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8 BEFORE THE DEPARTMENT OF MANAGED HEALTH CARE
9 OF THE STATE OF CALIFORNIA

10 In the Matter of the Investigation and
11 Examination of:

12 California Physicians' Services, dba Blue
13 Shield of California,

14 Respondent.
15

Enforcement Matter Nos.: 10-560, 10-561, 11-
018, 11-022, 11-038, 11-039, and 11-262

SETTLEMENT AGREEMENT

16
17 **I. Recitals**

18 1. This Settlement Agreement ("Agreement") is made and entered into on this 11th day of
19 July, 2011, by and between CALIFORNIA PHYSICIANS' SERVICES d/b/a BLUE SHIELD OF
20 CALIFORNIA (BLUE SHIELD) and the DEPARTMENT OF MANAGED HEALTH CARE (the
21 Department) solely for the purpose of resolving the dispute regarding the coverage of Applied Behavior
22 Analysis (ABA) services for the treatment of pervasive developmental disorder (PDD) or autism
23 spectrum disorder (ASD) to enrollees who are the subjects of Enforcement Matter numbers 10-560, 10-
24 561, 11-108, 11-022, 11-038, 11-039, and 11-262 (Subject Enrollees) and to establish an agreement to
25 cover ABA for Other Enrollees of the Plan.

26 2. ABA therapy is defined as "the design, implementation, and evaluation of systematic
27 instructional and environmental modifications to promote positive social behaviors and reduce or
28

1 ameliorate behaviors which interfere with learning and social interaction." Government Code section
2 95021(d)(1).

3 3. A dispute exists between the Department and BLUE SHIELD regarding BLUE
4 SHIELD's obligation to provide coverage for ABA, as described more fully below.

5 4. The Department asserts that under current California law, covered health care services
6 must be rendered by a person licensed, registered, or otherwise approved by the California legislature to
7 diagnose and/or treat health care conditions. [hereafter referred to as "licensed health care provider(s)
8 under California law"].

9 5. The Department further asserts that ABA is a covered health care service that health
10 plans must arrange, in accordance with the Knox-Keene Act (Act) and regulations, for children diagnosed
11 with ASD or PDD if a licensed health care provider (a) prescribes and/or orders ABA and (b) opines that
12 due to the severity of deficits, the condition must be treated by a clinician licensed by the state of
13 California with training and experience in delivering ABA therapy.

14 6. The Department also contends BLUE SHIELD is obligated to identify and contract with
15 a sufficient number of licensed providers qualified to deliver ABA therapy to ensure that it has an
16 adequate network to provide medically necessary services to enrollees of the plan.

17 7. BLUE SHIELD disputes that ABA is a health care service and disputes that ABA is a
18 required covered benefit under the Act.

19 8. BLUE SHIELD further asserts that ABA is generally provided by individuals who are
20 not licensed or certified by the state of California as health care providers¹; and that BLUE SHIELD's
21 contract(s) expressly exclude coverage for services provided by any individual or entity that is not
22 licensed or certified by the state to provide health care services and is not operating within the scope of
23 such license or certification.
24

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26
27 ¹Although some providers may be "certified" by the Behavior Analyst Certification Board (BCAB), that
28 is a private entity that does not result in state licensure or certification.

1 9. BLUE SHIELD at the direction of the Department, previously agreed, subject to an
2 express reservation of rights, to provide coverage for ABA when rendered by licensed health care
3 providers. BLUE SHIELD now contends it has been unable to locate licensed health care providers
4 willing to directly provide ABA services to plan enrollees.

5 10. BLUE SHIELD asserts that, since there are no California licensure requirements
6 applicable to the provision of ABA services, that the ABA can be performed by unlicensed people.
7 BLUE SHIELD further asserts that ABA is not a health care service.

8 11. Notwithstanding the above, the parties are willing to enter into this Agreement to resolve
9 the pending dispute over coverage of ABA services for the Subject Enrollees and for Other Enrollees as
10 set forth below.

11 In order to resolve this dispute:

12 A. It is understood and agreed that BLUE SHIELD is not admitting or waiving its
13 right to assert in any other subsequent dispute, Enforcement Matter, litigation, mediation,
14 arbitration or in any other forum its contention that:

15 1. BLUE SHIELD has not violated the Knox-Keene Act with regard for
16 requests for coverage of or claims for ABA services, and

17 2. ABA services are not health care services;

18 And BLUE SHIELD is not waiving its right to argue:

19 3. that it has no obligation to cover ABA services rendered by unlicensed
20 individuals; and

21 4. that ABA is not a covered service and is not a benefit of any BLUE
22 SHIELD health plan.

