

Q & A: Recent Medicaid EPSDT Cases¹

*Question: I have heard about the recent Medicaid case **Rosie D. v. Romney**. Are there any other cases on Medicaid's Early and Periodic Screening, Diagnosis and Treatment (EPSDT) benefit that have come out recently?*

Answer: There have been several significant EPSDT cases decided over the past two years. A number of these cases reach substantive issues, thus, they are particularly important. The cases and the trends they mark are summarized below.

The EPSDT Cases

A.G. v. Arnold, 2006 WL 334218 (M.D. Fla. Feb. 13, 2006).

C.F. v. Dep't Children and Families, CASE NO. 3D04-1147, 2005 Fla. App. LEXIS 20245 (Dec. 28, 2005).

Clark v. Richman, No. 4:00-cv-1306, (M.D. Penn.), 339 F. Supp. 2d 631 (Oct. 7, 2004) (decision on motions for summary judgment), (Aug. 17, 2005) (judgment).

Hawkins v. NH Dep't of Health & Human Servs., 2004 DNH 23 (D. N.H. 2004)

Health Care for All v. Romney, No. 00-10833-RWZ, 2005 U.S. Dist. LEXIS 14187 (July 14, 2005)

Jacobus v. Dep't of PATH, 2004 Vt. 70 (2004)

Memisovski v. Maram, No. 92-C-1982, 2004 U.S. Dist. LEXIS 16772 (N.D. Ill. Aug. 23, 2004)

Okla. Chapter of Am. Academy of Pediatrics v. Fogarty, 366 F. Supp. 2d 1050 (N.D. Okla. 2005) (**on appeal**)

Pediatric Specialty Care v. Ark. Dep't Human Services, No. 4:01CV00830 (E.D. Ark.)

Rosie D. v. Romney, NO. 01-30199-MAP, 2006 U.S. Dist. LEXIS 3026 (D. Mass. Jan. 26, 2006)

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OTHER OFFICES

S.D. v. Hood, 391 F.3d 581 (5th Cir. 2004)

Semerzakis v. Wilson-Coker, 274 Conn. 1 (2005)

Westside Mothers v. Haveman, 368 F. Supp. 2d 740 (E.D.Mich 2005) (**on appeal**)

Discussion

Merits in Systemic Cases (*Clark, Hawkins, Health Care for All, Memisovski, Oklahoma Academy, Rosie D.*)

The past two years have yielded several excellent, far-reaching EPSDT verdicts in systemic cases. The years of hard work that advocates put into these cases, and the extensive evidence they presented, for the most part paid off. Though *Hawkins* settled, the fact that such a far-reaching settlement could be achieved in this era is impressive and welcome. The *Oklahoma Academy* case was not entirely successful, however, because the decision is on appeal, it is likely that there will be further litigation.

Merits in Individual Cases (*C.F., Jacobus, S.D.*)

Individual cases have met with success and the cases indicate the impact that evidence of individual harm can have on a trier of fact.

EPSDT Enforceability (*Clark, Health Care for All, Memisovski, S.D., Westside Mothers*)

The trend in enforceability of the EPSDT provisions - 42 U.S.C. §§ 1396a(a)(10)(A), 1396a(a)(43), 1396d(a)(4)(B), 1396d(r) - has been mostly good. The case in which plaintiffs ran into enforcement difficulties - *A.G. v. Arnold* - did not rely on these provisions. And, advocates will want to watch *Westside Mothers* and *Oklahoma Academy of Pediatrics* closely, to determine how the Sixth and Tenth Circuits rule on enforceability.

Dental Cases (*Clark, Hawkins, Jacobus, Semerzakis*)

The evidence in these cases show the profound difficulties beneficiaries still face in obtaining dental services. The *Semerzakis* case is unsettling, as it indicates a willingness of courts to apply a lower standard of medical necessity due to the structure of the statute and language regarding dental services. Advocates will want to watch future dental cases and stay tuned for further analysis of this issue from NHeLP.

