

1 DEBRA L. DENTON
Acting Assistant Deputy Director, Bar No. 164482
2 DREW BRERETON
Sr. Counsel, Bar No. 213277
3 CALIFORNIA DEPARTMENT OF
MANAGED HEALTH CARE
980 9th Street, Suite 500
4 Sacramento, CA 95814-2725
916-323-0435 -Phone
5 916-323-0438 -Fax
enforcement@dmhc.ca.gov

6 Attorneys for Complainant
7

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

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

12 Anthem Blue Cross

13 Respondent.
14

Enforcement Matter Nos.: 10-578, 11-347,
11-348, 11-349, 11-350, and 11-351

SETTLEMENT AGREEMENT

15
16 **I. Recitals**

17 1. This Settlement Agreement (the "Agreement") is made and entered into on this 15th day
18 of July, 2011, by and between BLUE CROSS OF CALIFORNIA d/b/a ANTHEM BLUE CROSS
19 (BLUE CROSS) and the DEPARTMENT OF MANAGED HEALTH CARE (the Department) solely
20 for the purpose of resolving the dispute arising from the Department's findings that BLUE CROSS
21 delayed or failed to arrange for the provision of Applied Behavior Analysis (ABA) services for the
22 treatment of pervasive developmental disorder (PDD) or autism spectrum disorder (ASD) to enrollees
23 who are the subjects ("Subject Enrollees") of Enforcement Matter numbers 10-578, 11-347, 11-348, 11-
24 349, 11-350, and 11-351 ("Enforcement Matters") and to establish an Agreement to cover ABA for
25 other enrollees of BLUE CROSS who are in benefit plans regulated by the Department ("Enrollees").

26 2. ABA therapy is defined as "the design, implementation, and evaluation of systematic
27 instructional and environmental modifications to promote positive social behaviors and reduce or
28 ameliorate behaviors which interfere with learning and social interaction." Government Code section

1 95021(d)(1).

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

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

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

13 6. The Department also contends that BLUE CROSS is obligated to identify and contract with a
14 sufficient number of Licensed Health Care Providers qualified to render ABA therapy to ensure that
15 BLUE CROSS has an adequate network to provide medically necessary services to Enrollees.

16 7. BLUE CROSS contests whether Applied Behavior Analysis ("ABA") is a health care service
17 or is medically necessary and must be covered by a health plan under the Knox-Keene Act as a
18 treatment for PDD or ASD.

19 8. BLUE CROSS further asserts that there are no California licensure requirements applicable to
20 the provision of ABA service such that ABA can be performed by unlicensed persons. BLUE CROSS
21 asserts on this basis, among others, that ABA is not a health care service or a covered benefit under
22 BLUE CROSS health plan contracts(s).

23 9. Notwithstanding the above, the Parties are willing to enter into this Agreement to resolve
24 the pending dispute over coverage of ABA services for the Subject Enrollees and for all other Enrollees
25 ("Enrollees") in benefit plans regulated by the Department as set forth below.

26 In order to resolve this dispute:

27 A. It is understood and agreed that BLUE CROSS is not admitting any violation of the Knox-
28 Keene Act with regards to requests for coverage of or claims for ABA services; and that BLUE CROSS

1 is not admitting that ABA services are health care services or are always medically necessary to treat
2 PDD or ASD, BLUE CROSS is not waiving its rights to argue that ABA is not a covered service in any
3 current or subsequent litigation between BLUE CROSS and any third parties; and BLUE CROSS is not
4 waiving its right to argue that BLUE CROSS is not obligated to cover services rendered by unlicensed
5 providers.

6 B. It is further understood and agreed, as indicated above, that the Department's position is that
7 ABA, when provided as a covered health care service to diagnose and/or treat ASD or PDD, must be
8 provided by persons who are Licensed Health Care Providers under California law, and nothing in this
9 Agreement should be construed to indicate otherwise.

10 C. The Parties further understand that, except for purposes of enforcing the terms of this
11 Agreement, this Agreement shall not be used for any purpose by either party in any current or future
12 litigation or dispute resolution in any form.

