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

In the Matter of the Investigation and
Examination of:
California Physicians' Services, dba Blue
Shield of California,

Respondent.

SETTLEMENT AGREEMENT

I. Recitals

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

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

Administrative Pleading
Matter ID: 10-560 / Doc No.: 59577
ameliorate behaviors which interfere with learning and social interaction.” Government Code section 95021(d)(1).

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

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

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

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

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

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

Although some providers may be "certified" by the Behavior Analyst Certification Board (BCAB), that is a private entity that does not result in state licensure or certification.
9. BLUE SHIELD at the direction of the Department, previously agreed, subject to an express reservation of rights, to provide coverage for ABA when rendered by licensed health care providers. BLUE SHIELD now contends it has been unable to locate licensed health care providers willing to directly provide ABA services to plan enrollees.

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

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

In order to resolve this dispute:

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

1. BLUE SHIELD has not violated the Knox-Keene Act with regard for requests for coverage of or claims for ABA services, and
2. ABA services are not health care services;
And BLUE SHIELD is not waiving its right to argue:
3. that it has no obligation to cover ABA services rendered by unlicensed individuals; and
4. that ABA is not a covered service and is not a benefit of any BLUE SHIELD health plan.

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

C. As indicated above, the Department’s position is that ABA, when provided as a health care service to treat PDD or ASD, must be provided by persons who are licensed health care providers under California law, and nothing in this Agreement should be construed to indicate otherwise.
D. The Parties further understand that, except for purposes of enforcing the terms of this Agreement, this Agreement shall not be used for any purpose by either party in any current or future litigation or dispute resolution in any form.

II. Agreement

WHEREAS, this Agreement is entered into based on the Recitals set forth above, which are incorporated into this Agreement by this reference.

WHEREAS, the parties desire to enter into this Agreement and thereby resolve the disputed issues raised in the pending Enforcement matters.

WHEREAS, by entering into this Agreement, BLUE SHIELD does not admit any liability or violation of the Act. However, the parties agree that it is in the best interests of BLUE SHIELD to enter into this Agreement, and thereby settle the above-referenced Enforcement matters and all issues, accusations, and claims that the Department has against BLUE SHIELD related to, or arising from, the specific Enforcement matters referenced above as well as with respect to coverage of ABA services for Other Enrollees while this Agreement is in effect.

WHEREFORE, the Department of Managed Health Care and BLUE SHIELD mutually agree to enter into this Agreement, as follows:

A. BLUE SHIELD agrees to provide coverage for medically necessary ABA services when the ABA services are ordered by and deemed medically necessary by a licensed health care provider(s) under California law or by the state in which the services are rendered; and, either;

1. The ABA services are rendered by a licensed health care provider under California law or by the state in which the services are rendered ("Licensed Provider"). The Licensed Provider must certify that they personally provided the services and must utilize the billing codes supplied by BLUE SHIELD; or,

2. The ABA services are rendered by individuals who are not licensed providers but who maintain a BCBA-certification or who have ABA training and experience in serving children with
ASD or PDD, and the services are supervised by a Licensed Provider ("Supervising Licensed Provider") who;

    a. Supervises and bills for the services of the unlicensed individual;
    b. Utilizes the billing codes supplied by BLUE SHIELD;
    c. Maintains appropriate professional liability insurance covering the ABA services provided;
    d. Retains appropriate treatment records, including the identity of the individual providing the ABA services, in accordance with professional standards of practice; and
    e. Agrees to provide copies of the enrollee's ABA treatment records to BLUE SHIELD on reasonable request and at reasonable intervals.

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

B. Once the conditions in Paragraph A., above, are satisfied, BLUE SHIELD will seek to arrange for the provision of medically necessary ABA services for each Subject Enrollee who is still enrolled with BLUE SHIELD. ABA services will be authorized not later than ten (10) calendar days from the date of the execution of this Agreement or satisfaction of the conditions of Paragraph A., above, whichever is later. The ABA services shall be covered for a minimum of six (6) months, at the number of hours per week/month as specified by the Subject Enrollee's provider who recommended the ABA services. If the Subject Enrollee is not currently receiving ABA services or his current provider(s) refuse to agree to the terms of Paragraph A above, the Plan will undertake all reasonably necessary steps to identify alternate providers who will agree to the terms of Paragraph A. above, within thirty (30) days of the date the ABA services are ordered by and deemed medically necessary by a Licensed Provider.
During the initial six (6) month period an enrollee receives ABA services, BLUE SHIELD will not dispute the medical necessity of the services or the frequency at which the services were recommended. If, prior to the date this Agreement is executed, a Subject Enrollee has been receiving ABA services which, as a result of this Agreement, are being covered by BLUE SHIELD, then BLUE SHIELD reserves the right to conduct a periodic medical necessity review, as described herein, when the Subject Enrollee has received ABA services for at least six (6) months. Following the initial six (6) month period, BLUE SHIELD shall have the right to conduct periodic medical necessity reviews, as set forth in Paragraph E. After the date this Agreement is signed and the Department has confirmed that BLUE SHIELD has complied with this Agreement with respect to the Subject Enrollees, the Department will take no further enforcement action against BLUE SHIELD relative to the provision of ABA services for the Subject Enrollees, as long BLUE SHIELD continues to comply with the terms of this Agreement and applicable Knox-Keene Act statutes and regulations. For each Subject Enrollee who paid for ABA services for any dates of service between the date of notification of coverage of the ABA services sent by the Department’s Help Center to the given enrollee, and the date BLUE SHIELD commences services pursuant to this Agreement, BLUE SHIELD will reimburse those Subject Enrollees for the costs of those services within thirty (30) calendar days of receipt of the minimum documentation reasonably necessary to verify the charges paid for those services and confirmation that the conditions set forth in Paragraph A. above have been satisfied.

