

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

O.B., by and through his parents GARLAND BURT and JULIE BURT; **C.F.**, by and through his mother, KRISTEN FISHER; **J.M.** and **S.M.**, by and through their parents, and **DAN MCCULLOUGH** and **MICHELE MCCULLOUGH**, individually and on behalf of a class,

Plaintiffs,

v.

THERESA A. EAGLESON, in her official capacity as Director of the Illinois Department of Healthcare and Family Services,

Defendant.

No. 15-CV-10463

Judge Charles P. Kocoras

Magistrate Judge Jeffrey
Cummings

CONSENT DECREE

I. INTRODUCTION AND BACKGROUND

1. Four children, who are eligible to receive in-home shift nursing services under Illinois's Medicaid program, through their parents ("Plaintiffs"), filed this class action lawsuit on November 20, 2015 against the Director of the Illinois Department of Healthcare and Family Services ("HFS" or "Department"). The Complaint alleged violations of the EPSDT provisions of Title XIX of the Social Security Act ("Medicaid Act"), 42 U.S.C. §§ 1396a(a)(10)(a), 1396d(a)(4)(B), 1396a(a)(43)(C) (Count I); violations of the reasonable promptness provision of the Medicaid Act, *Id.* at § 1396a(a)(8) (Count II); violations of Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §12132 (Count III); and violations of section 504 of the Rehabilitation Act ("Section 504"), 29 U.S.C. §794a (Count IV).

2. Plaintiffs allege that Defendant, Theresa A. Eagleson, in her official capacity as Director of HFS, has been violating the Plaintiffs' rights by systematically failing to

arrange for in-home shift nursing services that the Department has found to be medically necessary for the Named Plaintiffs and Class Members.

3. On May 17, 2016, the Court certified a class under Fed. R. Civ. P. 23(b)(2) defined as:

All Medicaid-enrolled children under the age of 21 in the State of Illinois who have been approved for in-home shift nursing services by the Defendant, but who are not receiving in-home shift nursing services at the level approved by the Defendant, including children who are enrolled in a Medicaid waiver program, such as the Medically Fragile Technology Dependent (MFTD) Waiver program, and children enrolled in the nonwaiver Medicaid program, commonly known as the Nursing and Personal Care Services (NPCS) program. ECF 55.

4. The Parties desire to resolve this matter amicably and without going to trial. Without conceding any infirmity in their claims or defenses, the Parties have engaged in arms-length settlement negotiations to resolve the claims that Plaintiffs raised or could have raised in this action. Plaintiffs and Defendant have reached an agreement for settling this litigation that the Parties believe is fair, reasonable, and adequate to protect the interests of all Parties.

5. By entering into this Consent Decree, Defendant does not admit to any liability, fault, wrongdoing, or violation of law regarding the allegations made in this action or any other actions resolved herein. Moreover, no part of this Consent Decree may be used as evidence of Defendant's liability, fault, wrongdoing, or violation of law in this or any other legal proceeding.

6. The purpose of this Consent Decree is to provide remedies to enhance the ability of named Plaintiffs and Class Members to receive the in-home shift nursing services at the levels approved by Department and to comply with applicable law.

7. THEREFORE, based upon the foregoing, and the Court being otherwise fully advised, the Court hereby ORDERS, ADJUDGES, and DECREES:

II. JURISDICTION

8. The Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1343.

III. DEFINITIONS

9. As used herein, the following terms have the following meanings:

a. "Applicable law" means Title XIX of the Social Security Act, Title II of the ADA, Section 504 of the Rehabilitation Act, and any implementing regulations.

b. "Approval Date" means the date on which the Court approves this Consent Decree and enters judgment.

c. "Care Coordination" is assistance provided to Class Members and their Families to access waiver and State plan services, as well as medical, social, educational and other services, regardless of the funding source. Care Coordination includes services to assist Class Members' Families and Nursing Agencies to address issues that may arise with respect to providing Class Members their approved level of in-home shift nursing.

