

PARTIAL SETTLEMENT AGREEMENT

I. Parties to the Agreement

1. The parties to this Agreement are the Named Plaintiffs in *Alberto N., et al. v. Don A. Gilbert, et al.*, Civil Action No. 6:99CV459, United States District Court, Eastern District of Texas, Tyler Division: Alberto N., by his parents and next friends, Mr. and Mrs. N.; Alice F., by her next friend, Ms. K.; Keyaira R.-D., by her parent and next friend, Ms. D.; Kaitlyn C., by her parent and next friend, Ms. C.; Aaron D., by his parent and next friend, Ms. D.; Andrew M., by his parent and next friend, Ms. M.; Evan W., by his parents and next friends, Mr. and Mrs. W.; and Chelsea C., by her parent and next friend, Ms. C.; and the Named Defendants, Don A. Gilbert, in his official capacity as Commissioner of the Texas Health and Human Services Commission, Dr. Charles Bell, in his official capacity as the Deputy Commissioner of the Texas Department of Health, and James R. Hine, in his official capacity as the Commissioner of the Texas Department of Human Services.

II. General Provisions

2. It is expressly understood and agreed that all terms of this document are contractual and not merely recitals. The parties to this Agreement intend that this written document will incorporate the full terms and conditions of their agreement. It is also understood that the titles for each section of the document and all exhibits are part of the Agreement.

3. The parties acknowledge that this Agreement does not alter federal law and that such law and the terms of this Agreement will govern in any future action under this Agreement.

4. This Agreement applies to persons under the age of 21 years who are eligible to receive Early and Periodic Screening, Diagnosis, and Treatment (Texas Health Steps) benefits under the Texas Medical Assistance Program, established under Chapter 32, Texas Human Resources Code.

5. This Agreement is limited in scope to the issues raised in Plaintiffs' First Amended Complaint, filed in Civil Action No. 6:99CV459, and as described in paragraphs 51 and 52.

6. This Agreement is subject to the approval of the Attorney General, the Governor, and the Comptroller of the State of Texas. Defendants will make a good faith effort to obtain all necessary approvals by October 15, 2001.

7. To the extent that any provision of this Agreement is held to be invalid or unenforceable, such provision shall be severed from the remainder of the Agreement and the Agreement shall be construed as if the invalid or unenforceable provision did not exist.

III. Definitions

8. “Agency” means the Health and Human Services Commission and, when appropriate, the agency operating the relevant part of the Texas Medical Assistance Program.
9. “Contractor” means the health insuring organization, as that term is defined in 42 C.F.R. § 434.2, for the Texas Medical Assistance Program.
10. “Federal financial participation” means the federal government’s share of a state’s expenditures under the Medicaid program.
11. “Medicaid” means the Texas Medical Assistance Program established under the provisions of Chapter 32, Texas Human Resources Code, and subject to the requirements of Title XIX of the Social Security Act and its regulations.
12. “Notice” means a letter provided by the Agency to a Medicaid beneficiary under the age of 21 informing the beneficiary of any reduction, denial, or termination of a requested service, as described in 42 C.F.R. §§ 431.206 and 431.210.
13. “Policy” means all terms, criteria, guidelines, and standards that inform Agency action.
14. “Therapy” means occupational therapy, physical therapy, and services for individuals with speech, hearing and language disorders, as those terms are defined in 42 C.F.R. § 440.110.

IV. Resolution as to Certain Claims

A. Notice

15. Specific notice must be provided upon a determination by the Agency reducing, denying, or terminating a requested Medicaid service. The basis for such a determination will be limited to either not medically necessary or because federal financial participation is not available.
16. The notice informing the Medicaid beneficiary of a reduction, denial, or termination of a requested service because there is no federal financial participation for the requested service shall:
 - (a) state that this is the basis;
 - (b) contain an explanation of the basis for the Agency’s decision, applying the state or federal law to the individual’s particular request; and
 - (c) cite the particular federal law that prohibits federal financial participation for the requested service.
17. All notices required under this Agreement pursuant to paragraph 16 must contain—
 - (a) The dates, type, and amount of service requested;
 - (b) A statement of what action the Agency intends to take (i.e., a reduction, denial, or termination of services);
 - (c) The basis for the intended action;

- (d) An explanation of the basis for the Agency's decision, applying the state and/or federal law to the individual's particular request;
- (e) A cite to the particular federal law that prohibits federal financial participation for the requested service;
- (f) A toll free number for the individual's use in seeking additional information regarding the intended action, for requesting help understanding the notice, and for requesting a fair hearing;
- (g) Information about accessing medical case management; and,
- (h) An explanation of --
 - (1) The individual's right to a fair hearing;
 - (2) The number of days and date by which the fair hearing must be requested;
 - (3) The individual's right to represent himself or herself, or use legal counsel, a relative, friend, or other spokesman;
 - (4) The right to either a written, telephonic, or in-person hearing;
 - (5) The right to examine, at a reasonable time before the date of the hearing, the contents of the case file and any and all documents to be used by the Agency at the hearing; and,
 - (6) The circumstances under which services will be continued if a hearing is requested.

