3, ¶ B.)

The families’ searches for acceptable providers are likely to be unsuccessful - if Blue Shield, with a dedicated provider recruitment department, allegedly cannot find them, how can a layperson burdened with caring for a special needs child? Instead of relieving Blue Shield of its legal obligation to provide access to care providers, the DMHC should enforce the law. This settlement expressly states that it is in the “best interests of Blue Shield to enter into this Agreement” with no mention of the public’s interest or the DMHC’s obligation to enforce the legislature’s consumer protections. (pg. 4, line 11-12.)

The settlement gives Blue Shield a unilateral escape clause

The settlement further allows Blue Shield the ability, unilaterally and in its sole and unfettered discretion, to cease to comply. The settlement states that:

“In the event that Blue Shield ‘contends’ that . . . an act of the Legislature of the State of California or of the United States Congress or applicable regulations issued by a federal agency . . . or final judgment . . . entered by a Court of competent jurisdiction . . . support Blue Shield contentions . . .”, Blue Shield may cease performance under the Agreement.

(pg. 9, ¶ J.) There is no requirement that Blue Shield’s contention be reasonable, nor any objective standards or process by which that contention is evaluated. Instead, Blue Shield need only express a belief, without reasons or any support, and give notice to DMHC. The DMHC must then attempt to renegotiate a settlement, and if that cannot be achieved, initiate a new enforcement action.

The settlement reasserts incorrect interpretations of state law, giving the green light to other insurers to deny ABA services

DMHC and Blue Shield reassert erroneous views of the Knox-Keene Act and the Mental Health Parity Act, giving the green light to other insurers to continue to deny care in violation of the law:

- DMHC asserts, notwithstanding the terms of the settlement that provide otherwise, that licensure is required for ABA providers (pg. 2, ¶ 4-5) even though state law does not require licensure. (See e.g., Health & Safety Code 1367 (b) providing that licensure is only required where the legislature has specifically adopted a licensing requirement; the legislature has yet to adopt such a requirement relating to ABA.)
- Blue Shield asserts that ABA is not a health care service and disputes that ABA is a required covered benefit (pg. 2-3, ¶¶ 7, 10, 11(A)(2)) even though volumes of medical literature find it is a highly effective and medically necessary treatment for autism.

The settlement includes an overbroad release of prior violations by Blue Shield

In “exchange” for the empty provisions of the settlement, the DMHC releases Blue Shield from any violation of the Knox-Keene Act “*relating to or arising from Blue Shield’s actions regarding coverage or claims regarding for ABA for ASD, [autism spectrum disorders] or PDD [pervasive developmental disorders]*” prior to the date of the Settlement. (pg. 10, ¶ K).

- With this sweeping language, Blue Shield gets a get-out-of-jail-free card for any violations of the law regarding treatments for any autism spectrum disorder, encompassing a wide range of diagnoses, at any time in the past, and is shielded from enforcement actions related to its denial *of any autism spectrum disorder treatments*.
- For example, the release language is so broad that it captures claims that a patient with Asperger Syndrome might have against Blue Shield for the denial of Speech Therapy or Occupational Therapy, not just for ABA and related treatment.

The settlement fails to compensate thousands of families for past denials

Blue Shield is not required to compensate thousands of families that have paid tens of thousands of dollars out of pocket while waiting for the DMHC to resolve wrongful denials of ABA by Blue Shield.

- The settlement only purports to require Blue Shield to retroactively compensate the seven “Subject Enrollees” identified in the settlement; however, the settlement permanently releases Blue Shield from claims brought by *any enrollees*.
- In reality, the seven “Subject Enrollees” will likely not receive compensation because the settlement only requires retroactive reimbursement if the families can provide confirmation that past treatment complied with requirements of the settlement. (pg. 6, ¶ B). Past ABA treatment will in all likelihood not comply with the settlement requirements, which did not exist at the time the treatment was provided.
- If those seven enrollees’ treatment did not comply with the new requirements, Blue Shield would not pay out a dime in retroactive compensation even as it is granted immunity from past wrongs because the DMHC promises to “take no further enforcement action against Blue Shield relative to the provision of ABA services to the Subject Enrollees.” (pg. 6, ¶ B).

- Even if the Seven Subject enrollees previously met the requirements of the settlement, they would only be compensated from the point in time that the DMHC deemed the denied ABA services to be covered. (pg. 6, ¶ B.) As a result, these families will not receive compensation for ABA services they paid for out of pocket while waiting months for the DMHC to review their complaint.

Allowing “medical necessity” reviews every six months is an unreasonably short timeframe

The settlement agreement provides that initial services will be covered for a period specified by the provider or six months, whichever is shorter. (pg. 7, ¶ D). There is no justification for arbitrarily limiting to a six month period the care that a provider deems medically necessary. Moreover, six months is too short a period to evaluate progress and continued medical necessity of the ABA treatment, since treatment usually takes at least two years. Requiring parents to potentially seek Independent Medical Reviews (IMR) of ABA denials every six months imposes an extreme burden.

Lapse in coverage of ABA will likely occur with harmful consequences

The settlement provides that “. . . Blue Shield will continue to provide coverage for ABA services at the number of hours per week/month specified by the recommending provider following [] a decision to terminate or . . . reduce hours for 60 calendar days, or upon completion of the Independent Medical Review process, whichever occurs first.” (pg. 8, ¶ E.) This provision will likely lead to a lapse in coverage because denials and subsequent IMRs generally take longer than 60 days. However, the coverage will be cut off at the 60-day mark if it “occurs first.” Because of this potential lapse in coverage, an expedited appeals process should be required if coverage will be lost. A change/lapse in services can seriously impede progress for individuals receiving ABA treatments and consequently should be avoided.

We look forward to discussion these issues with you in more detail. We believe that with your involvement, California can emerge as a national leader in autism treatment.

Sincerely,



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