d. "Care Plans" are participant-centered support plans developed jointly with the family and participant, the DSCC care coordination team, and others as designated by the family. The support plan is based on a comprehensive assessment of support needs and available resources. The family and participant guide the support plan and utilization of services based on their preferences and goals.

e. "Class Counsel" means Attorneys Robert H. Farley, Jr.; the Legal Council for Health Justice (by Caroline Chapman, and Thomas Yates); and the National Health Law Program (by Jane Perkins and Sarah Grusin).

f. “Class” and “Class Members” mean the individuals who meet the definition of the class as certified by the Court on May 17, 2016, ECF 55.

g. “Court” means the United States District Court for the Northern District of Illinois, Eastern Division.

h. “Defendant” means the Director of the Illinois Department of Healthcare and Family Services in her official capacity, and any of her successors, agents, contractors, or assigns.

i. “Division of Specialized Care for Children” or “DSCC” means the program operated by the University of Illinois at Chicago (UIC) that provides care coordination to children with increased medical complexity who are medically fragile and technology dependent or who require in-home shift nursing.

j. “EPSDT” means the Early and Periodic Screening, Diagnostic, and Treatment requirement of Title XIX of the Social Security Act, which provides that, for Medicaid-eligible children under the age of 21, a State must provide “screening services ... [and] necessary health care, diagnostic services, treatment, and other measures described in subsection [1396d(a)] to correct or ameliorate defects and physical and mental illness and conditions discovered by the screening services, whether or not such services are covered under the State plan,” 42 U.S.C. § 1396d(r)(1),(5), and “arrange for (directly or through referral to appropriate agencies, organizations, or individuals) corrective treatment the need for which is disclosed by such child health screening services” *Id.* at § 1396a(a)(43)(C).

k. “Family” means the Class Member’s parents, guardians, caretakers, legally responsible adults, and other immediate family members.

l. "Illinois Medicaid State Plan" or "State Plan" means the plan the State of Illinois submitted to the United States Department of Health and Human Services, Centers for Medicare and Medicaid Services ("CMS"), in accordance with Title XIX of the Social Security Act, in effect as of the Approval Date, including any subsequent amendments thereto.

m. "In-home shift nursing" means shift nursing care in the home for the purpose of caring for Class Members.

n. "Managed Care Organization" ("MCO") means an entity or organization under contract with the State of Illinois to manage, coordinate, or facilitate arrangement of any type of health care for Medicaid enrollees.

o. "Named Plaintiffs" means the following individuals: O.B., C.F., J.M., and S.M.

p. "Nursing Agency" means any business entity that has enrolled as a Medicaid provider with the Department of Healthcare and Family Services to coordinate nursing services for in-home shift nursing to Class Members.

q. "Parties" means Plaintiffs and Defendant, collectively.

r. "Provider" means an entity or individual enrolled by the Department of Healthcare and Family Services to provide services in the Medicaid Assistance Program.

IV. OBLIGATIONS

10. Defendant shall revise her processes for providing in-home nursing services sufficient to staff the in-home shift nursing services for Class Members as provided in this Consent Decree.

11. Defendant shall establish the operational policies and structures necessary to implement this Consent Decree, including but not limited to financial and budgeting matters, funding of mechanisms, and interagency coordination of services.

12. Nothing in this Consent Decree shall require or authorize any particular service to be covered or made available to any Class Member if such service is beyond the federal EPSDT provisions of the Medicaid Act.

13. This Consent Decree shall not dictate how Defendant shall otherwise operate or fund the State's Medical Assistance programs beyond the obligations specifically set forth herein.