13 II. Agreement

14 WHEREAS, the Parties desire to enter into this Agreement based on the Recitals above, which
15 are incorporated by reference into this Agreement.

16 WHEREAS, the Parties desire to resolve the disputed issues raised in the pending Enforcement
17 Matters.

18 WHEREAS, by entering into this Agreement, BLUE CROSS does not admit any liability or
19 violation of the Act. However, the Parties agree that it is in the best interests of BLUE CROSS to enter
20 into this Agreement, and thereby settle and release the Enforcement Matters and all issues, accusations,
21 and claims that the Department now has or may have in the future against BLUE CROSS related to, or
22 arising from, the specific Enforcement Matters settled and released under this Agreement; and to agree
23 to cover ABA services for all other Enrollees as set forth in this Agreement.

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

26 A. BLUE CROSS agrees to arrange for ABA services for each Subject Enrollee, as
27 described in more detail below, while the Subject Enrollee is still enrolled with BLUE CROSS.
28

1 Coverage for ABA services commenced no later than June 1, 2011, and shall be provided until
2 November 30, 2011, or for six months, whichever is sooner, at the number of hours per week/month as
3 specified by the Subject Enrollee's provider who recommended the ABA services. Until November 30,
4 2011, BLUE CROSS will not dispute the medical necessity of the services or the frequency at which the
5 services were recommended. After November 30, 2011, BLUE CROSS shall have the right to conduct
6 periodic medical necessity reviews no more frequently than every six (6) months as set forth in
7 paragraph D. BLUE CROSS shall not be responsible for payment of services provided during any
8 period in which an Enrollee is not eligible for coverage under a BLUE CROSS plan. After the date this
9 Agreement is signed and once ABA services are commenced, the Department will take no further
10 administrative action against BLUE CROSS relative to the provision of ABA services for the Subject
11 Enrollees, as long as the services are provided consistent with this Agreement and applicable Knox-
12 Keene Act statutes and regulations. Nevertheless, the Department may fully investigate any further
13 complaint or grievance submitted to the Department by the Subject Enrollees and may process requests
14 for Independent Medical Review submitted to the Department by the Subject Enrollees.

15 B. For each Subject Enrollee who paid for ABA services for any dates of service between
16 the date of notification of coverage of the ABA services sent by the Department's Help Center to the
17 given enrollee, BLUE CROSS will reimburse those Subject Enrollees for the costs of those services, less
18 the cost-sharing required under those Subject Enrollees' benefit plans, within thirty (30) calendar days of
19 receipt of the minimum documentation reasonably necessary to verify the charges paid for those
20 services. When reimbursing Subject Enrollees who are enrolled in PPO benefit plans, BLUE CROSS
21 agrees to reimburse at the in-network benefit level for those dates of service.

22 C. BLUE CROSS agrees to arrange for the provision of all medically necessary ABA
23 services for the treatment of PDD or ASD for all current and future Enrollees and the Subject Enrollees,
24 in accordance with the terms of this Agreement, subject to any development or change in law or
25 regulation, as set forth in paragraph I, that clarifies BLUE CROSS' legal obligations with respect to
26 ABA services.

27 As part of this Agreement, BLUE CROSS agrees to arrange for the provision of ABA services
28 by either:

1 (i) Licensed Health Care Providers; or
2 (ii) by individuals who are not Licensed Health Care Providers, but who maintain a BCBA-
3 certification¹ or who have similar training, experience and competence in rendering ABA services to
4 individuals with ASD or PDD, and the services are supervised by a Licensed Health Care Provider
5 (“Supervising Licensed Provider”) who:

- 6 a. Supervises and bills for the services of the unlicensed provider;
- 7 b. Utilizes the billing codes provided by BLUE CROSS;
- 8 c. Maintains appropriate professional liability insurance covering the ABA services provided;
- 9 d. Retains appropriate treatment records, including the identity of the individual providing the
10 ABA services, in accordance with professional standards of practice;
- 11 e. Agrees to provide copies of the Enrollees’ ABA treatment records to BLUE CROSS on
12 reasonable request and at reasonable intervals; and
- 13 f. Provides BLUE CROSS with a treatment plan which incorporates behavioral strategies that
14 address the Enrollee’s identified language, social and behavioral impairments in accordance with the
15 treatment principles of ABA and which is updated at least every 6 months.

