

Case No. 08-3931

---

In the  
United States District Court of Appeals  
for the Sixth Circuit

---

Parents' League for Effective Autism Services, *et al.*  
*Plaintiffs-Appellees*

v.

Helen Jones-Kelley, *et al.*  
*Defendants-Appellants*

On Appeal from the United States District Court  
for the Southern District of Ohio, Case No. 2:08-CV-421

---

Response Brief of Plaintiffs-Appellees  
Parents' League for Effective Autism Services, *et al.*

---

**MICHELLE F. ATKINSON** (0079185)  
**SUSAN G. TOBIN** (00217250)  
Ohio Legal Rights Service  
50 West Broad Street, Suite 1400  
Columbus, Ohio 43215-5923  
Telephone: (614) 466-7264  
Facsimile: (614) 644-1888  
[matkinson@olrs.state.oh.us](mailto:matkinson@olrs.state.oh.us)  
[stobin@olrs.state.oh.us](mailto:stobin@olrs.state.oh.us)

Counsel for Plaintiffs

**ARA MEKHJIAN** (0068800)  
Senior Assistant Attorney General  
Health and Human Services Section  
30 East Broad Street, 26th Floor  
Columbus, Ohio 43215-3400  
Telephone: (614) 466-8600  
Facsimile: (866) 478-7791  
[amekhjian@ag.state.oh.us](mailto:amekhjian@ag.state.oh.us)

Counsel for Helen E. Jones-Kelley,  
Director of the Ohio Department of  
Job and Family Services

**ROGER F. CARROLL** (0023142)  
Principal Assistant Attorney General  
Health and Human Services Section  
30 East Broad Street, 26th Floor  
Columbus, Ohio 43215-3400  
Telephone: (614) 466-8600  
Facsimile: (614) 466-6090  
[rcarroll@ag.state.oh.us](mailto:rcarroll@ag.state.oh.us)

Counsel for Sandra Stephenson,  
Director of the Ohio Department of  
Mental Health

**GREGORY G. LOCKHART**  
United States Attorney

Mark T. D'Alessandro (0019877)  
Assistant United States Attorney  
303 Marconi Boulevard, Suite 200  
Columbus, Ohio 43215  
Telephone: (614) 469-5715  
Facsimile: (614) 469-5653  
[Mark.dalessandro@usdoj.gov](mailto:Mark.dalessandro@usdoj.gov)

Counsel for Centers for Medicare and  
Medicaid Services

---

**Disclosure of Corporate Affiliations and Financial Interest**

Pursuant to Sixth Circuit Rule 26.1, Plaintiffs-Appellees state that none of the Plaintiffs-Appellees are subsidiaries or affiliates of a publicly owned corporation not named in the appeal.

/s/ Michelle F. Atkinson  
Michelle F. Atkinson  
Attorney for Plaintiffs-Appellees  
January 12, 2009

## Table of Contents

Table of Contents .....	i
Table of Authorities .....	iii
Statement Regarding Oral Argument .....	1
I. STATEMENT OF THE CASE .....	2
II. STATEMENT OF FACTS .....	4
III. SUMMARY OF THE ARGUMENT .....	9
A. Standard of Review.....	9
B. Under EPSDT Plaintiff children are entitled to services listed in 42 U.S.C. § 1396d(a) that a licensed practitioner finds to be medically necessary to correct or ameliorate a condition.....	10
C. The proposed rule, Ohio Admin. Code § 5122-29-17, defines CPST services in a more restrictive manner than is permissible under EPSDT. ....	11
D. Plaintiff children have shown that they will suffer irreparable harm if Defendants’ proposed rules were implemented.....	12
E. Administrative Remedies.....	12
F. Contrary to Defendants’ arguments, the trial court properly addressed Defendants’ legal arguments.....	14
G. Contrary to Defendants' arguments, the trial court properly addressed Defendants' evidence regarding CMS' alleged interpretation of Medicaid coverage.....	14
IV. ARGUMENT.....	15
A. Standard of Review.....	15

B. Under EPSDT Plaintiff children are entitled to services listed in 42 U.S.C. § 1396d(a) that a licensed practitioner finds to be medically necessary to correct or ameliorate a condition.....16

    1. Overview of EPSDT.....17

    2. Services need not be specifically listed in Section 1396d(a) to be covered pursuant to the EPSDT mandate. ....20

    3. There is no requirement that services be “rehabilitative” in nature in order to be covered under Section 1396d(a)(13).....21

C. The proposed rule, Ohio Admin. Code § 5122-29-17, defines CPST services in a more restrictive manner than is permissible under EPSDT. ....25

D. Plaintiffs have shown that they will suffer irreparable harm if Defendants’ proposed rules were implemented. ....28

E. Administrative Remedies.....29

F. Contrary to Defendants’ arguments, the trial court properly addressed Defendants’ legal arguments.....31

G. Contrary to Defendants’ arguments, the trial court properly addressed Defendants’ evidence regarding CMS’ alleged interpretation of Medicaid coverage.....32

V. CONCLUSION .....34

Certificate of Compliance .....36

Certificate of Service .....37

**Table of Authorities**

**Cases**

*A.M.H. v. Hayes*, 2004 U.S. Dist. LEXIS 27387 (S.D. Ohio 2004) ..... 14, 31, 32  
*American Federation of Musicians v. Stein*, 213 F.2d 679 (6th Cir. 1954) .....16  
*Brandeis Mach. & Supply Corp. v. Barber-Greene Co.*, 503 F.2d 503, 505 (6th Cir. 1974).....16  
*Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.*, 511 F.3d 535, 541 (6th Cir. 2007).....15  
*Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984)..... 14, 33  
*Chisholm v. Hood*, 133 F. Supp. 2d 894 (E.D. La. 2001) ..... 17, 20, 21  
*Christian Schmidt Brewing Co. v. G. Heileman Brewing Co.*, 753 F.2d 1354, 1356 (6th Cir. 1985) .....16  
*Collins v. Hamilton*, 349 F.3d 371, 376 n.8 (7th Cir. 2003).....19  
*Hummel v. Ohio Dep’t. of Job & Family Servs.*, 164 Ohio App. 3d. 776, 777 (Ohio Ct. App. 2005) ..... 4  
*Illinois Hospital Assoc. v. Illinois Dep’t of Public Aid*, 576 F. Supp. 360, 371 (N.D. Ill. 1983) .....27  
*John B. ex rel. L.A. v. Menke*, 176 F. Supp. 2d 786, 800 (M.D. Tenn. 2001).....19  
*Katie A. v. Los Angeles County*, 481 F.3d 1150, 1154 (9th Cir. 2007).....17  
*Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991).....15  
*Moore v. Medows*, 563 F. Supp. 2d 1354 (N.D. Ga. 2008).....18  
*Patsy v. Board of Regents*, 457 U.S. 496, 502 (1982).....29  
*Pediatric Specialty Care, Inc. v. Ark. Dept. of Human Servs.*, 293 F.3d 472, 480 (8th Cir. 2002) ..... 19, 20  
*Pediatric Specialty Care, Inc. v. Ark. Dept. of Human Servs.*, 443 F.3d. 1005 (8th Cir. 2006).....21, 22  
*Rosie D. v. Romney*, 410 F. Supp. 2d 18 (D. Mass. 2006) ..... 19, 22  
*S.D. v. Hood*, 391 F.3d 581 (5th Cir. 2004).....18  
*Sandison v. Michigan High School Athletic Ass’n.*, 64 F.3d 1026, 1030 (6th Cir. 1995).....16  
*Stanton v. Bond*, 504 F.2d 1246, 1249 (7th Cir. 1974) .....18  
*U.S. v. Miami Univ.*, 294 F.3d 797, 806 (6th Cir. 2002) .....15  
*Washington v. Reno*, 35 F.3d 1093, 1098 (6th Cir. 1994).....15