Case Summaries

A.G. v. Arnold, 2006 WL 334218 (M.D. Fla. Feb. 13, 2006).

Background: A Medicaid EPSDT recipient with various conditions, including developmental delay, scoliosis, paraplegia, hydrocephalus, and spina bifida, requested coverage of a power wheelchair with a lift system. The claims were based on 42 U.S.C. § 1396 (stating purpose of the Medicaid Act), § 1396d(r) (requiring coverage of all Medicaid coverable services needed to correct or ameliorate problems); and § 1396a(a)(10)(B)(I) and 42 C.F.R. § 440.220 (regarding amount, duration and scope of medical assistance). The plaintiff did not base his claims on any of the EPSDT provisions. The defendant moved to dismiss, arguing that these provisions were not enforceable through Section 1983.

The Court's Decision: The court dismissed the claims, holding that the Medicaid provisions were not enforceable because they did not provide evidence of Congressional intent to impose a binding obligation on the defendant to provide the plaintiff with a power wheelchair. Moreover, according to the court, amendment of the complaint would be futile.

C.F. v. Dep't Children and Families, CASE NO. 3D04-1147, 2005 Fla. App. LEXIS 20245 (Dec. 28, 2005).

Background: Plaintiff is a nine year old Medicaid EPSDT recipient with severe disabilities, including mental retardation, brain damage, bronchopulmonary dysplasia and ADD. He receives numerous Medicaid-covered services including six hours of personal care services per day. After a review of his case, his personal care services hours were reduced to four per day, based on the state's medical necessity definition. Despite the testimony of the plaintiff's treating physician that six hours of services were medically necessary, the reduction was upheld by an administrative hearing officer.

The Court's Decision: The court held that this decision violated EPSDT because it applied a narrower definition of medical necessity than that contained in the EPSDT statute. Under the state's definition, in order for services to be medically necessary, they must meet the following conditions: (1) be necessary to protect life, to *prevent significant illness or significant disability, or to alleviate severe pain*; (2) be individualized, specific, and consistent with symptoms or confirmed diagnosis of the illness or injury under treatment, and not in excess of the patient's needs; (3) be consistent with *generally accepted professional medical standards* as determined by the Medicaid program, and not experimental or investigational; (4) be reflective of the level of service that can be safely furnished, and for which no equally effective and more conservative or less costly treatment is available; statewide; and (5) *be furnished in a manner not primarily intended for the convenience of the recipient, the recipient's caretaker, or the provider*. Fl. Admin. Code R. 59G-1.010(166) (emphasis added). The court held that this was significantly narrower than EPSDT's requirement that a service simply be necessary "to correct or ameliorate" a physical or mental illness or condition. In addition, the court held that the definition of "personal care services" applied was narrower than the statutory definition. Finally, the court held that the hearing officer failed to give appropriate deference to the opinion of the plaintiff's treating physician.

Clark v. Richman, No. 4:00-cv-1306, (M.D. Penn.), 339 F.3d 631 (Oct. 7, 2004) (partial grant, partial denial of cross-motions for summary judgment), (Aug. 17, 2005) (judgment)

Background: A class of individuals with disabilities (including children and youth under age 21) claimed that defendant denied access to Medicaid-covered dental services. Plaintiffs argued that

defendant had violated a number of Medicaid provisions including: 42 U.S.C. § 1396a(a)(10)(A), § 1396a(a)(8) and 42 C.F.R. § 435.930 (requiring that medical assistance be provided with reasonable promptness); 42 U.S.C. § 1396a(a)(30)(A) (requiring adequate rates); and 42 U.S.C. §§ 1396a(a)(10)(A), 1396a(a)(43), 1396a(a)(4)(B), and 1396d(r) (requiring EPSDT). Both sides filed motions for summary judgment.