16 D. BLUE CROSS agrees to provide coverage for the ABA services described above at the
17 number of hours per week/month as specified by the Enrollee’s Licensed Health Care Provider or
18 Supervising Licensed Provider who recommended the ABA services. The services shall be covered for
19 a duration equal to the length of time specified by the Enrollee’s provider, or for a period of six (6)
20 months, whichever is shorter, so long as the Enrollee remains enrolled as a BLUE CROSS member.
21 BLUE CROSS shall not be responsible for payment of services provided during any period in which an
22 Enrollee is not eligible for coverage under a BLUE CROSS plan. BLUE CROSS may revisit the issue of
23 whether the services remain medically necessary through periodic reviews, which shall not occur more
24 frequently than every six (6) months. These periodic reviews shall not result in delays by BLUE
25 CROSS in covering the provision of ABA services and shall be performed while services continue.

27 ¹ Behavior Analyst Certification Board (BCAB) is a private entity
28 that provides certification for behavior analyst practitioners, but
this does not result in licensure or certification under current
California law.

1 Except for denials on the basis that the Enrollee is no longer a BLUE CROSS member, has not complied
2 with the requirements of this Agreement to utilize participating providers, or as otherwise permitted by
3 this Agreement and while this Agreement is in effect, any denial of coverage for ABA services will be
4 construed as a denial based on medical necessity and will be subject to review under the Department's
5 Independent Medical Review process following participation by the Enrollee in BLUE CROSS' internal
6 grievance process for thirty (30) days.

7 E. BLUE CROSS agrees to submit to the Department an Action Plan (AP) that establishes
8 policies or procedures for handling Enrollee questions, concerns, and grievances regarding diagnoses
9 and treatment of PDD or ASD, including but not limited to coverage of ABA. The policies or
10 procedures will also describe BLUE CROSS' program for educating and informing BLUE CROSS'
11 staff responsible for handling Enrollee questions, concerns, and grievances, including, but not limited to,
12 the following:

- 13 • Answering Enrollees' questions, concerns, and grievances on the subject of diagnoses
14 and treatment of PDD or ASD in a prompt manner, with minimal re-direction or referral;
- 15 • Properly identifying and processing grievances on the subject of ABA in accordance with
16 the Knox-Keene Act; and
- 17 • Assisting Enrollees in locating Licensed Health Care Providers and/or Supervising
18 Licensed Providers that are contracted with BLUE CROSS, and are qualified and willing
19 to render ABA services for ASD or PDD. If a BLUE CROSS in-network Licensed
20 Health Care Provider or Supervising Licensed Provider cannot be located within a
21 reasonable distance from the Enrollee's geographic location, BLUE CROSS will arrange
22 for coverage for ABA with a non-network Licensed Health Care Provider or Supervising
23 Licensed Provider within a reasonable period of time, not to exceed thirty (30) days,
24 which will be reimbursed at the in-network benefit level.
- 25 • HMO Enrollees may contact their medical groups or BLUE CROSS with questions,
26 concerns, and grievances regarding ABA. PPO Enrollees' requests for ABA services
27 must be either authorized or be denied on the grounds of lack of medical necessity or
28 failure to comply with requirements of this Agreement to utilize participating providers.

23 The AP must be submitted to the Department's Office of Enforcement within sixty (60) calendar
24 days from the date this Agreement is signed for the Department's review and approval to ensure that the
25 AP appropriately addresses the Department's concerns. BLUE CROSS agrees that it must implement
26 the AP no later than October 1, 2011.