14. Defendant will work with DSCC or any MCOs involved in providing in-home shift nursing services to Class Members to provide individualized Care Coordination for all Class Members.

a. In addition to the existing enrollment and care coordination services provided by DSCC, a Staffing Support Team will be established to provide additional oversight of care coordination efforts pertaining to nurse staffing.

b. In the event that Class Members face challenges in obtaining approved in-home shift nursing that cannot be adequately addressed by the care coordinator or the care coordinator's manager, the case may be elevated to a Staffing Support Team as provided in this Consent Decree.

c. The Staffing Support Team will be made up of members of the DSCC Home Care Quality Improvement Team, DSCC Regional Managers, and DSCC Senior Administration. The Staffing Support Team will review care coordination efforts that have been taken to assist the Family, consult with the Family, and consult as necessary with HFS to determine if there are additional recommendations and strategies that could be used to assist in improved staffing, and will report to HFS on the status of these cases.

d. Class Members and their Families will have access to the Staffing Support Team if the Class Member is (a) medically ready for discharge from a hospital, respite care facility, or other institutional setting but are unable to be discharged because of insufficient in-home shift nursing; or (b) if the Family is unable to obtain approved in-home shift nursing for reasons not related to Family choice, and the Class Member's in-home shift nursing needs have not been adequately addressed by the care coordinator or the care coordinator's manager.

e. Families will be advised that before requesting assistance from the Staffing Support Team, they should first attempt to resolve any issues related to in-home shift nursing with the Class Member's assigned care coordinator(s), and then, if necessary, the care coordinator's manager. If those efforts to resolve the staffing issues are not successful, Class Members will be able to access the Staffing Support Team through their care coordinator or Class Counsel.

f. Class Members will receive information orally and in writing about the availability of Care Coordination and the Staffing Support Team within 30 days of entry of this Consent Decree, upon their eligibility for in-home nursing services, at each annual eligibility redetermination, and as needed by any entity providing care coordination services to Class Members.

15. Except as otherwise provided in this Decree, Defendant shall replace existing reimbursement rates paid to nursing agencies for in-home shift nursing with the following new reimbursement rates for registered nurses (RN), licensed practical nurses (LPN), and certified nursing assistants (CNA):

		Current Rate	Rate Under This Decree
Hourly RN Enhanced	Tier I	\$35.03	\$45.00
Hourly RN Regular	Tier II	\$28.75	\$45.00
Hourly LPN Enhanced	Tier I	\$31.14	\$37.50
Hourly LPN Regular	Tier II	\$24.78	\$37.50
Hourly CNA		\$20.00	\$25.00

16. As permitted by the Nurse Practice Act, 225 ILCS 65/50-1, *et seq.*, Defendant shall allow all RNs, LPNs, and CNAs licensed by the State of Illinois, or licensed by another State in the United States who have a pending application for licensure with the State of Illinois, to provide in-home shift nursing and related services to Class Members.

17. Defendant shall advise nursing agencies and MCO's involved in providing or approving in-home shift nursing for Class Members that nursing agencies may use out-of-state nurses to serve Class Members living in border areas, provided that the nurse has applied to become a licensed Illinois nurse and has no pending disciplinary charges.

18. Defendant shall advise nursing agencies and MCO's involved in providing or approving in-home shift nursing for Class Members that in-home nurses do not need to have prior work experience (*e.g.*, having worked for at least one year).

19. Defendant shall advise nursing agencies and MCO's involved in providing or approving in-home shift nursing for Class Members that Class Members may use more than one nursing agency to provide their approved in-home shift nursing.

20. Defendant will educate nurses about the opportunity to work for Nursing Agencies that provide services to Class Members.

21. Defendant will provide on-line education and resources for agencies and providers regarding provision of ventilator services needed by medically complex children.

22. Two times per year the Department shall provide a report to Class Counsel that identifies:

- a. the number of in-home shift hours per week allocated to each Class Member under the Class Member's Care Plan;
- b. the number or percentage of in-home hours per week provided to each Class Member;
- c. the Nursing Agency or Agencies assigned to each Class Member;
- d. the reasons for any shortfall in hours provided; and
- e. the actions taken to obtain in-home shift nursing, including any referral to the Staffing Support Team;
- f. for cases referred to the Staffing Support Team, the report shall describe the challenges faced and the result achieved.