**Statutes of the United States**

20 U.S.C. §§1400, *et seq.*.....16  
 42 U.S.C. §1396a.....19, 32  
 42 U.S.C. §1396d(a) ..... 10, 14, 16, 18, 20, 32  
 42 U.S.C. §1396d(a)(6)..... 20  
 42 U.S.C. §1396d(a)(1) – (28) .....18  
 42 U.S.C. §1396d(a)(13)..... 19, 20, 21, 22, 24, 32  
 42 U.S.C. §1396d(r)(5) ..... 18, 20, 28  
 42 U.S.C. §1983.....29

**Rules**

6 Cir. R. 32(a).....36  
 Fed. R. App. P. 32(a)(7)(B).....36  
 Fed. R. App. P. 32(a)(7)(B)(iii).....36  
 Fed. R. App. P. 32(a)(7)(C).....36  
 Fed. R. App. P. 43(c)(2)..... 2

**State Statutes**

Ohio Rev. Code § 5111.01 ..... 7

**State Administrative Rules**

Ohio Admin. Code 5101:1-37-01..... 7  
 Ohio Admin. Code 5101:3-1-01 .....23  
 Ohio Admin. Code 5101:3-1-01(A) .....23  
 Ohio Admin. Code 5101:3-14-05(E).....23  
 Ohio Admin. Code 5101:3-27-02.....11  
 Ohio Admin. Code 5101:3-27-02(A)(eff. 7/1/08).....8, 26  
 Ohio Admin. Code 5101:3-27-02(eff. 7/1/08).....2, 4, 8, 34  
 Ohio Admin. Code 5101:6-3-01(A) .....30  
 Ohio Admin. Code 5122-29-17 ..... 11, 25  
 Ohio Admin. Code 5122-29-17(A)(eff. 7/1/08).....8, 26, 27  
 Ohio Admin. Code 5122-29-17(B)(1)(eff. 7/1/08) .....27  
 Ohio Admin. Code 5122-29-17(B)(2)(eff. 7/1/08) .....27  
 Ohio Admin. Code 5122-29-17(B)(3) .....25  
 Ohio Admin. Code 5122-29-17(B)(9) .....26  
 Ohio Admin. Code 5122-29-17(eff. 7/1/08) ..... 2, 4, 8, 11, 25, 34

**Other Authorities**

Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders*  
§299.00 (4th ed. 1994). ..... 4

**Statement Regarding Oral Argument**

Plaintiffs-Appellees Parents' League for Effective Autism Services, *et al*,  
respectfully request the opportunity for oral argument.

**I. STATEMENT OF THE CASE**

Plaintiffs, 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, filed this action in the district court on May 2, 2008. Plaintiff children are Medicaid eligible. At the time of the filing of this action, Plaintiff children were receiving medically necessary services, including applied behavioral analysis (ABA) services, funded through Medicaid from Step By Step Academy (SBSA) in Worthington, Ohio.

Defendants Helen Jones-Kelley<sup>1</sup>, Director of Ohio Department of Job and Family Services, and Sandra Stephenson, Director of Ohio Department of Mental Health, proposed rules (Ohio Admin. Code §§ 5101:3-27-02 and 5122-29-17), with an effective date of July 1, 2008. If the rules were to take effect, medically necessary services that are currently provided to Plaintiff children by SBSA and funded by Ohio's Medicaid program would be greatly reduced and / or completely terminated.

Plaintiff children sought an injunction from the United States District Court for the Southern District of Ohio to prevent the proposed rules from being implemented. They alleged that the rules would violate federal Medicaid law and

---

<sup>1</sup> Helen Jones-Kelley resigned from office of Director of Ohio Department of Job and Family Services on December 17, 2008. Douglas E. Lumpkin was appointed Director of Ohio Department of Job and Family Services by Governor Strickland on December 19, 2008 and will begin on January 12, 2009. Pursuant to Fed. R. App. P. 43(c)(2), "[w]hen a public officer who is party to an appeal or other proceeding in an official capacity ... otherwise ceases to hold office, the action does not abate. The public officer's successor is automatically substituted as a party."

cause irreparable harm to Plaintiffs. Pls. Mot. for TRO, Record Entry No. 3; ROA p. 24. Plaintiffs joined Centers for Medicare and Medicaid Services (CMS) pursuant to the district court's order. Record Entry No. 24; ROA p. 628.

Defendants filed a motion to dismiss which the district court denied on June 30, 2008. Record Entry No. 34; ROA p. 805. Defendants do not appeal the denial of their motion to dismiss. Their appeal is limited to the granting of the preliminary injunction.

A hearing was held on June 27, 2008 regarding Plaintiffs' request for a preliminary injunction. On June 30, 2008 the district court issued a preliminary injunction which enjoined Defendants from implementing the proposed rules. Record Entry No. 40; ROA p. 955. Defendants filed a joint motion to stay the injunction on July 10, 2008. Record Entry No. 43; ROA p. 972. Additionally, Defendants Jones-Kelley and Stephenson, filed a joint Notice of Appeal on July 10, 2008. Record Entry No. 44; ROA p. 1104. The district court denied Defendants' joint motion to stay the injunction on July 17, 2008. Record Entry No. 48; ROA p. 1145. Finally, on July 17, 2008, the district court ordered a stay of further proceedings in the district court until a decision is rendered by the Sixth Circuit Court of Appeals. Record Entry No. 49; ROA p. 1157.

## II. STATEMENT OF FACTS

On June 30, 2008, the district court enjoined Defendants Jones-Kelley and Stephenson from implementing the proposed Medicaid rules Ohio Admin. Code §§ 5122-29-17 and 5101:3-27-02. Opinion and Order Granting the Preliminary Injunction, Record Entry No. 37 (Opinion), p. 23; ROA p. 952. The district court held that Plaintiff children “established a strong likelihood of success on the merits of the underlying allegation that the proposed rules violate federal law.” Opinion and Order Denying Defs. Mot. to Stay, Record Entry No. 48 (July 17 Opinion), p. 5; ROA p. 1149.

Plaintiff children are all Medicaid eligible children under the age of 21 with a diagnosis on the autism spectrum. Opinion p. 2; ROA p. 931. Autism is a diagnosis found in the *Diagnostic and Statistical Manual of Mental Disorders*, 4th Ed., 1994 (DSM IV) ). Mulick Decl. at ¶ 17, Record Entry No. 3-2; ROA. p. 46. “Autism is a medical disorder characterized by an inability to interact socially, repetitive behavior and language dysfunction.” *Hummel v. Ohio Dep’t. of Job & Family Servs.*, 164 Ohio App. 3d. 776, 777 (Ohio Ct. App. 2005). For a child with autism, “the best treatment plan will include ABA, the only treatment approach confirmed as effective by a comprehensive evaluation of all proposed therapies in a well known government sponsored review process.” Mulick Decl. at ¶ 20, Record Entry No. 3-2; ROA p. 46-47. Research has also shown that “children with

autism have the best chance for success when they receive 30 – 40 hours per week of intensive, one-on-one behavioral intervention based on strategies of Applied Behavior Analysis.” Rosner Decl. p. 1, Record Entry No. 3-10; ROA p. 85. SBSA bases its program on this research. When children are referred to SBSA, the staff psychologists<sup>2</sup>, Dr. Beth Rosner and Dr. Jeffrey Christiansen, conduct appropriate assessments and psychological evaluations if those have not been done already. Tr. at 28-29. SBSA’s psychologists look at the needs of the child and make a recommendation as to whether placement of the child at SBSA would be appropriate. Tr. at 29. The psychologists create an Individualized Service Plan (ISP) to identify the child’s behaviors that need treatment and SBSA uses that plan to provide treatment to the children. Tr. at 31. SBSA is a nationally accredited and state certified community mental health agency that provides mental health services, including intensive behavioral intervention services called ABA, to children with autism. Opinion p. 2; ROA p. 931; Tr. at 28.