The Court's Summary Judgment Decision: On October 7, 2004, the court denied plaintiff's summary judgment motion, and partially granted defendant's. It held that each of these provisions conferred rights enforceable through Section 1983. It granted defendant summary judgment on plaintiffs' reasonable promptness claim, reasoning that the statutory sections cited only guaranteed the right to payment for services, not to the provision of services themselves. The claims of inadequate rates and EPSDT violations were allowed to proceed to trial. The court did, however, acknowledge that the EPSDT provisions require more than merely payment for services and impose affirmative obligations to "play a more direct role."

The Court's Trial Decision: After an eight day trial, on August 17, 2005, the court ruled in favor of the defendant, finding that plaintiffs failed to carry their burden of proving violations of the EPSDT and equal access provisions. Among other things, the court held that: (1) the defendant had a proper periodicity schedule for screenings that had been formulated in consultation with the Pediatric Dental Association and the Academy of Pediatric Physicians; (2) the defendant complied with the informing requirements, evidenced by managed care organizations' compliance with the informing requirements in their contracts and the fact that defendant mailed out informational letters, handbooks and brochures; made and fielded phone calls from recipients; and maintained a website with "a wealth of information." Slip. Op. at 85. Finding no violation of the treatment requirements, the court discounted general observations by defendant and managed care organizations that recipients had difficulty finding treatment as "at best abstract observations of areas needing continued attention and improvement." Slip. Op. at 85. Finally, the court gave little weight to plaintiffs' testimony as to the difficulty of finding services as limited and only "tangentially related to EPSDT."

Hawkins v. NH Dep't of Health & Human Servs., 2004 DNH 23 (D. N.H. 2004)

Background: Plaintiff children filed suit on behalf of a class of current and future EPSDT-eligible individuals enrolled in New Hampshire's Medicaid program alleging that defendants failed to adhere to EPSDT requirements in the provision of dental services. The parties reached a settlement that certified the class and required: (1) defendant to comply with federal EPSDT statutes and regulations, listing each requirement specifically in the settlement; (2) allocation of \$ 1.2 million for EPSDT dental services; (3) a consent decree pursuant to which the court assumes jurisdiction for five years, with an additional sixth year for measuring compliance.

The Court's Decision: The court approved the class certification and the settlement.

Health Care for All v. Romney, No. 00-10833-RWZ, 2005 U.S. Dist. LEXIS 14187 (July 14, 2005)

Background: Plaintiffs, children eligible for Medicaid and an organization representing Massachusetts residents seeking affordable health care, sued defendants seeking improved dental care

and services. Plaintiffs alleged violations of a number of Medicaid provisions, including EPSDT's requirements to inform individuals about EPSDT benefits and to provide necessary treatment. In an earlier proceeding, the court found the Medicaid requirements at issue to be enforceable through Section 1983. 2004 U.S. Dist. LEXIS 26470 (Oct. 1, 2004).

The Court's Decision: The court held that Massachusetts' low Medicaid payment rates for dentists significantly contributes to a lack of available providers for children. This provider shortage, in large part, led the court to find the State in violation of the Medicaid Act requirements for prompt provision of services; adequate notice of EPSDT services; and treatment at reasonable intervals.

Plaintiffs detailed the hardships they experienced in finding dentists who would accept Medicaid and who would do so in a timely manner. Defendants argued that their responsibility under the Medicaid Act was to provide prompt medical assistance, not to ensure prompt receipt of medical care. They further argued that any shortcoming on their part should be addressed by the federal government, not by the courts, insisting that they need only have substantially complied with the statute--full or perfect compliance was not necessary. Finally, defendants asserted that any differences in the rates at which Medicaid recipients and privately insured patients receive dental care should be attributed not to a lack of Medicaid providers but, instead, to cultural and educational differences between the two populations.

