



Fact Sheet¹

Medicaid EPSDT Case Trends and Docket

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The Early and Periodic Screening, Diagnostic and Treatment (EPSDT) provisions are among the most specific in the Medicaid Act. See 42 U.S.C. §§ 1396a(a)(10)(A), 1396a(a)(43), 1396d(a)(4)(B), 1396d(r). EPSDT is critical for children with disabilities. Over the years, however, states have not adhered to their responsibilities, and litigation has resulted. This Fact Sheet summarizes the federal requirements for EPSDT, discusses legal and policy trends, and provides an annotated case docket.

Overview of EPSDT

Early and Periodic Screening, Diagnostic and Treatment (EPSDT) services are mandatory Medicaid services for Medicaid-eligible children and youth under age 21. Screening forms the foundation of EPSDT, and four separate screens are required: vision (including eyeglasses), hearing (including hearing aids), dental (including restoration of teeth), and medical. The medical screen has five required components: a comprehensive health and developmental history, unclothed physical exam, immunizations, laboratory testing, and health education and anticipatory guidance. Screening services must be provided according to “periodicity schedules,” set by the state in consultation with child health experts, and at other times to determine whether a child has a condition that needs follow-up. *Id.* at § 1396d(r)(1)-(4). State Medicaid agencies must effectively inform all Medicaid-eligible persons in the state who are under age 21 of the availability of EPSDT. *Id.* at § 1396a(a)(43)(A).

The Medicaid Act requires the state Medicaid agency to “arrange for (directly or through referral to appropriate agencies, organizations, or individuals) corrective treatment.” *Id.* at § 1396a(a)(43)(C). The Act prescribes a comprehensive treatment

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package and the medical necessity standard that must be applied on an individual basis to determine each child's treatment needs:

Scope of benefits: Covered services include all mandatory and optional services that the state can cover under Medicaid, whether or not such services are covered for adults, see *Id.* at § 1396d(a) (listing services).

Medical necessity: The Medicaid Act requires coverage of “necessary health care, diagnostic services, treatment, and other measures... to correct or ameliorate defects and physical and mental illnesses and conditions[.]”

Id. at § 1396d(r)(5). In sum, if a care provider determines that an EPSDT treatment service is needed, it should be covered to the extent needed and allowed under the federal Medicaid Act. For example, if a child needs personal care services to ameliorate a behavioral health problem, EPSDT should cover these services to the extent the child needs them—even if the state places a quantitative limit on personal care services or does not cover them at all for adults. *But see generally Moore ex rel. Moore v. Reese*, 637 F.3d 1220 (11th Cir. 2011) (establishing standards for determining roles of state agency and treating providers in deciding amount of covered services), *rev'g*, 674 F. Supp. 2d 1366 (N.D. Ga. 2009) (limiting state role to reviewing physician's order for fraud and whether services are within reasonable standards of care).²

Legal and Policy Trends

In April 2012, we identified a number of legal and policy trends affecting EPSDT services. See Jane Perkins, National Health Law Program, *Fact Sheet: Medicaid EPSDT Case Trends and Docket* (Apr. 2012), available at www.healthlaw.org. All of the trends are continuing, and readers are referred to the April 2012 Fact Sheet for details. The trends are:

- The subject matter of EPSDT cases is focusing on Treatment, particularly care and services needed to ameliorate developmental and/or intellectual disabilities. *Id.* at 2-3.
- The federal government is clarifying EPSDT requirements. *Id.* at 3-5.
- Some states are initiating efforts to standardize coverage of Treatment services. *Id.* at 5-7.

² For additional discussion of *Moore*, see Jane Perkins, National Health Law Program, *Q&A: EPSDT, Deference to Providers, and Moore v. Reese* (June 2011) (available from TASC or NHeLP).

- State attorneys continue to argue that the EPSDT provisions are not privately enforceable, but courts are rejecting the argument. *Id.* at 7-8.

Over the last two years, other notable developments have occurred. In particular:

- **State attorneys are seeking to avoid or limit liability using a variety of procedurally based arguments.**

As noted above, state attorneys are arguing the children and their caretakers cannot privately enforce the Medicaid EPSDT provisions pursuant to 42 U.S.C. § 1983. While this argument has almost uniformly failed, it is the affirmative defense most commonly raised by the state.