ABA uses a one-to-one approach that relies on reinforced practice of various skills. Mulick Decl. at ¶ 21, Record Entry No. 3-2; ROA p. 47. The goal of ABA therapy is “to get the child as close to typical developmental functioning as possible.” Mulick Decl. at ¶ 21, Record Entry No. 3-2; ROA p. 47. For children with autism, intensive behavioral interventions “represent the treatment modality

---

<sup>2</sup> “ABA programs are usually conducted under the supervision of a behavioral psychologist.” Mulick Decl. at ¶ 25, Record Entry No.3-2; ROA p 47.

that provides the maximum reduction of physical and mental disability to their best possible functional level.” Mulick Decl. at ¶ 35, Record Entry No. 3-2; ROA p. 48.

The trial court concluded that Plaintiff children received services funded by Medicaid from SBSA that were medically necessary. Opinion p. 3; ROA p. 932. Plaintiffs receive 35-40 hours per week, year round, of one-to-one intensive behavioral therapy from SBSA. The trial court also found that Plaintiffs provided evidence that they have benefitted from the services received at SBSA. Opinion pp. 3-4; ROA pp. 932-33. *See also*, Christiansen Decl. at ¶¶ 7-8, Record Entry No. 3-6; ROA pp. 58-59 (B.Y.’s aggressive behaviors have decreased and he is learning alternative forms of communication; S.J.’s aggressive behaviors have decreased and he has acquired alternative forms of communication); Rosner Decl. at p. 4, Record Entry No. 3-10; ROA p. 88 (X.C. has made progress in cognitive and adaptive behavior goals and has reduced tantrums, aggression and elopement); A.C. Decl. at ¶¶ 16, Record Entry No. 3-3; ROA p. 50 (X.C.’s communication skills have greatly improved); K.G. Decl. at ¶ 6, Record Entry No. 3-4; ROA p. 52 (W.G. has made progress in his prompted language). Further, the trial court concluded that Plaintiff children provided evidence that when the services were temporarily reduced in anticipation of the proposed rules becoming effective plaintiff children suffered harm. *See* A.W. Decl. at ¶ 17, Record Entry No. 3-5; ROA p. 55 (when K.W. is not receiving services his behaviors escalate, become

more frequent and he will self-stimulate more often, have a shorter attention span and pick up items and watch them fall with more frequency); A.C. Decl. at ¶ 6, Record Entry No. 45-2; ROA p. 1114 (X.C. has shown an increase in dangerous and aggressive behaviors toward himself and others, is less willing to communicate, tantrums more frequently and experienced negative changes in his sleep cycle and eating habits); K.G. Decl. at ¶ 12, Record Entry No. 3-4; ROA p. 53 (when W.G. is not receiving services from SBSA, his behavior regresses and he has a difficult time focusing); LaMarche Decl., Record Entry No. 45-5; ROA p. 1122-23 (children at SBSA have experienced regression); Rosner Decl. at ¶¶ 3, 5-11, Record Entry No. 45-6; ROA p. 1124-27 (children at SBSA are suffering harm from reduction in treatment; many children are resorting to earlier patterns of maladaptive behaviors).

Defendant Helen Jones-Kelley is the Director of Ohio Department of Job and Family Services (ODJFS). ODJFS is the agency responsible for the administration of the Medicaid program in Ohio. Ohio Rev. Code § 5111.01 and Ohio Admin. Code § 5101:1-37-01. Defendant Sandra Stephenson is the Director of Ohio Department of Mental Health (ODMH). Defendant Stephenson is responsible for adopting rules that establish standards for services provided by community mental health facilities. Defendants Jones-Kelley and Stephenson entered into an interagency agreement between ODJFS and ODMH to provide

behavioral health services to people who are eligible for Ohio Medicaid benefits. Record Entry No. 3-13; ROA pp. 100-118.

Defendant Kerry Weems, is the Acting Administrator of the federal Centers for Medicare and Medicaid Services (CMS). CMS is the federal agency responsible for administering the federal Medicaid program and providing the federal portion of payment for Medicaid services.

Defendants Jones-Kelley and Stephenson, in their official capacities, promulgated amendments to rules which govern the Medicaid program in Ohio. The rules at issue are Ohio Admin. Code §§ 5101:3-27-02 and 5122-29-17, both were to be effective July 1, 2008. The proposed rules require that community mental health services, including community psychiatric supportive treatment (CPST), be rehabilitative in nature. Ohio Admin. Code §§ 5101:3-27-02(A) and 5122-29-17(A)(eff. 7/1/08). Record Entry No. 3-7 and Record Entry No. 3-8; ROA pp. 63-77. The trial court held that Defendants Jones-Kelley and Stephenson's rules define rehabilitative services more narrowly than it is defined under federal law. Opinion p. 18; ROA p. 947. Defendants' narrow definition of rehabilitation focuses on the fact that the services must be restorative in nature. The trial court found that the proposed rules would act to effectively cut off the services Plaintiff children were receiving as of July 1, 2008. Opinion p. 5; ROA p. 934. Defendants were "well aware of the fact that the proposed rules will specifically hinder what

services can be rendered to these children” as evidenced by their attempt to find alternate services for Plaintiffs after the rules were to be effective. July 17 Opinion p. 11; ROA p. 1155

The lower court concluded that Plaintiffs have not found another provider, nor is there another treatment provider for autism in Ohio, that provides the same amount, duration, or type of services Plaintiffs require. Tr. at 34; Opinion p. 21; ROA p. 950; *See also* A.C. Decl. at ¶ 22, Record Entry No. 3-3, ROA p. 51; K.G. Decl. at ¶ 16, Record Entry No. 3-4, ROA p. 53; A.W. Decl. at ¶ 21, Record Entry No. 3-5, ROA p. 55.

Plaintiff children sought a preliminary injunction to enjoin Defendants from implementing their proposed rules and to preserve the medically necessary services provided to them. Record Entry No. 3; ROA p. 24 - 42. After a hearing on the matter, the district court issued a preliminary injunction. Record Entry No. 40; ROA p. 955. Defendants Jones-Kelley and Stephenson have appealed the district court’s decision.

### **III. SUMMARY OF THE ARGUMENT**

#### **A. Standard of Review.**

The appellate court should only reverse a trial court's granting of a preliminary injunction if the trial court abused its discretion. Defendants fail to

establish that the trial court relied on clearly erroneous findings of fact or improperly applied governing law.