23 B. It is further understood that the Department disputes BLUE SHIELD's assertion
24 that licensed providers are unavailable to provide ABA services to Plan enrollees.

25 C. As indicated above, the Department's position is that ABA, when provided as a
26 health care service to treat PDD or ASD, must be provided by persons who are licensed health
27 care providers under California law, and nothing in this Agreement should be construed to
28 indicate otherwise.

1 ASD or PDD, and the services are supervised by a Licensed Provider ("Supervising Licensed Provider")
2 who;

- 3
- 4 a. Supervises and bills for the services of the unlicensed individual;
- 5 b. Utilizes the billing codes supplied by BLUE SHIELD;
- 6 c. Maintains appropriate professional liability insurance covering the ABA
7 services provided;
- 8 d. Retains appropriate treatment records, including the identity of the
9 individual providing the ABA services, in accordance with professional
10 standards of practice; and
- 11 e. Agrees to provide copies of the enrollees' ABA treatment records to
12 BLUE SHIELD on reasonable request and at reasonable intervals.

13 If a Supervising Licensed Provider cannot be found who will agree to the above conditions in Paragraph
14 A.2., then BLUE SHIELD will have no obligation to pay for ABA services actually performed by
15 unlicensed individuals. However, BLUE SHIELD will assist the Enrollee by providing information
16 regarding Supervising Licensed Providers that are known to BLUE SHIELD that will agree to the
17 conditions in Paragraph A.2.

18 B. Once the conditions in Paragraph A., above, are satisfied, BLUE SHIELD will seek to
19 arrange for the provision of medically necessary ABA services for each Subject Enrollee who is still
20 enrolled with BLUE SHIELD. ABA services will be authorized not later than ten (10) calendar days
21 from the date of the execution of this Agreement or satisfaction of the conditions of Paragraph A.,
22 above, whichever is later. The ABA services shall be covered for a minimum of six (6) months, at the
23 number of hours per week/month as specified by the Subject Enrollee's provider who recommended the
24 ABA services. If the Subject Enrollee is not currently receiving ABA services or his current provider(s)
25 refuse to agree to the terms of Paragraph A above, the Plan will undertake all reasonably necessary steps
26 to identify alternate providers who will agree to the terms of Paragraph A. above, within thirty (30) days
27 of the date the ABA services are ordered by and deemed medically necessary by a Licensed Provider.

28

1 During the initial six (6) month period an enrollee receives ABA services, BLUE SHIELD will
2 not dispute the medical necessity of the services or the frequency at which the services were
3 recommended. If, prior to the date this Agreement is executed, a Subject Enrollee has been receiving
4 ABA services which, as a result of this Agreement, are being covered by BLUE SHIELD, then BLUE
5 SHIELD reserves the right to conduct a periodic medical necessity review, as described herein, when the
6 Subject Enrollee has received ABA services for at least six (6) months. Following the initial six (6)
7 month period, BLUE SHIELD shall have the right to conduct periodic medical necessity reviews, as set
8 forth in Paragraph E. After the date this Agreement is signed and the Department has confirmed that
9 BLUE SHIELD has complied with this Agreement with respect to the Subject Enrollees, the Department
10 will take no further enforcement action against BLUE SHIELD relative to the provision of ABA
11 services for the Subject Enrollees, as long BLUE SHIELD continues to comply with the terms of this
12 Agreement and applicable Knox-Keene Act statutes and regulations. For each Subject Enrollee who
13 paid for ABA services for any dates of service between the date of notification of coverage of the ABA
14 services sent by the Department's Help Center to the given enrollee, and the date BLUE SHIELD
15 commences services pursuant to this Agreement, BLUE SHIELD will reimburse those Subject Enrollees
16 for the costs of those services within thirty (30) calendar days of receipt of the minimum documentation
17 reasonably necessary to verify the charges paid for those services and confirmation that the conditions
18 set forth in Paragraph A. above have been satisfied.

19 C. BLUE SHIELD agrees to prepare and implement an Action Plan (AP) that establishes
20 policies and procedures for handling enrollee questions, concerns, and grievances regarding coverage of
21 ABA. The AP will specify whether and when BLUE SHIELD is responsible for receiving and
22 responding to enrollee questions, concerns, and grievances regarding ABA. HMO enrollees shall not be
23 required to contact their medical groups with questions, concerns, and grievances regarding ABA.

