

Q & A
EPSDT Case Developments from Georgia¹

Produced by Sarah Somers
National Health Law Program
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- Q. I have heard that two significant Medicaid decisions have been issued by the federal district court of Georgia in the past few weeks. What are they?
- A. The decisions are *Moore v. Medows* and *Hunter v. Medows*. Medicaid's Early and Periodic Screening, Diagnostic, and Treatment (EPSDT) requirements, which govern services for children and youth, are at issue in both cases. Both decisions were favorable to the child plaintiffs and are likely to have an impact that extends beyond those individuals or even the state of Georgia.

Discussion

Medicaid's Early and Periodic Screening, Diagnostic, and Treatment (EPSDT) provisions govern Medicaid services for children and youth under age 21.² EPSDT requires that states cover services when necessary "to correct or ameliorate" physical and mental illnesses and conditions, regardless of whether such services are covered for adults in the state Medicaid program.³

According to the federal agency, states are not permitted to put dollar or hourly limits on EPSDT services, or other limits unrelated to medical necessity. But, they may place tentative limits on services; require prior authorization for

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² 42 U.S.C. §§ 1396a(a)(43); 1396d(a)(4)(B); 1396d(r)(5).

³ 42 U.S.C. § 1396d(r)(5). States are also required to provide or arrange for the provision of screening services for medical, behavioral, dental, vision and hearing problems. 42 U.S.C. § 1396a(a)(43)(B), (C). In addition, they must perform outreach to ensure that eligible children are informed about and enrolled in EPSDT. 42 U.S.C. §§ 1396a(a)(43)(A).

services; and provide services in the most economic, yet equally effective, mode.⁴ In addition, states may exclude services that are unsafe or experimental.⁵

There have been many EPSDT-related cases.⁶ Many have involved the substance of what EPSDT requires. An increasing number have considered the procedural question of whether the EPSDT provisions are enforceable by individuals. Two district court cases from Georgia that were decided this month provide examples of each type.⁷ The Georgia Advocacy Office, Georgia's P & A, is counsel for the plaintiffs in both of these cases.

Moore v. Medows

This case has been mentioned in previous Q & As. To recap, on June 9, 2008, Judge Thomas Thrash of the Federal District Court for the Northern District of Georgia ordered Georgia's Medicaid agency to provide in-home nursing services for Callie Moore, a child with severe physical and cognitive disabilities.⁸ Callie's doctor had prescribed 94 hours of nursing services per week. The state cut her services to 84 hours per week. In granting partial summary judgment for the child, the court held that the state does not have discretion to deny coverage of Medicaid treatment and services when prescribed by a treating physician for a Medicaid-eligible child.⁹

The Medicaid agency appealed to the Eleventh Circuit Court of Appeals. In a brief, unpublished opinion, the court held that both the state and the treating provider have roles in determining what measures are needed to correct or ameliorate medical conditions and a treating physician's opinion is "not dispositive."¹⁰ The court did not, however, explain exactly what those roles were or where the state's discretion ended, leaving it to the district court to sort it out.

⁴ Memorandum from Christine Nye, HCFA Medicaid Director, to Regional Administrator Region VII (1991), available from NHELP.

⁵ Letter from Rozann Abato, Acting Director of Medicaid Bureau, to State Medicaid Directors (May 26, 1993); Letter from Albert Benz, Associate Regional Administrator (Region X) to Jean Schoonover, Chief of Health & Welfare Programs (April 30, 1991); Memo from Christine Nye, HCFA Medicaid Director, to Regional Administrator Region VI (Dec. 10, 1990), available from NHELP. See also Sarah Somers, "Q & A: Experimental Services," (Aug. 2009).

⁶ For an in-depth review of EPSDT cases, see Jane Perkins, "Fact Sheet: Medicaid EPSDT Litigation," (September 25, 2009). For recent discussions of the enforceability of Medicaid requirements, including EPSDT, see Jane Perkins and Sarah Somers, "Developments Affecting Medicaid Cases Filed Under 42 U.S.C. § 1983 and Supremacy Clause," (Nov. 2009).

⁷ Neither decision has yet appeared on Westlaw. Copies of the slip opinions are available from NHELP or NDRN.

⁸ *Moore v. Medows*, 563 F. Supp. 2d 1354 (N.D. Ga. 2008).

⁹ For a discussion of the issue of deference to the treating provider, see Sarah Somers, "Q & A: Medicaid and Deference to Treating Providers," (Nov. 2008).

¹⁰ No. 08-13926, 2009 WL 1099133 (11th Cir. Apr. 24, 2009) *rev'g and remanding*, 563 F. Supp. 2d 1354 (N.D. Ga. 2008), *same case*, No. 1:07-CV-631, 2007 WL 1876017 (N.D. Ga. June 28, 2007) (rejecting state's abstention request and plaintiff's preemption claim).