**B. Under EPSDT Plaintiff children are entitled to services listed in 42 U.S.C. § 1396d(a) that a licensed practitioner finds to be medically necessary to correct or ameliorate a condition.**

Contrary to Defendants Jones-Kelley and Stephenson's often repeated mischaracterization of the lower court's ruling, the district court did not hold that EPSDT requires the Ohio Medicaid program to cover habilitative services. Instead, the district court held that, "Plaintiffs established a strong likelihood of success on the merits of the underlying allegation that the proposed rules violate federal Medicaid law." July 17 Opinion p. 5; ROA p. 1149. The lower court rejected Defendants Jones-Kelley and Stephenson's argument that the services provided to Plaintiff children are habilitative in nature, and therefore not covered under Medicaid. The court's decision is supported by the record and by ample legal precedent. As laid out in the lower court's ruling and discussed more fully below, many circuit courts have reviewed the EPSDT requirements and have held that if a licensed practitioner finds the service to be medically necessary to correct or ameliorate a condition and the service is one listed in 42 U.S.C. § 1396d(a), then it is required under EPSDT. These courts, and the court below, have correctly recognized the different legal and developmental requirements for service provision to Medicaid eligible children as distinguished from their adult

counterparts. The failure of Defendants' proposed rules to conform to these different legal requirements and developmental needs of children necessitated the filing of this case and the issuance of a preliminary injunction.

**C. The proposed rule, Ohio Admin. Code § 5122-29-17, defines CPST services in a more restrictive manner than is permissible under EPSDT.**

The definition of CPST in Ohio Admin. Code § 5122-29-17 that is currently in effect allowed Plaintiff children to receive services from SBSA and for SBSA to bill Medicaid under current rule Ohio Admin. Code § 5101:3-27-02. SBSA is a nationally accredited and state certified community mental health agency that provides mental health services to children with a diagnosis on the autism spectrum.

The trial court held that the proposed amendments to the CPST rule: 1) limit covered services to those that are 'rehabilitative' services only and 2) use a definition of 'rehabilitative' that is more restrictive than the definition found in the federal Medicaid provision. Defendants Jones-Kelley and Stephenson's use of the term 'rehabilitative services' in this rule make it difficult for most children born with a disability to qualify for services. *See* Opinion pp. 18-19; ROA pp. 947-48. Essentially the Defendants' interpretation of rehabilitative services only allows these services to be provided to individuals who, at one time, developed a prior level of functioning and need services in order to be restored to that level of functioning. The lower court reasoned that for children who are born with

disabilities, they may have never possessed that level of functioning due to their disability, and therefore, cannot be restored. *See* July 17 Opinion pp. 7-8; ROA pp. 1151-52. The lower court correctly held that Defendants Jones-Kelley and Stephenson must use the more expansive EPSDT standard for services that is applicable to children. Opinion p. 7; ROA p. 936.

Defendants Jones-Kelley and Stephenson consistently try to make this case about SBSA's billing rates under the CPST services rule. The lower court found that Defendants decided to change the Administrative Rules "to avoid having to pay for certain services under its Medicaid plan." Opinion p. 7; ROA p. 936. However expensive the obligation may be to pay for EPSDT services, the State "cannot use this as an excuse to ignore the requirements of the law." July 17 Opinion p. 11; ROA p. 1155.

**D. Plaintiff children have shown that they will suffer irreparable harm if Defendants' proposed rules were implemented.**

The district court was correct in issuing an injunction because, as discussed more fully later, Plaintiff children have made a sufficient showing that they will suffer irreparable harm if the proposed rules are implemented. Opinion p. 20; ROA p. 949.

**E. Administrative Remedies.**

The lower court rejected Defendants Jones-Kelley and Stephenson's erroneous argument that Plaintiffs have an alternate way to gain services by

pursuing administrative remedies such as requesting that their provider request prior authorization. Opinion p. 21; ROA p. 950. Defendants Jones-Kelley and Stephenson argued that the services are not covered under Medicaid; however, Plaintiffs might be able to get some services through prior authorization. Defendants cannot have it both ways that on the one hand, the services Plaintiff children need are not covered because they are habilitative and on the other hand the Plaintiffs might get the services through prior authorization.

In addition to prior authorization, Defendants argue that Plaintiff children can request a state hearing. But the trial court held that Plaintiff children are not required to exhaust administrative remedies. To request a state hearing, there must be a reason and notice to prompt that request such as a decrease in services, termination of services or lack of decision about services. As no change in services occurred prior to the rules becoming effective which would prompt such a request, it would have been premature for Plaintiffs to pursue administrative remedies. Moreover, once the overly restrictive rules became effective, pursuit of administrative remedies would have been futile because the hearing officers would be bound to apply those rules.

**F. Contrary to Defendants' arguments, the trial court properly addressed Defendants' legal arguments.**

Defendants erroneously claim that case authorities cited by Defendants, specifically *A.M.H. v. Hayes*, 2004 U.S. Dist. LEXIS 27387 (S.D. Ohio 2004), were not sufficiently considered by the trial court.

*A.M.H.* held that community-based services are not covered under EPSDT. Jt. Brief of Defs. at 44. Contrary to Defendants' claim, the record in this case reflects that the court did consider the *A.M.H.* ruling during the June 27, 2008 hearing. The trial court reasoned that while "community-based" services were not covered in *A.M.H.* all of the other services listed in Section 1396d(a) , including those at issue in this case, are covered. Tr. at 186-87.

**G. Contrary to Defendants' arguments, the trial court properly addressed Defendants' evidence regarding CMS' alleged interpretation of Medicaid coverage.**

The trial court considered the administrative materials offered by Defendants and addressed Defendants' argument that the court should defer to CMS letters and guidance documents by stating that the Defendants "have not cited to any agency which is entitled to *Chevron*<sup>3</sup> deference." Opinion p. 19; ROA p 948.

Additionally, the court was correct in not deferring to the materials offered by the Defendants because those materials showed that the state and federal

---

<sup>3</sup> *Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984).

Medicaid agencies are uncertain about whether the services the Plaintiff children receive are covered under EPSDT.

#### **IV. ARGUMENT**

##### **A. Standard of Review.**

The decision to grant a preliminary injunction is within the sound discretion of the trial court and is accorded great deference. *See Washington v. Reno*, 35 F.3d 1093, 1098 (6th Cir. 1994); *See also, U.S. v. Miami Univ.*, 294 F.3d 797, 806 (6th Cir. 2002). Because the granting of a preliminary injunction is a discretionary decision in a trial court, the appellate court will reverse only if the trial court abused its discretion. *See Washington*, 35 F.3d at 1098. Abuse of discretion “is defined as a definite and firm conviction that the district court committed a clear error of judgment.” *U.S. v. Miami Univ.*, 294 F.3d at 806 (citations omitted). “This standard of review is ‘highly deferential’ to the district court’s decision.” *Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.*, 511 F.3d 535, 541 (6th Cir. 2007).

This Court should disturb “such a decision only if the district court ‘relied upon clearly erroneous findings of fact, improperly applied the governing law, or used an erroneous legal standard.’” *Washington*, 35 F.3d at 1098 citing *Michigan Coalition of Radioactive Material Users, Inc. v. Griepenstrog*, 945 F.2d 150, 153 (6th Cir. 1991). “Ordinarily, an appellate court, upon an appeal from an order

granting or denying a temporary injunction, will not go into the merits of a case further than is necessary to determine whether the trial court exceeded a reasonable discretion in making the order...” *Brandeis Mach. & Supply Corp. v. Barber-Greene Co.*, 503 F.2d 503, 505 (6th Cir. 1974) (citing *American Federation of Musicians v. Stein*, 213 F.2d 679 (6th Cir. 1954)); *See also*, *Christian Schmidt Brewing Co. v. G. Heileman Brewing Co.*, 753 F.2d 1354, 1356 (6th Cir. 1985). “[T]he district court’s weighing and balancing of the equities of a particular case is overruled only in the rarest of cases.” *Sandison v. Michigan High School Athletic Ass’n.*, 64 F.3d 1026, 1030 (6th Cir. 1995).