28 F. BLUE CROSS agrees that it will adjudicate complete claims (as defined under the

1 California Code of Regulations, title 28, section 1300.71(a)(2)) without requests for additional
2 documentation or information from any provider of ABA services after such time as the claim is
3 complete. In adjudicating claims, BLUE CROSS will not request any information beyond that
4 information which is "reasonably relevant information" (as that phrase is defined in California Code of
5 Regulations, title 28, section 1300.71(a)(10)) and "information necessary to determine payer liability"
6 (as that phrase is defined in California Code of Regulations, title 28, section 1300.71(a)(11)). BLUE
7 CROSS will utilize its standard claims payment procedures and will not require submission of ABA-
8 related claims to a unique address different from the standard claims address. Recitation of these
9 obligations is not intended to waive any claims reimbursement laws not specifically referenced. BLUE
10 CROSS and its ABA providers may reach more specific agreements regarding claims reimbursement
11 and issues of documentation by contract. However, in no event shall BLUE CROSS request that an
12 ABA provider waive any of its rights under the Knox-Keene Act or related regulations, or require more
13 documentation of a claim than is permissible under the law.

14 G. When reimbursing PPO Enrollees for medically necessary ABA services, BLUE CROSS
15 agrees to reimburse at the preferred provider benefit level and not to apply an out-of-network deductible
16 or maximum unless BLUE CROSS can demonstrate that a qualified in-network provider of ABA
17 services with sufficient capacity to provide the full amount of medically necessary ABA services was
18 reasonably available to the Enrollee and that the Enrollee elected to utilize a non-network provider
19 instead.

20 H. Any examination, survey, or audit conducted by the Department relating to the provision of
21 ABA services to BLUE CROSS Enrollees will be reviewed in consideration of the terms of this
22 Agreement.

23 I. Should BLUE CROSS contend that a change in the law in the State of California relieves
24 it of its responsibility to continue to perform in accordance with any provision of this Agreement, BLUE
25 CROSS will give no less than sixty (60) calendar days notice to the Department of its intent to change
26 its practices pursuant to this Agreement, including specific reference to this Agreement. That notice
27 shall be sent to the attention of the Director with a copy to the head of the Department's Office of
28 Enforcement. The Department will give BLUE CROSS written notice if the Department disagrees with

1 BLUE CROSS' assertion that a change in California law relieves BLUE CROSS of its compliance with
2 this Agreement. BLUE CROSS may then suspend its performance under this Agreement and the Parties
3 will meet in good faith to renegotiate this Agreement. If the disagreement cannot be resolved, this
4 Agreement shall not limit or impede the Department's right to pursue enforcement against BLUE
5 CROSS for failing to comply with the Knox-Keene Act requirements relating to the treatment of
6 children with ASD or PDD, except to the extent that the Subject Enrollees' Enforcement Matters are
7 settled and released under this Agreement.

8 J. BLUE CROSS waives any right to appeal, contest, dispute or otherwise bring a challenge
9 in connection with the Enforcement Matters, be it by administrative, judicial or other proceeding. This
10 Agreement shall be a complete defense to any such appeal, contest, dispute, or challenge, and shall
11 entitle the Department to an immediate dismissal, with prejudice, of any such appeal, contest, dispute, or
12 challenge.

13 K. This Agreement shall terminate on December 31, 2013, unless extended by mutual
14 agreement of the Parties, or earlier as set forth in paragraph I, above. BLUE CROSS agrees that if it
15 breaches this Agreement, the Department is entitled to assess a separate monetary penalty as provided
16 under the Knox-Keene Act. In the event of such breach, the terms of this Agreement do not prevent the
17 Department from exercising any and all other aspects of its disciplinary authority to ensure BLUE
18 CROSS' compliance with all of its obligations under this Agreement.

19 L. It is understood and agreed that, by executing this Agreement BLUE CROSS does not
20 admit any liability or violation of the Knox-Keene Act or associated regulations. This Agreement
21 pertains to disputed matters and does not constitute a concession and/or admission and shall not be used
22 as evidence of liability or wrongdoing for any purpose whatsoever.

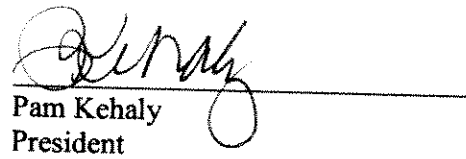
1 **IN WITNESS WHEREOF**, the parties hereby execute this Agreement by the signatures of their
2 respective duly authorized officials.

3 Dated: 7/15/11



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

7
8 Dated: 7/15/11



9 Pam Kehaly
10 President
11 Anthem Blue Cross

12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28