However, other procedural disputes are arising in EPSDT cases. Among other things, class certification is being hotly contested in some cases. *See, e.g., N.B. v. Hamos*, __ F. Supp. 2d __, 2014 WL 562637 (N.D. Ill. Feb. 14, 2014) (certifying Rule 23(b)(2) class of children whose providers have recommended intensive home- and community-based services to correct or ameliorate their diagnosed mental health or behavioral disorders), *same case*, No. 11 C 6866.2012 WL 1953146 (N.D.Ill. May 30, 2012) (denying request for class certification).

Similarly, states have argued about the scope of relief in Medicaid cases. In *K.G. v. Dudek*, for example, the state disputed the scope of relief granted by the district court as overly-broad. The case was brought by individual Medicaid recipients and was not a class action. As a result, the state argued that any court-ordered relief could extend only to those individuals, and it asked the Eleventh Circuit to vacate an order for permanent injunctive or declaratory relief that required the state to change its policies excluding coverage of ABA Therapy. However, the Eleventh Circuit rejected the argument for the most part, clarifying one provision but allowing the remainder of the order to stand. *See K.G. ex rel. Garrido v. Dudek*, 731 F.3d 1152 (11th Cir. 2013), *aff'g in part and modifying in part*, 864 F. Supp. 2d 1314 (S.D. Fla. 2012) *on remand*, __ F. Supp. 2d __, 2013 WL 5930764 (S.D. Fla. Nov. 5, 2013) (permanent injunction), *and* 2013 WL 5930709 (S.D. Fla. Nov. 5, 2013) (declaratory judgment).

- **States are seeking to terminate all or parts of EPSDT consent decrees.**

Federal Rule of Civil Procedure 60(b) authorizes a motion for relief from a final judgment, including a consent decree. The grounds include when the responsibilities set forth in the decree have been met and when apply the judgment prospectively “is no longer equitable.” Fed. R. Civ. P. 60(b)(5). In *Horne v. Flores*, 557 U.S. 433 (2009), the Supreme Court expressed discontent with long-standing injunctions in “institutional reform litigation.” Writing for the majority, Justice Alito expressed concern that these injunctions “often raise sensitive federalism concerns” by potentially “dictating state or

local budget priorities,” and “bind[ing] state and local officials to the policy preferences of their predecessors.” 125 S.Ct. at 2593-94. State attorneys are citing the Court’s words to argue that ongoing consent decrees in EPSDT cases should be terminated.

Since 2009, at least three courts have terminated on-going consent decrees or parts of decrees, rejecting plaintiffs’ arguments that the requirements of the decree have not been met by the defendant. See *John B. v. Emkes*, 710 F.3d 394 (6th Cir. 2013), *aff’g*, 852 F. Supp. 2d 957 (M.D. Tenn. 2012) (finding state in substantial compliance with consent decree provisions addressing outreach, diagnosis and treatment, and monitoring and dissolving injunction); *Frew v. Janek*, ___ F. Supp. 2d ___, 2013 WL 6698378 (E.D. Tex. Dec. 18, 2013) (dissolving medications and medical equipment provisions of consent decree); *Hawkins v. Comm’r*, 665 F.3d 25 (1st Cir. 2012) (refusing to extend consent decree after finding agency had no duty to collect information from dental providers regarding openings, no evidence that children requesting services were not receiving them, and that statewideness provisions did not require orthodontic services within a certain driving distance), *aff’g*, No. 99-cv-143-JD, 2010 WL 2039821 (D.N.H. May 19, 2010). *But compare Salazar v. D.C.*, 671 F.3d 1258 (D.C. Cir. 2012) (dismissing appeal of order denying motion to dismiss consent decree as not immediately appealable), *lower court decision*, 729 F. Supp. 2d 257 (D.D.C. 2010) (refusing to vacate consent decree on grounds that *Gonzaga* was a significant change in the law making the EPSDT provisions unenforceable); *Chisholm ex rel. CC v. Kliebert*, No. 97-3274, 2013 WL 3807990 (E.D. La. July 18, 2013) (modifying contempt order to require state plan coverage of ABA therapy and reimbursement of Board Certified Behavior Analysts to provide ABA therapy).

