

1
2
3
4
5 IN THE UNITED STATES DISTRICT COURT
6 FOR THE DISTRICT OF ARIZONA
7

8 RACHEL EKLOFF, REBECCA) No. CIV-O5-407-TUC-RCC
9 EKLOFF, and GRACE EKLOFF, minor)
10 children by and through their mother)
11 SARAH EKLOFF, RICHARD HARRIS,) **CONSENT DECREE**
12 a minor child by and through his father)
13 STEVE HARRIS, CAITLAN HOEL, a)
14 minor child by and through her mother)
15 TRACY HOEL, KRISTINA)
16 RICHARDSON, a minor child by and)
17 through her mother, MARY HULL,))
18 NICHOLAS IGRAS, a minor child by and)
19 through his father LEON IGRAS, SARAH)
20 EKLOFF, STEVE HARRIS, TRACY)
21 HOEL, MARY HULL and LEON IGRAS,))
22 as individuals and representatives of a)
23 class of persons similarly situated,)
24)

25 Plaintiffs,)
26)
27)

28 vs.)
29)
30)

31 ANTHONY D. RODGERS, Director of)
32 the Arizona Health Care Cost Containment)
33 System, in his official capacity, and the)
34 ARIZONA HEALTH CARE COST)
35 CONTAINMENT SYSTEM)
36 ADMINISTRATION,)
37)

38 Defendants.)
39)
40)

41 Plaintiffs filed the Complaint in this action on June 22, 2005 on their own
42 behalf and on behalf of others similarly situated. On November 22, 2005, Plaintiffs' filed a Motion
43 to Certify Class Action and a Motion for Summary Judgment. On December 5, 2005, the Court
44

1 granted the Motion to Certify Class Action. The court certified a class consisting of two subclasses.
2 First, a class of persons under age twenty-one who are eligible for AHCCCS services and need
3 incontinence briefs as a result of a disability. Second, a class of these children's parents who have
4 purchased incontinence briefs at personal cost.

5 Defendants filed their Cross-Motion for Summary Judgment on January 23, 2006. On
6 March 3, 2006, the Court granted the Plaintiffs' Motion for Summary Judgment, denied the
7 Defendants' Cross-Motion for Summary Judgment, and entered a permanent injunction against the
8 Defendants prohibiting them from denying Plaintiff children incontinence briefs for preventive
9 purposes and ordering Defendants to reimburse Plaintiff parents for their out-of-pocket expenses for
10 providing incontinence briefs to their Plaintiff children. The terms of this permanent injunction were
11 clarified by the Court by its Order of April 17, 2006.

12 On March 26, 2006, Defendants filed an appeal to the United States Court of
13 Appeals for the Ninth Circuit (No. 06-15580). The injunction was stayed for 60 days on April 17,
14 2006. On May 8, 2006, the parties were notified that the case was considered for inclusion in the
15 Mediation Program of the U.S. Court of Appeals for the Ninth Circuit. The parties thereafter
16 participated in several mediation sessions with a Circuit Mediator.

17 The parties have agreed to a proposed settlement of this case and on June 28,
18 2006, filed a Joint Motion to Substitute Terms of Injunction pending the Court's final approval of
19 the settlement and notice to the class. The Joint Motion was approved by the Court on June 28, 2006
20 and the parties were ordered to file a Motion for Approval of Proposed Settlement of Class Action
21 and Proposed Notice to Class Pursuant to Fed.R.Civ.P. Rule 23(e).

22 The Court, after reviewing the terms of the Consent Decree, the pleadings in this case, and
23 any comments from class members, finds:

- 24 1. For the purposes of this Consent Decree, the class is defined as previously
25 certified on December 5, 2006.
- 26 2. This settlement is fair, reasonable, and adequate.
- 27 3. This settlement requires AHCCCSA to provide coverage of incontinence briefs
28

1 prescribed for AHCCCS members between the ages of 3 and 21 years old who are incontinent due
2 to a disability. The settlement also requires AHCCCSA to reimburse the parents of Plaintiff children
3 for their out-of-cost expenses for purchase of incontinence briefs, when they meet certain criteria.