The court disagreed with each of the Defendants' arguments. For example, while recognizing that there might be other contributing factors, the judge discussed at length the effect of low reimbursement rates on dentists' willingness to become Medicaid providers, finding that dentists will usually forgo this option because accepting Medicaid means accepting a loss. The court struck a middle ground between the Defendants' assertion that they had no responsibility to ensure the promptness of medical care and the Plaintiffs' argument that the Defendants should be "ultimately responsible" for service delivery, stating, "[a] state may not circumvent a statutory duty for prompt payment by under-funding a mandatory Medicaid service to the degree that no health care practitioners can afford to provide the service. Setting reimbursement levels so low that private dentists cannot afford to treat Medicaid enrollees effectively frustrates the reasonable promptness provision by foreclosing the opportunity for enrollees to receive medical assistance at all, much less in a timely manner."

Plaintiffs further alleged that the Defendants failed in their responsibility to inform them of the EPSDT program; to ensure adequate provision of dental screens and services; and to recruit and retain sufficient providers to meet the EPSDT dental needs. Finding for the Plaintiffs on this count, the court, noting that the State's literature and customer service were often outdated and incorrect, said, "[n]otices that accurately inform an enrollee about the need for screening but then inaccurately explain the means to obtain such screening do not satisfy defendants' obligation to notify." The court noted that its holding did not rely on the theory of inadequate reimbursement to providers; instead, the judge relied on the evidence of inadequate and inaccurate materials, the high volume of customer complaints, and the "shockingly low" numbers of children enrolled in Medicaid versus children enrolled in a private insurance plan who received dental services.

Finally, the court found that, because of the negative effect of the Defendants' reimbursement on the availability of Medicaid providers, Medicaid enrollees were unable to find participating providers and thus unable to take advantage of the periodic treatment at reasonable intervals outlined in the State's EPSDT dental protocol. Recognizing the similarity between the reasonable intervals and

reasonable promptness issues, the judge said, “A child who cannot find a participating provider certainly cannot obtain dental care at the prescribed intervals.”

The court further ordered the parties to confer and develop a joint remedial program.

The Joint Remedial Program

The parties submitted a First Joint Report on Proposed Remedial Program which outlined the program. Further details were provided in the court’s Judgment, dated February 3, 2006. Among other measures, the Remedial Program requires:

- a program of member assistance and intervention, which includes assistance in making and keeping appointments and with transportation;
- developing and maintaining a provider network, including instituting a practice of contacting any provider announcing intent to withdraw and attempting to discover why and to convince them not to do so;
- appropriations in FY 2007 to increase reimbursement rates, followed by subsequent study to determine whether further increase is necessary;
- instituting a practice of sending out information at six month intervals, 60 days after eligibility determination and redetermination, and sending targeted information to individuals for whom there has been no Medicaid claim in the past year;
- appointing a monitor; and
- requiring reports from the parties and the monitor to the court.

Jacobus v. Dep’t of PATH, 2004 Vt. 70 (2004)

Background: Three individual children appealed defendant’s denial of request for interceptive orthodontic treatment. Each girl had persistent pain and malocclusions. Defendant found them ineligible for orthodontic services because the malocclusions they suffered did not meet the listed coverage criteria that they “carry with them real functional deficits.” The plaintiffs argued that limiting coverage to the exact conditions listed in the criteria, without conducting an individualized assessment of each child’s medical need, violated state regulations as well as the federal EPSDT statutes and regulations. The Human Services Board held that the services should be covered, but this decision was reversed by the Secretary of the department. Plaintiffs appealed to the supreme court.

The Court’s Decision: The court upheld the appeals board’s original findings, agreeing that even if the listed criteria were not met, there was no medically significant difference between plaintiffs’ conditions and those covered pursuant to the criteria. “The assessment of medical need for treatment of a given condition . . . cannot be limited to a pre-defined list of criteria.” Exercise of professional judgment is also required. In sum, defendants were ordered to provide coverage of

interceptive orthodontic treatment whenever an eligible beneficiary's conditions meet listed treatment criteria or when the evidence reveals conditions of equal or greater severity.