18. The notice informing the Medicaid beneficiary of a reduction, denial, or termination of a requested service, based on a determination that the requested service is not medically necessary, shall (a) state that this is the basis; (b) contain an explanation of the medical basis for the Agency's decision, applying the Agency's policy or the accepted standards of medical practice to the individual's particular medical circumstances; and (c) cite the particular state and federal law that supports, or the change in state or federal law that requires, the intended action.

19. All notices required under this Agreement pursuant to paragraph 18 must contain--
- (a) The dates, type, and amount of service requested;
 - (b) A statement of what action the Agency intends to take (i.e., a reduction, denial, or termination of services);
 - (c) The basis for the intended action;
 - (d) An explanation of the medical basis for the Agency's decision, applying the Agency's policy or the accepted standards of medical practice to the individual's particular medical circumstances;
 - (e) A cite to the particular state and federal law that supports, or the change in state or federal law that requires, the intended action;
 - (f) A toll free number for the individual's use in seeking additional information regarding the intended action, for requesting help understanding the notice, and for requesting a fair hearing;
 - (g) Information about accessing medical case management; and,
 - (h) An explanation of --

- (1) The individual's right to a fair hearing;
- (2) The number of days and date by which the fair hearing must be requested;
- (3) The individual's right to represent himself or herself, or use legal counsel, a relative, friend, or other spokesman;
- (4) The right to either a written, telephonic, or in-person hearing;
- (5) The right to either examine, at a reasonable time before the date of the hearing, the contents of the case file and any and all documents to be used by the Agency at the hearing; and
- (6) The circumstances under which services will be continued if a hearing is requested.

20. When a request for prior authorization is submitted to the Agency or its contractor with incomplete specific documentation/information: the Agency or its contractor will return the request to the Medicaid provider with a letter describing the documentation that needs to be submitted, or when possible, the Agency or its contractor will contact the Medicaid provider by telephone and obtain the information necessary to complete the prior authorization process. If the documentation/information is not provided within sixteen (16) business hours of its request to the Medicaid provider, a letter will be sent to the Medicaid beneficiary explaining that the request cannot be acted upon until the documentation/information is provided, along with a copy of the letter sent to the Medicaid provider describing the documentation/information that needs to be submitted. If the documentation/information is not provided to the Agency or its contractor within seven days (7) of its letter to the Medicaid beneficiary, a notice will be sent to the Medicaid beneficiary informing the beneficiary of its denial of the requested service due to the incomplete documentation/information, and providing the beneficiary an opportunity to request a fair hearing. Notwithstanding the above, the Agency shall require its contractor to modify these procedures as necessary to improve the prior authorization process. The Agency shall notify Plaintiffs' counsel thirty (30) days prior to the implementation of any such changes.

21. Notices must substantially conform to the sample notices attached as Exhibit A.

22. All notices required under this Agreement must be written at a sixth grade reading level with the exception of citations, medical terms, policy, or law.

23. Within six (6) months of the effective date of this Agreement, the Agency shall require its contractor to implement the terms of paragraphs 15 through 22.

B. Fair Hearings

24. The Agency's fair hearing system must meet the due process standards set forth in Goldberg v. Kelly, 397 U.S. 254 (1970), and any additional standards specified in 42 C.F.R. §§ 431.200-250.

25. Hearing decisions must be based exclusively on evidence introduced and received at the hearing and must meet the standards specified in 42 C.F.R. § 431.244. This requirement will be reduced to writing and will be part of the training and guidance materials provided to all Agency hearing officers.

26. Because fair hearings must be based exclusively on evidence introduced and received into evidence at the hearing, hearing officers are prohibited from engaging in ex parte communications relating to matters to be adjudicated. This prohibition will be reduced to writing and will be part of the training and guidance materials provided to all Agency hearing officers.

27. If the fair hearing decision sustains the Agency action reducing, denying, or terminating a requested service on the basis that there is no federal financial participation, the decision must contain an explanation of the basis for the hearing officer's decision, applying the state and federal law to the individual's particular request.

28. If the fair hearing decision sustains the Agency action reducing, denying, or terminating a requested service on the basis that the service is not medically necessary, the decision must contain an explanation of the medical basis for the hearing officer's decision, applying the Agency's policy or the accepted standards of medical practice to the individual's particular medical circumstances.