- **The federal government is providing detailed policy guidance to encourage the receipt of oral health services through EPSDT.**

Although dental disease is preventable, tooth decay remains the single most common chronic disease among children in the United States. It can affect all aspects of a child’s life, from eating and sleeping to education and self-esteem. Low-income children are most likely to suffer from dental disease.

To address the problem, CMS launched an Oral Health Initiative in April 2010, setting two goals:

1. Increase by ten percentage points from FY 2011, the percentage of children ages 1-20 enrolled in Medicaid for at least 90 continuous days that received a preventive dental service. The target date for this goal is FY 2015.

2. Increase by ten percentage points the percentage of children ages 6-9 enrolled in Medicaid for at least 90 continuous days that received a sealant on a permanent molar. A target date has not yet been set.

CMS is developing resources to help states, Medicaid-participating providers, and families improve oral health. These include:

- CMS, *Improving Oral Health Delivery in Medicaid and CHIP: A Toolkit for States* (Feb. 2014), available at <http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Benefits/Downloads/Oral-Health-Quality-Improvement-Toolkit-for-States.pdf>
- CMCS Information Bulletin, *CMS Oral Health Initiative and Other Dental-Related Items* (Apr. 18, 2013) (highlighting top ten improving states and discussing two new American Dental Association CPT billing codes to improve screening and assessment, available at <http://medicaid.gov/Federal-Policy-Guidance/Downloads/CIB-04-18-13.pdf>.
- CMS: *Keep Kids Smiling: Promoting oral Health Through the Medicaid Benefit for Children & Adolescents- EPSDT* (Sept. 2013), available at <http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Benefits/Downloads/Keep-Kids-Smiling.pdf>

To stay up-to-date on these federal activities, go to CMS, *Dental Care Website* (last visited Mar. 26, 2014), at <http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Benefits/Dental-Care.html>.

Annotated Case Docket

The annotated EPSDT case docket begins on the next page.

EPSDT Case Docket³

U.S. S. Ct.

Frew ex rel. Frew v. Hawkins, 540 U.S. 431 (2004) (enforcement of EPSDT **consent decree** does not violate **Eleventh Amendment**), *on remand*: 401 F. Supp. 2d 619 (E.D. Tex. 2005) (refusing to dissolve consent decree in part because provider participation rates had decreased in recent years and including extensive discussion of **CMS Form 416**), *aff'd*, ***Frazar v. Ladd***, 457 F.3d 432 (5th Cir. 2006) (finding “object of the consent decree is not mere compliance with federal law,” but rather to “implement the Medicaid statute ‘in a highly detailed way;’” holding defendants had not attained the EPSDT objectives of the consent decree and denying motion to dissolve consent decree), *additional case history*, ***Frew v. Janek***, __ F. Supp. 2d __, 2013 WL 6698378 (E.D. Tex. Dec. 18, 2013) (dissolving medications and medical equipment provisions of consent decree), *same case*, ***Frew v. Suehs***, 775 F. Supp. 2d 930 (E.D. Tex. 2011) (refusing to modify dental provisions of consent decree), No. 3:93CV065 (E.D. Tex. July 9, 2007) (settlement) (available from NHeLP), *and* ***Frew v. Gilbert***, 109 F. Supp. 2d 579 (E.D. Tex. 2000) (concerning screening, informing, and reporting).

U.S. Courts of Appeal

K.G. ex rel. Garrido v. Dudek, 731 F.3d 1152 (11th Cir. 2013), *aff'g in part and modifying in part*, 864 F. Supp. 2d 1314 (S.D. Fla. 2012) (permanent inj.) (finding **ABA therapy** for children with autism is a **rehabilitative service** covered by the Medicaid Act and is not **experimental**), *on remand*, __ F. Supp. 2d __, 2013 WL 5930764 (S.D. Fla. Nov. 5, 2013 (permanent injunction), *and* 2013 WL 5930709 (S.D. Fla. Nov. 5, 2013) (declaratory judgment), *earlier decision*, 839 F. Supp. 2d 1254 (S.D. Fla. 2011) (preliminary injunction).