As discussed below, the trial court’s granting of the preliminary injunction was well within its discretion and based upon applicable federal EPSDT requirements.

**B. Under EPSDT Plaintiff children are entitled to services listed in 42 U.S.C. § 1396d(a) that a licensed practitioner finds to be medically necessary to correct or ameliorate a condition.**

Defendants Jones-Kelley and Stephenson repeatedly mischaracterize the holding of the district court by arguing that the decision requires the Ohio Medicaid program to cover habilitative services. In support of their position, Defendants make two arguments that the lower court found to be unpersuasive. First, Defendants cite to special education cases under the Individuals with Disabilities Education Act ('IDEA', 20 U.S.C. §§1400, *et seq.* ). By referring to

special education cases instead of precedent in Medicaid law, Defendants attempt to characterize ABA as a methodology instead of a medically necessary EPSDT service.<sup>4</sup> Second, they argue that since SBSA provided services in the past under the Community Alternative Funding System (CAFS), the services currently provided to the Plaintiffs are habilitative and not covered under EPSDT.

The lower court rejected these arguments advanced by Defendants Jones-Kelley and Stephenson in support of their position that the services provided to Plaintiff children are habilitative in nature and therefore not covered by Medicaid: Defendants' argument "presupposes that these CPST services received by the Plaintiff children at SBSA are 'habilitative services.'" July 17 Opinion p. 3; ROA p. 1147. The lower court found credible evidence to support Plaintiffs' claim that the services they were receiving are covered under the EPSDT mandates. Moreover, the lower court's ruling is supported by ample case law as well as the statutory and regulatory provisions of the Medicaid act.

### **1. Overview of EPSDT.**

The EPSDT mandate is a 'comprehensive child health program of prevention and treatment.'" ROA p. 1150, citing *Katie A. v. Los Angeles County*, 481 F.3d 1150, 1154 (9th Cir. 2007)(emphasis added). "In making the EPSDT

---

<sup>4</sup> Instead of special education cases, the trial court relied on a relevant Medicaid case, *Chisholm v. Hood, infra.* that held that behavior management services for children with autism fell within the EPSDT mandates. Defendants erroneously argue that Plaintiff children can receive these services through an Individualized Education Program (IEP) under IDEA. However the evidence at trial established that ABA services are covered under EPSDT and that comparable services were not available elsewhere, including through the IEP process.

provisions mandatory, Congress recognized the need for making ‘services available so that young people can receive medical care before health problems become chronic and irreversible damage occur [sic].’” July 17 Opinion p. 11; ROA p. 1155; *See also, Stanton v. Bond*, 504 F.2d 1246, 1249 (7th Cir. 1974) (citing Senate and House Committee reports emphasizing the need for EPSDT services).

Under EPSDT, children must receive all medical assistance covered in 42 U.S.C. 1396d(a)(1) – (28) “to correct or ameliorate defects and physical and mental illnesses and conditions whether or not such services are covered under the State plan.” 42 U.S.C. 1396d(r)(5); *See Moore v. Medows*, 563 F. Supp. 2d 1354 (N.D. Ga. 2008). The Fifth Circuit court stated that “every Circuit which has examined the scope of the EPSDT program has recognized that states must cover every type of health care or service necessary for EPSDT corrective or ameliorative purposes that is allowable under § 1396d(a),” *S.D. v. Hood*, 391 F.3d 581 (5th Cir. 2004).

The trial court’s decision that under EPSDT services deemed medically necessary must be provided to children is not only supported by the Fifth, but also by the Seventh, and Eighth Circuit courts and the district courts in Massachusetts, Louisiana and Tennessee. One court stated that “no Medicaid-eligible child in this country, whatever his or her economic circumstances, will go without treatment

deemed medically necessary by his or her clinician.” *Rosie D. v. Romney*, 410 F. Supp. 2d, 18, 22 (D. Mass. 2006).

Section 1396d(a)(13) “has been interpreted by other courts to mean that if a ‘licensed clinician finds a particular service to be medically necessary to help a child improve his or her functional level, this service must be paid for by a state’s Medicaid plan pursuant to the EPSDT mandate.’” Opinion p. 16; ROA p. 945, citing *Rosie D.*, 410 F. Supp. 2d at 26. In the Seventh Circuit the court held that “[o]ther circuits also found that in the context of individuals under the age of twenty-one subject to EPSDT services, a state’s discretion to exclude services deemed ‘medically necessary’ by an EPSDT provider has been circumscribed by the express mandate of the statute.” *Collins v. Hamilton*, 349 F.3d 371, 376 n.8 (7th Cir. 2003). The Eighth Circuit court held that “[t]he State Plan, however, must pay part or all of the cost of treatments to ameliorate conditions discovered by the screening process when those treatments meet the definitions set forth in § 1396a.” *Pediatric Specialty Care, Inc. v. Ark. Dept. of Human Servs.*, 293 F.3d 472, 480 (8th Cir. 2002). A district court in Tennessee held that a state “is bound by federal law to provide ‘medically necessary’ EPSDT services.” *John B. ex rel. L.A. v. Menke*, 176 F. Supp. 2d 786, 800 (M.D. Tenn. 2001). The trial court’s ruling was clearly consistent with governing law as applied by a number of U.S. circuit and district courts.

**2. Services need not be specifically listed in Section 1396d(a) to be covered pursuant to the EPSDT mandate.**

Defendants assert that in order for a service to be covered under EPSDT the service must be specifically listed in § 1396d(a)(13). The trial court’s holding that “the fact that a state plan does not mention a particular service does not mean it is not a covered EPSDT service” is supported by law. June 30 Opinion p. 7; ROA p. 811. *See* 42 U.S.C. 1396d(r)(5) (stating that services are required “whether or not such services are covered under the State plan”); *See also, Pediatric Specialty Care, Inc. v. Ark. Dept. of Human Servs.*, 293 F.3d 472, 480 (8th Cir. 2002) (the state plan need not specifically list every treatment service conceivably available under the EPSDT mandate).

A “very relevant” Medicaid case, *Chisholm v. Hood*, 133 F. Supp. 2d 894 (E.D. La. 2001)<sup>5</sup> held “that ‘psychological and behavior management services’ for autistic children fell within the services described in 42 U.S.C. § 1396d(a)(13).” July 17 Opinion p. 8; ROA p. 1152.<sup>6</sup> The *Chisholm* court further held that “..failure to make behavioral and psychological services available to all EPSDT recipients who need them violates the requirement of 42 U.S.C. § 1396d(r)(5) that the defendant provide all services within the scope of 42 U.S.C. § 1396d(a) necessary

---

<sup>5</sup> Notably, Defendants do not cite the *Chisholm* case in their brief to this Court nor the majority of the other cases cited in the trial court’s opinions.

<sup>6</sup> The trial court noted that the *Chisholm* court also held that behavioral and psychological services to children with autism was also covered by 42 U.S.C. § 1396d(a)(6) which mandates EPSDT coverage for “any other type of remedial care recognized under State law, furnished by licensed practitioners within the scope of their practice as defined by State law.” July 17 Opinion at 9, note 1, citing *Chisholm*, 133 F. Supp. 2d at 898.

to correct or ameliorate health conditions of EPSDT recipients.” *Chisholm*, 133 F. Supp. 2d at 90.