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

The AP must be submitted to the Department’s Office of Enforcement within thirty (30) calendar days from the date this Agreement is signed for the Department’s review and approval to ensure that the AP appropriately addresses the items set forth in this Paragraph C. BLUE SHIELD agrees that it must implement the AP no later than October 1, 2011.
D. BLUE SHIELD agrees to provide coverage for all medically necessary ABA services for the treatment of PDD or ASD for all current and future enrollees ("Other Enrollees") in accordance with the terms of this Agreement from Licensed Providers or Supervising Providers that agree to the conditions set forth in Paragraph A. above. The services shall be covered for a duration equal to the length of time specified by the enrollee's provider, or for a period of six (6) months, whichever is shorter, at the number of hours per week/month as specified by the enrollee's provider who recommended the ABA services. During the initial six (6) month period following commencement of the services, BLUE SHIELD will not dispute the medical necessity of the services or the frequency at which the services were recommended (whether or not prior authorization is sought or obtained, coverage will not be denied during this initial period based on medical necessity). Except for denials based upon the enrollee no longer being a BLUE SHIELD member or as otherwise permitted by this Agreement and while this Agreement is in effect, any denial of coverage for ABA services shall be construed as a denial based on medical necessity and will be subject to review under the Department's Independent Medical Review process.

E. BLUE SHIELD will provide coverage for the ABA services described above at the number of hours per week/month as specified by the enrollee's provider who recommended the ABA services as long as those services remain medically necessary as provided by Licensed Providers or by Supervising Providers. BLUE SHIELD may revisit the issue of whether the services remain medically necessary through periodic reviews, which shall not take place until the enrollee has received at least six (6) months of ABA services. Subsequent periodic reviews may take place in six (6) month increments following that initial periodic review. The conditions referenced in Paragraph A. above in this Agreement shall be applicable to ABA provided during and as a result of periodic reviews. Those periodic reviews shall not result in delays in the provision of ABA services and shall be performed while services continue. Should BLUE SHIELD require as part of a periodic review any type of analysis, status or progress update from a provider beyond the normal and routine chart notes and reports already prepared by the provider, for which BLUE SHIELD and the provider do not have specific contractual terms, then BLUE SHIELD must pay the provider's reasonable and customary charges for the preparation of such an analysis, status or progress update, for a period of time not to exceed four hours.
In no event shall any portion of the cost for the preparation of such an analysis, status or progress update be borne by the enrollee other than applicable co-payments and deductibles. Should the ABA provider fail to provide, within thirty (30) days from the date of the request, the analysis, status or progress update reasonably necessary for BLUE SHIELD to perform a periodic review, BLUE SHIELD may discontinue coverage for that provider's service, in which case BLUE SHIELD will provide the enrollee with written notice and offer to continue to cover ABA from another provider, subject to the conditions stated herein. BLUE SHIELD will continue to cover the services of the current provider for up to thirty (30) days to provide an opportunity for the enrollee to locate, and for services to be transferred to, another provider who meets the conditions of Paragraph A. BLUE SHIELD will cooperate with the enrollee in attempting to locate another provider by providing information regarding Licensed Providers and Supervising Licensed Providers that are known to BLUE SHIELD that will agree to the conditions in Paragraph A above. Other than a review in which relevant necessary records cannot be obtained, if, as a result of a periodic review, BLUE SHIELD decides to terminate or reduce the number of hours of ABA services, such decision shall be reviewable in the Department's Independent Medical Review process following participation by the enrollee in BLUE SHIELD's internal grievance process for thirty (30) days. In any such case, BLUE SHIELD will continue to provide coverage for ABA services at the number of hours per week/month specified by the recommending provider following such a decision to terminate or intention to reduce hours for sixty (60) calendar days, or upon completion of the Independent Medical Review process, whichever occurs first.

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

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

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

J. In the event that BLUE SHIELD contends that (1) an act of the Legislature of the State of California or of the United States Congress or applicable regulations issued by a federal agency, or (2) a final judgment has been entered by a Court of competent jurisdiction from which no appeal or other judicial review has been taken, or, if appealed, the final judgment has been affirmed by the court of last resort and is no longer subject to further appeal or review support BLUE SHIELD’s contentions that (1) ABA is not a health care service required to be covered under the Act; or (2) BLUE SHIELD may lawfully deny coverage for services provided by individuals who are not Licensed Providers; or (3) BLUE SHIELD may lawfully deny coverage for services provided by an individual who is a Licensed Provider but is providing services beyond the scope of his or her license, BLUE SHIELD will give no less than sixty (60) calendar days’ notice to the Department of its intention to cease performance under
this Agreement. That notice shall be sent to the attention of the Director with a copy to the head of the
Department’s Office of Enforcement. If the Department disagrees with BLUE SHIELD’s assertion that
the legislation or final judgment supports its contentions as set forth above in this Paragraph I, the
Department will give BLUE SHIELD written notice. BLUE SHIELD may then suspend its
performance under this Agreement and the parties will meet in good faith to renegotiate this Agreement.
If the disagreement cannot be resolved, this Agreement shall not limit or impede the Department’s right
to pursue enforcement against BLUE SHIELD for failing to comply with the Knox-Keene Act
requirements relating to the treatment of children with ASD or PDD.

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

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

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

Dated: 7-11-2011

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

Dated: 7-11-2011

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