29. All hearing decisions must substantially conform to the sample hearing decision attached as Exhibit B.

30. Within thirty (30) days of the date of the fair hearing decision, the Agency will redact all confidential information from the decision and make it available to the public.

C. Therapy

31. The parties agree that no limitations exist for the provision of medically necessary physical therapy, occupational therapy, and services for individuals with speech, hearing, and language disorders, for which federal financial participation is available. The Agency shall approve medically necessary physical therapy, occupational therapy, and services for individuals with speech, hearing, and language disorders, except where federal financial participation is not available.

32. The Agency shall provide medically necessary physical therapy, occupational therapy, and services for individuals with speech, hearing, and language disorders if there is or will be progress made towards a goal, as supported by documentation from the prescribing physician and the treating therapist. Therapy goals include improving function, maintaining function, or slowing the deterioration of function.

33. The Agency will revise the Medicaid Provider Procedures Manual to conform with the policies described in paragraphs 31 and 32 of this Agreement. The Manual revisions will also include a description of the documentation that must be submitted by the prescribing physician and

treating therapist, when seeking authorization for therapy services. The Agency will provide Plaintiffs' counsel with a copy of these revisions for review and comment prior to publication in the Medicaid Provider Procedures Manual. Any corrections or clarifications will be made in subsequent Texas Medicaid Bulletins.

34. Within ninety (90) days of the effective date of this Agreement, the Agency will publish an explanation of the policies described in paragraphs 31 and 32 of this Agreement in the Texas Medicaid Bulletin. The text to be published in the Bulletin will be provided to Plaintiffs' counsel for review and comment at least fourteen (14) days prior to the publication deadline.

35. The Agency will publish an explanation of the policies described in paragraphs 31 and 32 of this Agreement in the 2002 Medicaid User's Guide. This information will also be highlighted in a letter to be included with the Medicaid User's Guide. The User's Guide and the text of the letter will be provided to Plaintiffs' counsel for review and comment at least fourteen (14) days prior to the publication deadline.

V. Additional Terms and Provisions

A. Medicaid User's Guide and Hotline

36. The Agency will update and improve the Medicaid User's Guide on an annual basis.

37. The Agency will make reasonable good faith efforts to provide beneficiaries who contact its contractor's toll-free Medicaid Hotline with consistent, detailed information regarding the following: (a) the intended action; (b) the basis for the intended action; (c) the procedure for requesting a fair hearing; and (d) accessing medical case management services.

B. Training

38. The Agency will train its relevant staff concerning all requirements of this Agreement within ninety (90) days of its effective date.

39. The Agency will require its contractor to train its relevant staff concerning all requirements of this Agreement within ninety (90) days of its effective date.

40. The Agency will approve the contractor's curriculum and verify that the training has been conducted for all relevant staff.

41. The Agency will provide copies of all training materials to Plaintiffs' counsel prior to the training sessions.

42. Plaintiffs' counsel may observe one (1) Agency training and one (1) contractor training conducted pursuant to this Agreement.

C. Reporting

43. The parties acknowledge the importance of mutual communication during the implementation of the terms of this Agreement. To ensure effective and timely communication regarding the changes to the state's Medicaid programs necessitated by this Agreement, the Agency or its counsel shall submit three (3) written status reports to Plaintiffs' counsel. These status reports shall provide detailed information as to all activities undertaken to fully implement the terms of this Agreement. The reports shall be provided according to the following schedule: ninety (90) days, one hundred and eighty (180) days and three hundred and sixty (360) days after the effective date of this Agreement.

44. For a period of two (2) years after the effective date of this Agreement, the Agency or its counsel shall submit to Plaintiffs' counsel quarterly reports concerning the following Medicaid services for EPSDT beneficiaries: private duty nursing services; home health skilled nursing visits; durable medical equipment and supplies; and occupational therapy, physical therapy and services for individuals with speech, hearing and language disorders. These reports shall identify the number of: requests for prior authorization; approvals of prior authorization requests; modifications of prior authorization requests; and denials of prior authorization requests. Agency expenditures for the identified services shall also be reported to Plaintiffs' counsel on a quarterly basis or as the data is typically reported in the regular course of business. These reports will be provided to Plaintiffs' counsel within fourteen (14) days from the date that the information from the previous quarter becomes available.

D. Monitoring and Verification

45. Each quarter, the Agency will provide Plaintiffs' counsel with copies of the following notices:

- (a) denials on the basis of no federal financial participation: all notices, not to exceed two hundred (200);
- (b) denials and reductions of therapy services: thirty percent (30%), or two hundred (200), whichever is less;
- (c) denials and reductions of all other services on the basis of no medical necessity: two hundred (200).