23. If Defendant utilizes or contracts with MCOs or any other entities to provide in-home shift nursing services, Defendant shall ensure that any such entity substantially complies with the terms of this Consent Decree; provided, however, that the inclusion of other State agencies or government entities in this paragraph neither binds those agencies to this Consent Decree's obligations nor relieves Defendant of her obligations under this Consent Decree.

24. This Consent Decree does not require the use of any particular federal funding mechanism, and nothing in this Consent Decree requires that payment for any service be made out of any particular state agency or entity budget or appropriation.

V. DISPUTE RESOLUTION.

25. Before initiating formal dispute resolution procedures under this paragraph, the Parties shall endeavor to resolve disputes informally. In the event those informal efforts are

unsuccessful, and Class Counsel believes Defendant is not materially complying with the terms of this Consent Decree, Class Counsel shall provide written notice to Defendant of Defendant's alleged material non-compliance. Defendant shall respond in writing within 30 days of receipt of Class Counsel's notification of a claim of non-compliance. Class Counsel shall advise Defendant of their acceptance or rejection of Defendant's response within 7 business days of their receipt of Defendant's response. If rejected, the Parties shall meet within 14 days to discuss and attempt to resolve any matter addressed in the written submissions in good faith. At the end of negotiations, the parties shall create a document that sets forth the issue(s) in dispute as well as resolution, or if there was no resolution, the respective positions of the parties. If the Parties are not successful in their efforts to resolve the matter, they may jointly or individually seek intervention from the Court for the purpose of effecting compliance with the provisions specified in the written submissions. The parties may agree in writing to modify the timelines in this paragraph to accommodate appropriate inquiry, review, and resolution of a compliance matter before seeking court resolution.

26. Non-compliance with this Consent Decree shall not be interpreted or understood to encompass individual challenges to in-home shift nursing staffing levels. No Class Member, Plaintiff, or any other group or entity purporting to act on behalf of any Class Member, may seek an order of contempt or seek to enforce this Consent Decree (a) solely on the basis of any individual instance of alleged non-compliance with this Consent Decree; (b) for the purpose of seeking individualized or other relief not expressly provided in this Consent Decree; or (c) on the basis of any issue or requirement not expressly provided in this Consent Decree. All individual challenges to the sufficiency, amount, medical necessity of, or result of any prior approval for in-

home nursing services must proceed through existing state processes for administrative appeal and judicial review.

27. If Class Counsel seeks intervention by the Court, Class Counsel may move the Court for further relief to enforce compliance, including requesting an order to show cause why the Defendant should not be held in civil contempt and attorneys' fees and costs. Class Counsel will not seek an order to show cause without first meeting and conferring with Defendant's counsel in a good faith effort to resolve the dispute.

VI. ATTORNEYS' FEES AND COSTS

28. On behalf of Defendant, the State of Illinois agrees to pay to Class Counsel the sum of \$650,000 in settlement of Plaintiffs' claims for attorneys' fees and costs associated with this litigation. Such amounts shall be distributed to Class Counsel in the manner agreed to by the Parties. Such amounts shall be set forth in a Judgment Order to be entered by the Court. Defendant shall complete and submit all paperwork necessary for payment of such amounts within ten business days after the Court enters judgment. Class Counsel shall not seek additional or future attorneys' fees or costs beyond those agreed to in this paragraph, including but not limited to any that may be related to any future implementation, enforcement, compliance, or other work associated with litigation and settlement of matters related to the *O.B. v. Norwood* class action, with the exception that plaintiffs may seek additional attorney fees and costs limited to a prevailing action pursuant to Section V of this Consent Decree.