On remand, the state argued that the Eleventh Circuit's decision established that "the state is the final arbiter of medical necessity" and that "it is clear that [the state] has the authority and discretion to determine medical necessity as well as to determine the amount, scope, and duration of services paid for and provided by Medicaid in accordance with EPSDT."¹¹ The district court did not agree, holding that

[p]rior to the Court of Appeals' unpublished opinion in this case, my understanding of the law was that the state may determine whether the physician's diagnosis or prescribed treatment 'was without any basis in fact.' Thus, the state may review an order of a treating physician for 'fraud, abuse of the Medicaid system, and whether the service is within the reasonable standards of medical care.' [citation omitted.] It is not clear to me that the Court of Appeals' opinion changes that.¹²

The state also argued that the federal government had approved its Medicaid program for children. Thus, the state argued, Georgia's policies and procedures for determining medical necessity of coverage of PDN services were entitled to the deference usually afforded to federal agencies. The state conceded, however, that this federal approval did not extend to the specific policy at issue.¹³ Accordingly, the court paid no attention to this fact. In addition, it held that

Regardless of the level of deference with which to give a state's regulation of the Medicaid program, the Defendant cannot escape the clear statutory intent that the 1989 amendment adding § 1396d(r)(5) took away a state's discretion not to provide necessary treatment for individuals under the age of twenty-one.¹⁴

Further, the court held that there was no issue of material fact as to whether the treating provider's recommendation that 94 hours per week of PDN be covered was correct. Accordingly, the district court again granted partial summary judgment to the plaintiff.¹⁵

On January 6, 2010, the state filed another appeal to the Eleventh Circuit.

Hunter v. Medows

The second EPSDT decision issued by Judge Thrash dealt with the question of whether the EPSDT provisions are enforceable in suits by individual beneficiaries. The plaintiff in this case, Marketric Hunter, is a seven year-old boy

¹¹ No. 1:07-cv-00631-TWT, Slip Op. 6.

¹² Slip Op. at 7-8, citing *Rush v. Parham*, 625 F.2d 1150, 1157 (5th Cir. 1980).

¹³ Slip Op. at 6.

¹⁴ Slip Op. at 9.

¹⁵ Slip Op. at 10.

with severe cerebral palsy and other physical and neurological disorders. He has been receiving Medicaid-covered private duty nursing (PDN) services for several years. Recommendations for these services are reviewed and handled by Georgia Medical Care Foundation (GMCF), a non-profit corporation that contracts with the Medicaid agency. Over the course of several years, GMCF had reduced the number of hours of coverage from to 84 per week, then 70 per week, and, finally, to 63 hours per week. Marketric's doctor recommended significantly more hours because he was going to have spinal surgery. GMCF denied this request and the family sued.

The court issued an injunction enjoining the state Medicaid agency from enforcing their policy that limited coverage of PDN based upon criteria unrelated to medical necessity. The state filed a motion to dismiss, arguing that the EPSDT provisions on which Marketric's suit was based, 42 U.S.C. §§ 1396a(a)(43) and 1396d(r) were not enforceable through Section 1983, which provides a cause of action for violation of federal rights by entities acting under color of state law.¹⁶

The court rejected this argument. It used the usually troublesome Supreme Court case of *Gonzaga University v. Doe* to support its conclusion. It held that "although *Gonzaga* [and other Supreme Court precedent] narrow the availability of § 1983, it remains an appropriate remedy here."¹⁷ Further, the court rejected Defendants' argument that the plaintiff had to show that Congress intended the Medicaid provisions at issue to create a private remedy, as well as a private right. Quoting *Gonzaga*, the court noted that "plaintiffs suing under § 1983 do not have the burden of showing intent to create a private remedy because § 1983 generally supplies a remedy for vindication of the rights secured by federal statutes."¹⁸

Also, despite the fact that it was not named as a defendant, GMCF argued that, because it was a private entity and not subject to suit under Section 1983. The court held that there was a sufficient connection between the state and this entity to make the challenged actions attributable to the state.¹⁹

Conclusion

¹⁶ 42 U.S.C. § 1983. Sec. 1396a(a)(43) requires state Medicaid plans to include requirements for informing, screening, and treating Medicaid-eligible children and youth, as well as reporting on the treatment and screening provided. It requires that states "arrang[e] for (directly or thorough referral to appropriate agencies, organizations, or individuals) corrective treatment, the need for which is disclosed by such child health screening services." Sec. 1396d(r) defines the EPSDT requirements and specifies that treatment services are "such other necessary health care, diagnostic services, treatment and other measures . . . necessary to correct or ameliorate defects and physical and mental illnesses and conditions discovered by the screening services, whether or not such services are covered by the state plan. 42 U.S.C. § 1396d(r)(5).

¹⁷ No. 1:08-cv-02930, Slip Op. at 8, citing *Gonzaga*, 536 U.S. 273 (2002).

¹⁸ Slip Op. at 8, quoting 536 U.S. at 284.

¹⁹ Slip Op. at 10-11.

These are individual cases that are binding precedent in Georgia only. Nonetheless, they will be useful for advocates in any state who are arguing about the extent of the EPSDT mandate and its enforceability. NHeLP will keep advocates informed about further progress and developments in these cases.