46. The notices described in (b) and (c) above will be selected randomly. All notices will be redacted, and will be provided for a period of two (2) years beginning six (6) months from the effective date of the Agreement.

E. Effective Date, Adoption and Approval of the Agreement by the Court

47. This Agreement is effective as of the date of the Court's approval and adoption of the Agreement.

F. Incorporation, Jurisdiction, and Enforcement

48. It is the intention of the parties that the Agreement be fully incorporated into an order of the Court and that the Court have exclusive jurisdiction over all matters relating to enforcement of the Agreement. This Agreement neither adds to nor subtracts from the court's jurisdiction.

49. In the event that any party fails to comply with any portion of this Agreement, the party alleging noncompliance may seek enforcement of the Agreement in the United States District Court for the Eastern District of Texas. Prior to seeking enforcement, and absent an emergency, the party alleging noncompliance will provide notice to the opposing party and will give them thirty (30) days to correct the alleged noncompliance.

50. Failure by a party to enforce any provision of this Agreement shall not be construed as a waiver of the party's right to enforce other provisions of the Agreement.

G. Dismissal of Certain Claims

51. Within thirty (30) days of the effective date of this Agreement, the parties will file with the Court a Joint Stipulation of Voluntary Dismissal, in accordance with Rule 41(a) of the Federal Rules of Civil Procedure. The Stipulation will dismiss with prejudice claims related to:

- (a) therapy services;
- (b) the provision of notice and an opportunity to request a fair hearing upon denial, reduction, or termination of a requested Medicaid benefit;
- (c) the adequacy of the written notices denying, reducing, or terminating a Medicaid benefit;
- (d) Medicaid fair hearing procedures; and
- (e) the contents of Medicaid fair hearing decisions.

52. The above provision and the Joint Stipulation of Voluntary Dismissal does not apply to the following issues:

- (a) the obligation to provide notices to parents or legal guardians of beneficiaries under the age of 18;
- (b) the continuation of prior-authorized services pending appeal;
- (c) the authority of hearing officers;
- (d) private duty nursing services;
- (e) personal care services; and
- (f) durable medical equipment and supplies.

H. Attorneys' Fees, Costs, and Expenses

53. Within fourteen (14) days of the effective date of the Agreement, Plaintiffs will submit to Defendants a request for reasonable attorneys' fees, costs, and expenses. Defendants will respond to this request within sixty (60) days of receipt. Within sixty (60) days of an agreement on fees,

Defendants will seek the approval of the Attorney General, the Governor, and the Comptroller of the State of Texas and, once approved, will forward a check made payable to Advocacy, Inc., 7800 Shoal Creek Blvd., Suite 171-E, Austin, Texas 78757. If the parties cannot agree on the amount of attorneys' fees, or the required approvals are not obtained, Plaintiffs may petition the Court for an award of reasonable attorneys' fees, costs, and expenses.

I. Counterparts

54. This Agreement may be executed in multiple counterparts, each of which, if fully executed, may be admitted in evidence as a duplicate original.

J. Binding

55. This Agreement is final and binding on the parties, including all principals, agents, administrators, representatives, successors, and assigns. Each party has a duty to so inform any such principal, agent, administrator, representative, successor or assign.

K. Execution of Agreement

56. Counsel for Defendants represent that they have been fully authorized by their clients to enter into and execute this Agreement, under the terms and conditions contained herein.

SIGNED on the dates indicated below:

MARYANN OVERATH
State Bar No. 00786851

Date: _____

PETER HOFER
State Bar No. 09777275

Date: _____

ADVOCACY, INCORPORATED
7800 Shoal Creek, Suite 171-E
Austin, Texas 78757
Tel. (512) 454-4816

MAUREEN O'CONNELL
State Bar No. 00795949

Date: _____

SOUTHERN DISABILITY LAW CENTER
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ATTORNEYS FOR PLAINTIFFS

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ATTORNEYS FOR DEFENDANTS

NAMED PLAINTIFFS:

PATRICIA N.
Parent and next friend of Plaintiff Alberto N.

Date: _____

MARIA K.
Next friend of Plaintiff Alice F.

Date: _____

RITA D.
Parent and next friend of Plaintiff Keyaira R.-D.

Date: _____

KATHY C.
Parent and next friend of Plaintiff Kaitlyn C.

Date: _____

MARIE D.
Parent and next friend of Plaintiff Aaron D.

Date: _____

KAREN M.
Parent and next friend of Plaintiff Andrew M.

Date: _____

ALLEN W.
Parent and next friend of Plaintiff Evan W.

Date: _____

CHAVA W.
Parent and next friend of Plaintiff Evan W.

Date: _____

PATRICIA C.

Parent and next friend of Plaintiff Chelsea C.

Date: _____