24 The AP must be submitted to the Department's Office of Enforcement within thirty (30) calendar
25 days from the date this Agreement is signed for the Department's review and approval to ensure that the
26 AP appropriately addresses the items set forth in this Paragraph C. BLUE SHIELD agrees that it must
27 implement the AP no later than October 1, 2011.

28

1 D. BLUE SHIELD agrees to provide coverage for all medically necessary ABA services for
2 the treatment of PDD or ASD for all current and future enrollees ("Other Enrollees") in accordance with
3 the terms of this Agreement from Licensed Providers or Supervising Providers that agree to the
4 conditions set forth in Paragraph A. above. The services shall be covered for a duration equal to the
5 length of time specified by the enrollee's provider, or for a period of six (6) months, whichever is
6 shorter, at the number of hours per week/month as specified by the enrollee's provider who
7 recommended the ABA services. During the initial six (6) month period following commencement of
8 the services, BLUE SHIELD will not dispute the medical necessity of the services or the frequency at
9 which the services were recommended (whether or not prior authorization is sought or obtained,
10 coverage will not be denied during this initial period based on medical necessity). Except for denials
11 based upon the enrollee no longer being a BLUE SHIELD member or as otherwise permitted by this
12 Agreement and while this Agreement is in effect, any denial of coverage for ABA services shall be
13 construed as a denial based on medical necessity and will be subject to review under the Department's
14 Independent Medical Review process.

15 E. BLUE SHIELD will provide coverage for the ABA services described above at the
16 number of hours per week/month as specified by the enrollee's provider who recommended the ABA
17 services as long as those services remain medically necessary as provided by Licensed Providers or by
18 Supervising Providers. BLUE SHIELD may revisit the issue of whether the services remain medically
19 necessary through periodic reviews, which shall not take place until the enrollee has received at least six
20 (6) months of ABA services. Subsequent periodic reviews may take place in six (6) month increments
21 following that initial periodic review. The conditions referenced in Paragraph A. above in this
22 Agreement shall be applicable to ABA provided during and as a result of periodic reviews. Those
23 periodic reviews shall not result in delays in the provision of ABA services and shall be performed while
24 services continue. Should BLUE SHIELD require as part of a periodic review any type of analysis,
25 status or progress update from a provider beyond the normal and routine chart notes and reports already
26 prepared by the provider, for which BLUE SHIELD and the provider do not have specific contractual
27 terms, then BLUE SHIELD must pay the provider's reasonable and customary charges for the
28 preparation of such an analysis, status or progress update, for a period of time not to exceed four hours.

1 In no event shall any portion of the cost for the preparation of such an analysis, status or progress update
2 be borne by the enrollee other than applicable co-payments and deductibles. Should the ABA provider
3 fail to provide, within thirty (30) days from the date of the request, the analysis, status or progress
4 update reasonably necessary for BLUE SHIELD to perform a periodic review, BLUE SHIELD may
5 discontinue coverage for that provider's service, in which case BLUE SHIELD will provide the enrollee
6 with written notice and offer to continue to cover ABA from another provider, subject to the conditions
7 stated herein. BLUE SHIELD will continue to cover the services of the current provider for up to thirty
8 (30) days to provide an opportunity for the enrollee to locate, and for services to be transferred to,
9 another provider who meets the conditions of Paragraph A. BLUE SHIELD will cooperate with the
10 enrollee in attempting to locate another provider by providing information regarding Licensed Providers
11 and Supervising Licensed Providers that are known to BLUE SHIELD that will agree to the conditions
12 in Paragraph A above. Other than a review in which relevant necessary records cannot be obtained, if,
13 as a result of a periodic review, BLUE SHIELD decides to terminate or reduce the number of hours of
14 ABA services, such decision shall be reviewable in the Department's Independent Medical Review
15 process following participation by the enrollee in BLUE SHIELD's internal grievance process for thirty
16 (30) days. In any such case, BLUE SHIELD will continue to provide coverage for ABA services at the
17 number of hours per week/month specified by the recommending provider following such a decision to
18 terminate or intention to reduce hours for sixty (60) calendar days, or upon completion of the
19 Independent Medical Review process, whichever occurs first.