4 4. The parties provided notice to the class of this settlement on September 19, 2006
5 and a fairness hearing was held on November 17, 2006.

6 5. There was one (1) objection to this Consent Decree.

7 IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

8 1. This Consent Decree (Docket No. 65) resolves all of the claims of Plaintiffs and the
9 class against Defendants Rodgers and AHCCCSA arising out of this lawsuit.

10 2. This Consent Decree is final and binding upon the parties, their successors, and
11 assigns.

12 3. The terms of this Consent Decree will be substituted for the terms of Court's
13 injunctions issued on of March 3, 2006 and April 17, 2006 and the Court's Order of June 29, 2006.

14 **DEFENDANTS AHCCCSA AND RODGERS' ACTIONS**

15 4. Defendants AHCCCSA and Rodgers, their officers, agents, employees,
16 successors and assigns and all persons in active concert or participation with him, for the duration
17 of the decree, are permanently enjoined from:

18 A. Failing to provide coverage of incontinence briefs under the following terms:

19 1. Coverage: Incontinence briefs, including pull-ups, are covered for
20 AHCCCS members who have a documented disability, in order to
21 prevent skin breakdown, and to enable participation in social,
22 community, therapeutic, and educational activities. Coverage shall
23 be determined by:

- 24 a. Documentation of a disability that causes
25 incontinence of bowel and/or bladder; and
26 b. A prescription from the PCP or attending physician
27 ordering the incontinence briefs.
28

2. Age Limit: Coverage for incontinence briefs is limited to members over age three (3) and under age twenty-one (21).
3. Number of Briefs per Month: The benefit is limited to 240 briefs per month, except in cases involving members who are diagnosed with chronic diarrhea and/or spastic bladder. In these cases, more than 240 briefs shall be authorized when evidence of medical necessity is provided by the prescribing physician.
4. Prior Authorization: Prior authorization will be permitted to ascertain that:
 - a. the member is over age three (3) and under age twenty-one (21);
 - b. the member has a disability that causes incontinence of bladder and/or bowel;
 - c. a physician has prescribed incontinence briefs as medically necessary; and
 - d. the prescription is for 240 briefs or fewer per month, unless evidence of medical necessity for over 240 briefs is provided.
 - e. A physician prescription supporting medical necessity may be required for specialty briefs (for instance, hypo-allergenic briefs) or for briefs different from the standard briefs supplied by the health plan.
5. Number of Prior Authorizations Per Year: AHCCCS health plans may require a new prior authorization to be issued every twelve (12) months. Prior authorization for a renewal of an existing prescription may be provided by the physician through telephone contact with the member, rather than an in-person physician visit.
6. Obtaining Supplies: Members will be required to obtain incontinence briefs from the in-network providers contracted with the health plans.

AHCCCS health plans and in-network providers will be required by contract to provide standard adequate types of briefs, including pull-ups.

B. Failing to provide reimbursement for the out-of-pocket purchase of incontinence briefs under the following terms: Defendants' liability for reimbursement for purchases of incontinence briefs begins on June 25, 2005, when the Complaint in this action was filed in District Court, and ends the date that notice is provided to the class. Defendants shall reimburse members for out-of-pocket expenses for the purchase of briefs from the date of the denial or June 25, 2005, whichever is later, when the AHCCCS member can provide proof of the following:

1. The AHCCCS member is over age three (3) and under age twenty-one (21) and has a disability that results in incontinence of bladder and/or bowel;
2. The AHCCCS member had a prescription for briefs which was denied by the AHCCCS health plan;
3. The AHCCCS member purchased briefs at personal cost after the prescription was denied; and
4. The AHCCCS member provides receipts for the purchases sought to be reimbursed.