Additionally, “the Eighth Circuit court read Section 1396d(a)(13) as requiring the State to provide early intervention behavioral treatment to children under the EPSDT mandate.” Opinion p. 20; ROA p. 949. *See Pediatric Specialty Care, Inc. v. Ark. Dept. of Human Servs.*, 443 F.3d. 1005 (8th Cir. 2006).

**3. There is no requirement that services be “rehabilitative” in nature in order to be covered under Section 1396d(a)(13).**

The trial court correctly held that 42 U.S.C. § 1396d(a)(13) covers the services provided to Plaintiff children. Section 1396d(a)(13) requires Medicaid coverage of:

other diagnostic, screening, preventive, and rehabilitative services, including any skilled or remedial services recommended by a physician or other licensed practitioner of the healing arts within the scope of their practice under State law, for the maximum reduction of physical and mental disability and restoration to the best possible functional level. (Emphasis added).

Defendants argue that this section does not cover services that Plaintiff children receive because the ‘remedial services’ language only modifies the word ‘rehabilitative’. The district court found that “Defendants have cited no authority for their restrictive interpretation that ‘remedial and medical services’ are covered only if they are ‘rehabilitative’.” Opinion p. 19; ROA p. 948.

The *Rosie D.* court found that Section 1396d(a)(13) does not contain a requirement that the services be “rehabilitative”. *Rosie D.*, 410 F. Supp. 2d 18. Instead the *Rosie D.* court used the word “improve” and not “restore” in concluding that the services were necessary. Opinion p. 20; ROA p. 949. In the *Pediatric Specialty Care, Inc .v. Ark. Dept. of Human Servs.*, 443 F.3d. 1005 (8th Cir. 2006) case, the district court concluded that such treatment was rehabilitative, even though it applied to young children who presumably were not being “restored” to a prior ability.

Defendants “want to define rehabilitative services so narrowly as to include only services that ‘restore’ a person to a prior level of functioning.” July 17 Opinion p. 7; ROA p. 1151. The trial court stated that “while this could arguably make sense in the context of adults (who are not afforded as extensive coverage under Medicaid as children), it makes no sense in the context of children.” July 17 Opinion p. 8; ROA p. 1152. The district court correctly recognized the different legal and developmental requirements for service provision to Medicaid eligible children when it stated that Plaintiff children “provided sufficient evidence that ABA therapy, when recommended by a licensed practitioner of the healing arts, is a medically necessary service which provides the maximum reduction of a mental or physical disability.” Opinion p. 20; ROA p. 949.

Further, the lower court stated, “[t]aken to its logical conclusion, such an [sic] restrictive interpretation of ‘rehabilitative’ would mean that no child who is born with a disability, could ever receive rehabilitative services. This does not comport with the broad coverage afforded under the EPSDT mandate.” Opinion pp. 18-19; ROA pp. 947-48. The trial court further found “no requirement that the services be “rehabilitative” but only that they ameliorate or correct a condition.” Opinion p. 20; ROA p. 949.

Even the Ohio Administrative Code supports the trial court’s conclusion and does not require services to be restorative. Ohio Admin. Code § 5101:3-14-05(E) states that EPSDT services are covered by Medicaid “when the services are medically necessary, as defined in rule 5101:3-1-01 of the Administrative Code, to treat or ameliorate a defect, physical or mental illness, or condition.” (Emphasis added). Memorandum Opinion and Order Denying Defendants’ Motion to Dismiss, Record Entry No. 34, (June 30 Opinion), p. 6; ROA p. 810; *See also* Opinion p. 11; ROA p. 940. Medically necessary is defined as “services that are necessary for the diagnosis or treatment of disease, illness or injury and without which the patient can be expected to suffer prolonged, increased or new morbidity, impairment of function, dysfunction of a body organ or part, or significant pain and discomfort.” Ohio Admin. Code § 5101:3-1-01(A); June 30 Opinion p. 6, ROA p. 810.

Moreover, the district court found that “[w]hat truly differentiates ‘habilitative’ and ‘rehabilitative’ services is the ‘medical necessity’ of those services.” Opinion p. 18; ROA p. 947. Comparing habilitative and rehabilitative services, the district court found that habilitative services are not medical or remedial, not recommended by a physician or other licensed practitioner of the healing arts and are not designed for the maximum reduction of physical or mental disability and restoration of a recipient to his best possible functional level. *See* July 17 Opinion p. 7; ROA p. 1151. However, ultimately, the district court concluded that “this dichotomy has no relevance to medical or remedial services for children when treatment has been recommended by a physician or other licensed practitioner ‘for the maximum reduction of a physical or mental disability.’” July 17 Opinion p. 1; ROA p. 1145.

In addition, the trial court concluded that Section 1396d(a)(13) “also requires that State’s [sic] provide ‘preventive services’ which are defined as: ‘services provided by a physician or other licensed practitioner of the healing arts within the scope of his practice under State law to: 1) prevent disease, disability, and other health conditions or their progression; 2) prolong life; and 3) promote physical and mental health and efficiency. Thus, the services provided at SBSA may well be ‘preventative’ as well as ‘rehabilitative’”. Opinion p. 19; ROA p. 948.

The lower court did not abuse its discretion in concluding that the services provided to Plaintiff children at SBSA are medical or remedial services recommended by a licensed practitioner of the healing arts designed for the maximum reduction of their disabilities and to restore Plaintiff children to their best possible functional levels and thus likely covered under EPSDT. As Defendants' proposed rules conflict with these different legal requirements and developmental needs of children, the district court correctly enjoined implementation of Defendants' rules.

**C. The proposed rule, Ohio Admin. Code § 5122-29-17, defines CPST services in a more restrictive manner than is permissible under EPSDT.**

Ohio Admin. Code §5122-29-17 provides the definition of CPST services. Currently, the services that Plaintiff children receive are covered under the CPST rule as the services focus on the recipient's ability to succeed in the community, and to show improvement in school, work and family and integration and contributions within the community.<sup>7</sup> Notably, the trial court points out that the current rule also includes "further development of daily living skills" (Ohio Admin. Code § 5122-29-17(B)(3)) and "mental health interventions that address symptoms, behaviors, thought processes, etc., that assist an individual in

---

<sup>7</sup> The current rule, Ohio Admin. Code § 5122-29-17, lists these as services to be provided under CPST. The rule further states that CPST activities should include "assistance in achieving personal independence in managing basic needs as identified by the individual and/or parent or guardian; facilitation of further development of daily living skills, if identified by the individual and/or parent or guardian."

eliminating barriers to seeking or maintaining education and employment” (Ohio Admin. Code 5122-29-17(B)(9)). July 17 Opinion pp. 4-5; ROA p. 1148-49.

In contrast, the proposed CPST rule covers as Medicaid community mental health services only those that are rehabilitative. Ohio Admin. Code 5101:3-27-02(A)(eff. 7/1/08). *See* Opinion p. 6; ROA p. 935. The proposed version of the CPST rule “specifies that CPST services is a ‘rehabilitative service intended to maximize the reduction of symptoms of mental illness in order to restore the individual’s functioning to the highest level possible.’” Ohio Admin. Code § 5122-29-17(A)(eff. 7/1/08), ROA p. 69; June 30 Opinion p. 8; ROA p. 812. Further, CPST covered rehabilitative services are limited to those that are restorative in nature. The trial court found that the proposed rule uses a “much more narrow definition of ‘rehabilitative’ than that found in the Federal Medicaid Act.” Opinion p. 6, ROA p. 935. Therefore, under Defendants’ interpretation, it is nearly impossible for most children born with a disability to qualify for services because they cannot be restored to a prior level of functioning they may never have developed in the first place. *See* July 17 Opinion pp. 7-8; ROA p. 1151-52.