VII. TERMINATION

29. Unless otherwise ordered, this Consent Decree shall terminate five years after the Approval Date and the case will be deemed dismissed with prejudice. The Parties, jointly or

severally, may file a motion requesting modification or termination of this Consent Decree at any time after the Approval Date and before the Consent Decree is terminated.

VIII. MISCELLANEOUS PROVISIONS

30. The Parties will provide notice of this Consent Decree and fairness hearing to the Class Members as required by Fed. R. Civ. P. 23.

31. Within 30 days of Final Approval of the Consent Decree, Defendant will provide notice of the Consent Decree to Nursing Agencies that provide in-home shift nursing services to Class Members.

32. The Parties agree to use their best efforts to carry out the terms of this Consent Decree. At no time shall any of the Parties or their counsel seek to solicit or otherwise advise the Class Members to submit objections to this Consent Decree or to appeal from the order giving final approval to this Consent Decree.

33. This Consent Decree contains all the terms and conditions agreed upon by the Parties hereto, and no oral agreement entered into at any time nor any written agreement entered into prior to the execution of this document regarding the subject matter of this proceeding shall be deemed to exist, or to bind the Parties hereto, or to vary the terms and conditions contained herein. This Consent Decree supersedes all prior agreements, representations, negotiations, or positions taken by the Parties in this litigation not set forth herein.

34. The Parties to this document have mutually participated in its drafting and, consequently, any ambiguity shall not be construed for or against either party.

35. This Consent Decree may be amended, modified, or supplemented only by an agreement in writing signed by the Parties and approved by the Court.

36. This Consent Decree shall inure to the benefit of and be binding upon the legal representatives of any successor of the Plaintiffs and Defendant.

37. The cost of all notices hereunder or otherwise ordered by the Court shall be borne by Defendant.

38. Each undersigned representative of Defendant and the Attorney General for the State of Illinois certifies that he or she is authorized to enter into this Consent Decree and to execute and bind legally Defendant to its terms. Each undersigned representative of Plaintiffs certifies that he or she is authorized to enter into this Consent Decree and to execute and bind legally the Plaintiffs to its terms. Execution of this Consent Decree by signature is a condition precedent to the Consent Decree becoming effective and binding on the Parties. This Consent Decree may be executed in counterparts, each of which will be deemed to be an original and all of which taken together shall constitute a single instrument. This Consent Decree may be executed by a signature via facsimile transmission or electronic mail which shall be deemed the same as an original signature.


39. The Court will retain jurisdiction to enforce the terms of the Consent Decree. To permit enforcement of the terms of this Consent Decree, the Parties agree that, should it become necessary to seek Court assistance as to enforcement of the Consent Decree, any order granting such relief must include a finding that the relief sought is narrowly drawn, extends no further than is necessary and is the least intrusive means for doing so.

40. This Consent Decree resolves and provides the sole and exclusive remedy for all claims and issues arising from this action that were raised or could have been raised by the Class certified by the Court. Defendant shall have no duties or obligations to Plaintiffs or Class Members for claims and issues arising from this action beyond the terms of this Consent Decree.

EACH UNDERSIGNED PARTY enters into this Consent Decree in the matter of *O.B., et al. v. Norwood*, Case No. 15-10463, pending in the United States District Court for the Northern District of Illinois, Eastern Division.

Executed as of ^{AUGUST} ~~June~~, 14, 2019

FOR NAMED AND CLASS PLAINTIFFS:


Title: ATTORNEY FOR PLAINTIFFS
Date: 8-14-19

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Executed as of ~~June, 14~~ ^{AUGUST}, 2019


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FOR DEFENDANT, DIRECTOR OF ILLINOIS DEPARTMENT OF HEALTHCARE AND FAMILY SERVICES:


Title: Director
Date: 8/14/19

So Ordered:

Charles P. Kocoras

Honorable Charles P. Kocoras

United States District Judge

Dated: 11/14/2019