Memisovski v. Maram, No. 92-C-1982, 2004 U.S. Dist. LEXIS 16772 (N.D. Ill. Aug. 23, 2004)

Background: This case was filed on behalf of Medicaid-eligible children in Cook County, Illinois alleging that the EPSDT requirements were being violated.

The Court's Decision: The court held that the EPSDT provisions and the equal access provision (§ 1396a(a)(30)(A)) were enforceable. After an eleven-day trial, the court ruled in favor of the plaintiffs. The court held that defendants had failed to effectively inform plaintiffs of the availability of EPSDT services. It held that defendant s had failed to provide screenings in compliance with its periodicity schedule.

The evidence presented showed severe inadequacies. Among other findings, the court held that defendants' informing practices were inadequate. Some of the primary entities involved in applications had no written policies for informing, nor did they monitor or track the effect of any informing policies. In addition, any of the notices used were far too difficult for the target population to read. In addition, the court found that very low percentages of plaintiffs received the appropriate level of screening services - with nearly half of children receiving no medical screens. Even fewer children received lead blood screens and almost none received vision screens. With regard to these rates, "the court understands defendants to be suggesting that because, in their mind, the periodicity schedule is only a so-called 'recommendation,' it is acceptable if plaintiffs are not afforded all of these services. There is no basis for such a belief. While the American Academy of Pediatrics may have recommended a certain schedule for well-child screenings and immunizations, federal law requires states to adopt a periodicity schedule that meets reasonable standards of medical and dental practice."

A consent decree was entered on November 18, 2005 that set forth Defendants' agreement to, among other things: (1) conduct public information campaigns; (2) provide additional notices and handbooks in English and Spanish; (3) develop and maintain an information and referral program to recruit additional providers; (4) develop a bonus program for providers to encourage proper billing; (5) provide additional training for caseworkers; and (6) provide reports.

Okla. Chapter of Am. Academy of Pediatrics v Fogarty, 366 F. Supp. 2d 1050 (N.D. Okla. 2005)

Background: The plaintiffs - providers, Medicaid beneficiaries and an organization representing beneficiaries - filed suit alleging widespread failure of the state's EPSDT system. The court previously found that a number of Medicaid provisions §§ 1396a(a)(8), 1396a(a)(10)(A), 1396a(a)(30)(A), 1396d(a)(4)(B) and 1396d(r) - were enforceable. 205 F. Supp. 2d 1265 (2002). The case went to trial in May 2004.

The Court's Decision: After a 19 day trial, the court found that defendants had violated the reasonable promptness provision (§ 1396a(a)(8)) and the equal access provision (§ 1396a(a)(30)(A)). The court also ruled, however, that defendants are in substantial compliance with all EPSDT provisions of the Medicaid Act other than the requirement set forth in 42 U.S.C. § 1396d(r)(1)(A)(I) that they establish a periodicity schedule for EPSDT screening services "after consultation with recognized medical and dental organizations involved in child health care." It also held that

defendants, in compliance with federal law, may refuse to pay for experimental treatment desired by certain class members when their decisions are based upon reasonable concern for safety.

This decision has been appealed to the Sixth Circuit.

Rosie D. v. Romney, NO. 01-30199-MAP, 2006 U.S. Dist. LEXIS 3026 (D. Mass. Jan. 26, 2006)

Background: For a detailed discussion of this decision, see Center for Public Representation, February Q & A, “Summary of the Court’s Decision in *Rosie D. v. Romney*.”

The Court’s Decision: After a six week trial, the court granted a verdict in favor of the plaintiff class of children with behavioral, emotional or psychiatric disabilities. It held that defendant’s violated both the EPSDT and reasonable promptness provisions. Among other findings, the court held that the defendants failed to provide service coordination, crisis services and adequate in-home supports. The judge observed that the “defendants’ failure to provide adequate [services] for Medicaid-eligible children with serious emotional disturbances was glaring from the evidence and, at times, shocking in its consequence.” The parties will meet to discuss proposed remedies and a timetable for implementation.