The trial court held that “the new version’s restrictive language may have the effect of denying many children, not just Plaintiff children, access to CPST services.” July 17 Opinion p. 5; ROA p. 1149. The trial court relied on the fact that the amended rule specifically requires that the individual “take responsibility for

managing his/her mental illness” (Ohio Admin. Code § 5122-29-17(A)), “be an active participant in his/her treatment and care” (Ohio Admin. Code § 5122-29-17(B)(2)) and also requires that the individual “have the cognitive ability to be able to participate in and benefit from the service” (Ohio Admin. Code § 5122-29-17(B)(1)). *See* July 17 Opinion p. 5; ROA p. 1149.<sup>8</sup>

The district court found that “[t]he proposed amendments specifically target the provision of CPST services to these children” as “evidenced by the “State’s own attempts to find other arrangements for the children once the new rules are effective.” Opinion p. 21; ROA p. 950.

Defendants consistently try to make this case about SBSA’s billing practices and state that the Ohio Administrative Code rules were changed because of billing issues. *Jt. Brief of Defs.* at 26. The trial court stated it was clear that the State had adopted the new rules to avoid having to pay for these services. Opinion p. 22; ROA p. 951. But, “[t]he State is obligated to comply with Federal Medicaid law and may not characterize its duty to comply with the requirements of an elective program such as Medicaid as constituting a hardship to its citizens.” July 17 Opinion pp. 11-12; ROA p. 1155-56, citing *Illinois Hospital Assoc. v. Illinois Dep’t of Public Aid*, 576 F. Supp. 360, 371 (N.D. Ill. 1983).

---

<sup>8</sup> *See also* Testimony of Michele LaMarche, Tr. at 42-43 (testifying that since there is no clear definition of cognitive ability there is concern as to whether a child with autism has the cognitive ability to participate).

The lower court found that the proposed CPST rule ignores the EPSDT standard that services provided to children must correct or ameliorate their conditions. *See* 42 U.S.C. 1396d(r)(5). The district court holding that requires the EPSDT standard be applied is clearly supported by the record and case law.

**D. Plaintiffs have shown that they will suffer irreparable harm if Defendants' proposed rules were implemented.**

The lower court's conclusion that Plaintiff children will suffer irreparable injury is supported by the record. At the June 27, 2008 hearing Dr. Rosner testified about several Plaintiffs. She testified that Plaintiff X.C. continues to need one-to-one treatment because he needs someone who can be within an arm's reach to implement his behavior plan and prevent negative and unsafe behaviors, redirect his behaviors and prevent elopement. Tr. at 101. X.C.'s mom testified that he hits himself, kicks windows out of their house, punches holes in the wall, jumps off furniture and harms himself and runs away. Tr. at 92-93. Without continued treatment X.C.'s mom testified that she may not be able to retain custody of X.C., and may be forced to place him in an institutional facility. Tr. at 92-93.

Dr. Rosner testified that Plaintiff PLEAS member J.L. will suffer irreparable harm without these services in large part because of his rumination disorder.<sup>9</sup> If left unchecked there are serious consequences to rumination, including death. Tr. at

---

<sup>9</sup> At the June 27, 2008 hearing, Dr. Rosner testified that rumination is "when someone regurgitates previously swallowed food and liquid". Tr. at 103.

103. After implementing J.L.'s behavior plan his rumination went from 600 times per day to less than 5 times per day. Tr. at 103. J.L.'s mother testified that she has observed his rumination lessen, his communication improve and his elopement behaviors lessen with the treatment J.L. receives from SBSA. Tr. at 74.

The lower court found that Defendants attempted to find other arrangements for Plaintiff children once the new rules were to become effective but they were unsuccessful. Opinion p. 21; ROA p. 950. Their efforts showed that they were well aware of the harmful effect of the new rules. Clearly, the lower court's ruling is supported by the uncontroverted evidence which shows that Plaintiff children will suffer irreparable harm without these services.

**E. Administrative Remedies.**

Although Defendants Jones-Kelley and Stephenson argue that the services received by Plaintiffs are not covered under Medicaid, Defendants also argue to the contrary that Plaintiffs have an alternate way to gain services by requesting a state hearing or asking their provider to request prior authorization.<sup>10</sup> Defendants cannot have it both ways and the law does not require Plaintiffs to pursue a futile option.

Prior authorization can only be requested by providers and not families. Tr. at 125. Further, prior authorization will only be granted if the requested services

---

<sup>10</sup> Although all Medicaid recipients are guaranteed the right to request a state hearing, recipients are not required to do so. Defendants confuse the availability of state hearing rights with the requirement of exhaustion of administrative remedies. It is well established that, except in certain prison cases, plaintiffs suing under § 1983 are not required to exhaust administrative remedies. *Patsy v. Board of Regents*, 457 U.S. 496, 502 (1982).

meet Defendants' overly restrictive definition of rehabilitative services. Tr. at 126. Plaintiff parents and families clearly could not request prior authorization, but even if they could their request would have been denied under the proposed rules.

Denial of a prior authorization request is a reason a Medicaid recipient could request a state hearing.<sup>11</sup> Prior to the proposed rules being implemented there was no need to request a state hearing as there had not yet been an event which would trigger a hearing. Additionally, the hearing officer would apply the illegal new rules at issue at the state hearing. Therefore, the request of a state hearing prior the rules becoming effective by Plaintiff children would have been premature and ineffective.

The lower court rejected Defendants' argument that if the new rules came into effect the services might still be covered under other sections of the Medicaid Act. The trial court concluded that Defendants' "argument ignores the fact that the services Plaintiff children need are not provided at the same intensive level elsewhere and for some children SBSA may offer the only site where they can receive such services." Opinion p. 21; ROA p. 950.

Defendants recognized that this proposed rule change would affect Plaintiffs' receipt of services from SBSA. While Defendants worked to put

---

<sup>11</sup> A Medicaid recipient may request a state hearing for many reasons, including when the recipient contends that the Medicaid benefits were wrongly reduced or terminated, or the recipient contends that he or she was incorrectly denied assistance. Ohio Admin. Code § 5101:6-3-01(A); *See also*, testimony of Erika Robbins, Tr. at 127 (testifying that Medicaid recipients have the right to request a hearing if they feel something is inaccurate; or that their benefits were increased, decreased, terminated, or there was a lack of decision).

together alternate plans for the provision of services to Plaintiff children (Opinion p. 21; ROA p. 950), nothing offered by the State was as complete as the current provision of services to Plaintiffs and did not follow the medical recommendations provided to Plaintiffs.<sup>12</sup> The evidence showed that other providers cannot offer the same amount, duration and type of services that are necessary for Plaintiffs. Tr. at 34. The lower court recognized this effort made by the State and used it to support the conclusion that there are no other providers that can provide the same amount, duration, level and types of services Plaintiffs currently receive. *See* Opinion p. 21; ROA p. 950.

The trial court correctly concluded that prior authorization and state hearings would likely not prevent harm to the Plaintiff children.

**F. Contrary to Defendants' arguments, the trial court properly addressed Defendants' legal arguments.**

Defendants erroneously claim that case authorities cited by Defendants were not sufficiently considered by the trial court.