20 F. When reimbursing claims for ABA services rendered, BLUE SHIELD agrees that it will
21 not place any unique conditions on providers of ABA services for the treatment of PDD or ASD other
22 than those set forth in this Agreement, including but not limited to Paragraph A, and except as otherwise
23 required of other providers. BLUE SHIELD additionally agrees that it will adjudicate complete claims
24 in accordance with the provisions of the Act and regulations. BLUE SHIELD and its ABA providers
25 may reach more specific agreements regarding claims reimbursement and issues of documentation by
26 contract. However, in no event shall BLUE SHIELD request that an ABA provider waive any of its
27 rights under the Knox-Keene Act or related regulations, and that includes requiring more documentation
28 of a claim than is permissible under the law.

1 G. When reimbursing PPO enrollees for medically necessary ABA services in accordance
2 with the conditions set forth herein, BLUE SHIELD agrees to reimburse at the preferred provider level
3 of benefits.

4 H. Any examination, survey, or audit conducted by the Department relating to the provision
5 of ABA services to BLUE SHIELD enrollees will be reviewed in consideration of the terms of this
6 Agreement.

7 I. Except for actions for the purpose of enforcing this Agreement, neither the existence of
8 this Agreement nor any of the terms thereof shall be admissible in any legal proceeding of any kind
9 whether against BLUE SHIELD or against the Department or against any third party relating to the legal
10 obligations of a health care service plan to provide coverage for ABA, including but not limited to the
11 legal case now pending California Association of Health Plans v. California Department of Managed
12 Health Care, et al. Sacramento Superior Court, Case No. 34-2010-00090594. It is understood and
13 agreed that, by entering into this Agreement, BLUE SHIELD is not waiving and specifically reserves all
14 rights and defenses in any such actions brought by the Department or by any third party. It is also
15 understood and agreed that, by entering into this Agreement, the Department specifically reserves its
16 right to assert in any such actions, that ABA, when provided as a health care service to treat PDD or
17 ASD, must be provided by persons authorized to perform health care by the state of California or by the
18 State in which the services are rendered.

19 J. In the event that BLUE SHIELD contends that (1) an act of the Legislature of the State of
20 California or of the United States Congress or applicable regulations issued by a federal agency, or (2) a
21 final judgment has been entered by a Court of competent jurisdiction from which no appeal or other
22 judicial review has been taken, or, if appealed, the final judgment has been affirmed by the court of last
23 resort and is no longer subject to further appeal or review support BLUE SHIELD's contentions that (1)
24 ABA is not a health care service required to be covered under the Act; or (2) BLUE SHIELD may
25 lawfully deny coverage for services provided by individuals who are not Licensed Providers; or (3)
26 BLUE SHIELD may lawfully deny coverage for services provided by an individual who is a Licensed
27 Provider but is providing services beyond the scope of his or her license, BLUE SHIELD will give no
28 less than sixty (60) calendar days' notice to the Department of its intention to cease performance under

1 this Agreement. That notice shall be sent to the attention of the Director with a copy to the head of the
2 Department's Office of Enforcement. If the Department disagrees with BLUE SHIELD's assertion that
3 the legislation or final judgment supports its contentions as set forth above in this Paragraph J, the
4 Department will give BLUE SHIELD written notice. BLUE SHIELD may then suspend its
5 performance under this Agreement and the parties will meet in good faith to renegotiate this Agreement.
6 If the disagreement cannot be resolved, this Agreement shall not limit or impede the Department's right
7 to pursue enforcement against BLUE SHIELD for failing to comply with the Knox-Keene Act
8 requirements relating to the treatment of children with ASD or PDD.

9 K. By entering into this Settlement Agreement, the parties hereby settle the pending
10 enforcement matters identified above, and all issues, accusations, and claims that the Department has or
11 may have against BLUE SHIELD, including, without limitation, any alleged violation of the Knox-
12 Keene Act, relating to or arising from BLUE SHIELD's actions regarding coverage or claims for ABA
13 for ASD or PDD that occurred on or before the date this Agreement is executed.


14 L. BLUE SHIELD agrees that if it breaches this Agreement, the terms of this Agreement do
15 not prevent the Department from exercising any and all other aspects of its disciplinary authority to
16 ensure BLUE SHIELD's compliance with all of its obligations under this Agreement.

17 IN WITNESS WHEREOF, the parties hereby execute this Agreement by the signatures of their
18 respective duly authorized officials.

19
20 Dated: _____

Edward G. Heidig II
Interim Director
Department of Managed Health Care

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22
23
24 Dated: 7/11/2011



Paul Markovich
Executive Vice President, Chief Operating Officer
California Physicians' Service
dba Blue Shield of California