Semerzakis v. Wilson-Coker, 274 Conn. 1 (2005)

Background: The plaintiff sought payment for orthodontic treatment for her daughter, an EPSDT recipient with an overbite. The State Department of Social Services uses a tool known as the Salzman Assessment as one component of its process for determining whether the orthodontia sought in any given case is medically needed and thus subject to EPSDT coverage. If a recipient reaches the statutory minimum on the tool, her orthodontia is considered per se medically necessary. If, however, she falls short of the bar, the Department will consider “additional information of a substantial nature” in its deliberations. The EPSDT recipient in *Semerzakis* did not meet the bar; nor did she, according to the State, present sufficient or compelling additional information proving medical necessity that would have required the State to pay for her orthodontia.

The plaintiff persuaded the trial court that the State’s decision was not correct because the State should have been adhered to the EPSDT requirement that states provide “[s]uch other necessary health care, diagnostic services, treatment, and other measures...to correct or ameliorate defects and physical and mental illnesses and conditions discovered by the screening services, whether or not such services are covered under the State plan.” The plaintiff argued that the State’s eligibility requirements were stricter than those authorized by Congress.

The Court’s Decision: The Supreme Court reversed. The Court held that because dental services are explicitly addressed in subsection 1396d(r)(3), the catch-all provision, 1396d (r)(5), setting forth the “correct or ameliorate” standard, did not apply. In addition, the Court found that Connecticut’s procedure for determining medical necessity (using the Salzman Assessment and the “substantial nature” savings clauses) was “valid as a reasonable utilization control that does not cause recipients to receive less care than was envisioned” by Congress when it addressed dental care with subsection (r)(3). Thus, the Supreme Court concluded that Connecticut’s regulation regarding

orthodontia did not frustrate the purpose of the EPSDT program and reversed the earlier judgment for the plaintiff.

Westside Mothers v. Haveman, 368 F. Supp. 2d 740 (E.D.Mich 2005) (on appeal)

Background: The plaintiffs in this case are a class of children and providers alleging widespread failure of Michigan's EPSDT program. The plaintiffs have claimed that defendant violated a number of Medicaid provisions including 1396a(a)(8), 1396a(a)(10), 1396a(a)(43), 1396d(a)(4) and 1396d(r). The case has been mired in motion practice for years and has traveled up to the Supreme Court and back, and is now on its second journey through the appellate courts. It is currently on appeal before the Sixth Circuit.

The Court's Decision: After remand, the court held that the EPSDT-related provisions at issue conferred enforceable rights, but found that Plaintiffs have failed to state a claim for violations to the extent that they alleged failure to ensure the actual provision of, or arrangement for, medical services. According to the court, the scope of rights to "medical assistance" under §§ 1396a(a)(8) and 1396a(a)(10) does not include the provision of actual medical services (as opposed to Medicaid payment); nor does it include a right to force Defendants to ensure 100% participation by all potentially eligible individuals. However, the court held that the Plaintiffs who have already been determined to be eligible for EPSDT services and who have requested them, have stated a claim to enforce rights created by § 1396a(a)(43).

Plaintiffs have appealed this decision and will argue the case before the Sixth Circuit on March 9, 2006.

For Information on Other Important Cases:

Pediatric Specialty Care v. Ark. Dep't Human Services, No. 4:01CV00830 (E.D. Ark. Feb. 7, 2005), see Perkins, NHeLP, "March Q & A: Pediatric Specialty Care EPSDT Case," March 23, 2005

S.D. v. Hood, 391 F.3d 581 (5th Cir. 2004), see Perkins, NHeLP, "November Q & A: Early and Periodic Screening Diagnosis and Treatment," (Nov. 24, 2004).