Specifically, Defendants assert that the trial court did not address the ruling in *A.M.H. v. Hayes*, 2004 U.S. Dist. LEXIS 27387 (S.D. Ohio 2004), which held that community-based services are not covered under EPSDT. *Jt. Brief of Defs.* at 44. Contrary to Defendants' claim, the record in this case reflects that the court did

---

<sup>12</sup> Plaintiffs currently receive as 35-40 hours per week, year round, of one-to-one intensive behavioral therapy.

consider the *A.M.H.* ruling during the June 27, 2008 hearing.<sup>13</sup> The trial court reasoned that while “community-based” services were not covered in *A.M.H.* all of the other services listed in Section 1396d(a), including those at issue in this case, are covered. Tr. at 186-87. The trial court’s ruling in this case is consistent with the holding in *A.M.H.*

**G. Contrary to Defendants’ arguments, the trial court properly addressed Defendants’ evidence regarding CMS’ alleged interpretation of Medicaid coverage.**

Defendants assert that the trial court did not address the administrative materials which they argue supported their contention that habilitation services are not covered pursuant to Section 1396d(a)(13). Jt. Brief of Defs. at 55. “In support of this contention, the State cites to various letters from CMS, a CMS State Medicaid Manual, and a Pennsylvania Departmental Appeals Board decision, all of which indicate that habilitative services are generally not covered by Medicaid.” July 17 Opinion p. 3; ROA p. 1147. The trial court considered the administrative materials offered by Defendants and addressed Defendants’ argument that the court should defer to CMS letters and guidance documents by stating that the

---

<sup>13</sup> THE COURT: “Incidentally, we did find Judge Smith's [*A.M.H. v. Hayes*] case, and I note that it involved something called community-based services, yes. And Judge Smith concluded that community-based services were not mandated under the Medicaid Act, but were available only through the waiver process. He pointed out, however, that in his case, all the parties – that the parties agreed, which included the State of Ohio, that all of the 27 services mentioned under 1396a must be provided to children eligible for Medicaid. And, of course, that would include the services that we are focusing on here, as including other diagnostic, screening, preventative and rehabilitative services, etcetera, recommended by a physician or licensed practitioner for the maximum reduction of physical or mental disability and restoration of an individual to the best possible functional level.” Tr. at 186-87.

Defendants “have not cited to any agency which is entitled to *Chevron*<sup>14</sup> deference.” Opinion p. 19; ROA p 948.

Additionally, the trial court was correct in not deferring to the materials offered by the Defendants because those materials showed that the state and federal Medicaid agencies are uncertain about whether the services the Plaintiff children receive are covered under EPSDT. At the June 27, 2008 hearing there was conflicting testimony from Defendants’ witness that components of ABA services are covered and that if a child requires behavioral intervention to extinguish aggressive behaviors it is reimbursable under the rehabilitation option.<sup>15</sup> Tr. at 133-34. Moreover, counsel for CMS represented to the trial court that CMS’ determination about whether the services provided by SBSA to the Plaintiff children were properly billed to Medicaid was not a “done deal.”<sup>16</sup> Counsel for

---

<sup>14</sup> *Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984).

<sup>15</sup> Testimony of Erika Robbins at the June 27, 2008 hearing: Q. Even though [CMS is] telling you that there are components of ABA that could be covered? A. That’s a component, not ABA in total. Q. Okay. And has it been determined exactly what components can and cannot be covered? Has that been determined yet? Did you have clarity on that issue? A. This does provide clarity among the clinical component of ABA therapy, which would be the psychology component. Q. So, if a child requires behavioral intervention to extinguish aggressive behavior, that would be reimbursable under the rehab option; is that correct? A. That is what CMS is saying. Q. Do you disagree? A. No, I do not.

<sup>16</sup> THE COURT: Does CMS have a position on whether these services are covered under the Medicaid Act?

MR. D’ALESSANDRO: Your Honor, I hate to use the word “it depends,” but the answer is, it depends on the service. And I think that’s what the deferral process is going to decide for all of us. There may be -- the three outcomes of the deferral process could be a decision that all of the services are not covered, all of the services are covered, or that some of the services are covered. And I think the State may have spoken a little too strongly when it said we have decided not to pay. There has been no such decision not to pay. That’s what the deferral process is for.... I would like to note that the deferral letter, which is attached to, I believe, the defendants’ motion to dismiss as an exhibit and will be introduced, I will acknowledge, Your Honor, that the language used by CMS in the letter of March 21st does appear to hone in on one issue, the issue of rehabilitative versus habilitative. I think that may have been an unfortunate choice by the Acting Associate Regional Administrator to hone in on that. I think all coverage and eligibility and reimbursement issues are in play during the deferral process.

CMS also stated: "On the issue of habilitative versus rehabilitative, it is true that in August 2007, CMS proposed a federal regulation that would clarify those terms and exclude certain services." Plaintiffs explained in their Memorandum in Opposition to Defendants' Motion to Dismiss that Defendants were already applying the restrictive definitions contained in the proposed regulations as a justification for denying EPSDT services to the Plaintiff children. Pls. Memo. in Opposition to Defs. Mot. to Dismiss, Record Entry No. 16, pp. 12-14; ROA pp. 239-241. Counsel for CMS represented to the trial court that "the argument you've already heard from the State may have given the impression that, again, it's a done deal. It's a proposed regulation. A moratorium has been placed on the enactment of that regulation." Tr. at 18. Therefore the trial court correctly dismissed Defendants' deference argument and properly applied the existing regulations which do not limit Medicaid coverage for the services at issue in this case. It is also important to note that Defendant Weems has not filed an appeal of the lower court's order granting the preliminary injunction of the implementation of the state's overly restrictive rules.

## V. CONCLUSION

The trial court did not abuse its discretion and it properly relied on governing law when it enjoined Defendants' proposed rules, Ohio Admin. Code

---

MR. D'ALESSANDRO: To any extent -- and I don't believe it was their intent, but to any extent that the State left the impression that there is a done deal here, I don't think that's the case. Tr. p. 16-18.

§§ 5101:3-27-02 and 5122-29-17. This Court should uphold the district court's preliminary order enjoining the proposed rules and remand the case for trial.

Respectfully submitted,

/s/ Michelle Atkinson

Michelle F. Atkinson, Trial Attorney  
(0079185)

matkinson@olrs.state.oh.us

/s/ Susan G. Tobin

Susan G. Tobin, Of Counsel (0021725)

stobin@olrs.state.oh.us

Ohio Legal Rights Service  
50 West Broad Street, Suite 1400  
Columbus, Ohio 43215  
Telephone: (614) 466-7264  
Facsimile (614) 644-1888

Counsel for Plaintiffs

### **Certificate of Compliance**

Pursuant to Fed. R. App. P. 32(a)(7)(C) and 6 Cir. R. 32(a), the undersigned certifies that this brief complies with the type-volume limitation of Rule 32(a)(7)(B). As measured by the word count provided by Microsoft Word 2003, and in accordance with the provisions of Fed. R. App. P. 32(a)(7)(B)(iii), this brief contained 8,582 words.

/s/ Michelle F. Atkinson

Michelle F. Atkinson

### **Certificate of Service**

This certifies that on January 12, 2009, a copy of the foregoing Brief of Plaintiffs-Appellees was filed electronically. Notice of this filing will be sent to all registered parties by operation of the Court's electronic filing system.

/s/ Michelle F. Atkinson

Michelle F. Atkinson