C. Failing to provide access to the following dispute resolution process: Any disputes regarding prior authorization will be addressed through the existing administrative appeal system (A.A.C. R9-34-101 *et seq.*). If an AHCCCS health plan denies a request for prior authorization, the health plan shall provide a notice in writing outlining (1) the specific reason for the denial, citing to the particular prior authorization criteria, in paragraph four above, that it believes are not met, and (2) the citation to the relevant policy or regulation supporting the denial.

5. To effectuate the above provisions, Defendants shall take the following actions:

A. Provider Notice: Notice of the terms of this settlement agreement shall be provided to providers through the health plans/program contractors, via a notice on the AHCCCS website, and through Claims Clues within thirty (30) days of approval of this settlement agreement.

B. Policy And Rule Revision: All AHCCCS policies and rules shall be modified to be consistent with the terms of this settlement agreement within nine (9) months of approval of this settlement agreement.

ATTORNEYS FEES AND COSTS

6. The parties agree that this settlement agreement shall not compromise the Plaintiffs' right to an award of fees and costs.

COURT APPROVAL OF SETTLEMENT AND DISMISSAL

7. The parties agree to submit this settlement agreement to the District Court pursuant to Fed.R.Civ.P. Rule 23(e). The parties agree that the briefing schedule in the United States Court of Appeals for the Ninth Circuit will be stayed pending this approval. Defendants agree to dismiss their appeal in the United States Court Appeals for the Ninth Circuit (No. 06-15580) pursuant to Fed.R.App.P. Rule 42 after the District Court approves this settlement.

JURISDICTION AND ENFORCEMENT

8. Once the District Court approves this settlement agreement, the case in the District Court (No. CIV05-407-TUC-RCC) will be dismissed with prejudice. However, the Court will reserve and retain jurisdiction to hear issues of alleged violations of the terms of this agreement pursuant to the following procedures:

A. Individual disputes over any aspect of the issues raised in this case or this agreement will be heard through the AHCCCS grievance and appeal procedures followed, if necessary, by judicial review in Arizona state courts.

B. The Plaintiffs shall give Defendants written notice of any allegation of systemic violation of the terms of this agreement (i.e. recurring issues that have not been resolved by individual grievances and appeals), said notice to

1 be in writing and in specific detail so that Defendants may investigate the
2 allegations being made.

3 C. However, if Plaintiffs allege that Defendants have failed to adopt written
4 rules and policies to implement the terms of this settlement agreement within
5 nine (9) months of court approval, or have modified or violated the terms of
6 the settlement agreement by written rule or policy, Plaintiffs may seek relief
7 in District Court without exhausting the AHCCCS administrative grievance
8 and appeals process. Plaintiffs shall first give Defendants written notice of
9 the allegations before seeking relief from the District Court.

10 D. Defendants shall have 60 days from receipt of notice of Plaintiffs'
11 allegations (pursuant to subparts b. or c. of this paragraph) to investigate and
12 cure the alleged issue. After 60 days, the Plaintiffs may seek further
13 intervention by the District Court if the issue remains unresolved.

14
15 **CHANGE IN LAW**

16 9. The provisions of this settlement agreement shall remain in effect unless there is
17 a change in the federal Medicaid statute or regulations that directly affects the coverage of
18 incontinence briefs under Title XIX. If Defendants believe that a change in the federal Medicaid
19 statute directly affects the terms of this settlement agreement, Defendants shall give Plaintiffs'
20 counsel notice of the change within 30 days of when Defendants found out about the change. The
21 notice shall include the following:

- 22 A. The federal change in law;
23 B. When Defendants were informed of the change;
24 C. The manner in which Defendants believe the change affects the terms of the
25 settlement agreement; and
26 D. The basis of Defendants' conclusion in paragraph c.

27
28 Plaintiffs shall have 30 days from receipt of the notice to either advise Defendants that

1 Plaintiffs agree with Defendants' interpretation or that they disagree and will file a motion in court
2 to request judicial intervention or interpretation.

3 DATED this 17th day of November, 2006.
4
5
6
7
8

9
10 

11 **Raner C. Collins**
12 **United States District Judge**
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28