John B. v. Emkes, 710 F.3d 394 (6th Cir. 2013), *aff'g*, 852 F. Supp. 2d 957 (M.D. Tenn. 2012) (finding state in substantial **compliance with consent decree** provisions addressing outreach, diagnosis and treatment, and monitoring and dissolving injunction), *and* 852 F. Supp. 2d 944 (M.D. Tenn. 2012) (holding § 1396a(a)(43)(B) and (C) enforceable under **§ 1983**), *earlier case history*, 661 F.Supp.2d 871 (M.D. Tenn. 2009) (denying defendants’ motion to vacate consent decree), *rev'd in part sub nom. John B. v. Goetz*, 626 F.3d 356 (6th Cir. 2010), *on remand*, 2011 WL 795019 (M.D. Tenn. Mar. 1, 2011) (refusing to vacate consent decree), *additional case history*, ***John B. v. Menke***, 176 F. Supp. 2d 786 (M.D. Tenn. 2001) (holding **managed care** system

³ In the citations below, “additional case history omitted” can be found at National Health Law Program, *The Advocate’s Guide to the Medicaid Program* at Services Ch. notes 51-61 (May 2011, with Oct. 2012 Supp.) (available from NHeLP). Also, the docket presents the cases in chronological, not “Bluebook,” order.

did not adequately meet EPSDT mandates and ordering state to remedy violations), *enforcing*, No. 3-98-0168 (M.D. Tenn. Feb. 25, 1998) (consent decree to implement a multi-year remedial plan that included requirements for: (1) updating **periodic screening** requirements to identify medical and mental health problems; (2) **developmental screening** to include the use of culturally sensitive assessments and avoidance of premature diagnosis labeling; (3) improving access to treatments, with attention to children who are medically fragile; and (4) integration of health care and custodial services for children in foster care) (additional case history omitted).

Salazar v. D.C., 671 F.3d 1258 (D.C. Cir. 2012) (dismissing appeal of order denying motion to dismiss consent decree as not immediately appealable), *lower court decision*, 729 F. Supp. 2d 257 (D.D.C. 2010) (finding § 1396a(a)(43) enforceable under **§ 1983** and refusing to vacate **consent decree**), *earlier case history*, 685 F. Supp. 2d 72 (D.D.C. 2010) (refusing to vacate EPSDT **dental** screening order), *aff'd but criticized*, 633 F.3d 1110 (D.C. Cir. 2011), *same case*, 596 F. Supp. 2d 67 (D.D.C. 2009), *partial recon. granted*, 750 F. Supp. 2d 65. (D.D.C. 2010) (citing 42 C.F.R. § 438.10 and ordering District to disclose **copyrighted clinical guidelines** being used by managed care contractor to deny plaintiff's request for EPSDT in-home services), *same case*, 570 F. Supp. 2d 105 (D.D.C. 2008) (assessing **financial sanctions** for District's failure to meet deadlines for dental corrective action plan), *aff'd in part and rev'd in part*, 602 F.3d 431 (D.C. Cir. 2010), *earlier case history*: No. CA-93-452 (GK) (Order Sept. 17, 2001) (ordering compliance with **screening, adolescent targeting, provider outreach, and tracking** requirements of settlement agreement), *same case*, (Jan. 25, 1999) (Consent Judgment; Order Modifying the Amended Remedial Order of May 6, 1997 and vacating the order of March 27, 1997); 1997 WL 306876 (D.D.C., Jan. 17, 1997) (remedial order for (state to comply with EPSDT screening and informing requirements), *same case*, *Wellington v. D.C.*, 851 F. Supp. 1 (D.D.C. 1994) (holding EPSDT provisions enforceable under 1983) (additional case history omitted).

Hawkins v. Comm'r, 665 F.3d 25 (1st Cir. 2012) (refusing to extend **consent decree**; finding agency had no duty to collect information from **dental** providers regarding openings in the office, no evidence that children requesting services were not receiving them, and that statewideness provisions did not require agency to provide orthodontic services within a certain driving distance), *aff'g*, No. 99-cv-143-JD, 2010 WL 2039821 (D.N.H. May 19, 2010), *same case*, 2008 WL 2741120 (D.N.H. July 10, 2008) (refusing to find contempt), 2007 WL 2325216 (D.N.H. Aug. 13, 2007) (same), *earlier proceeding*, 2004 WL 166722 (D.N.H. Jan. 23, 2004) (approving consent decree, certifying class).

Va. Dep't of Med. Assistance. Servs. v. U.S Dep't of Health & Human Servs., 678 F.3d 918 (D.C. Cir. 2012), *aff'g*, 779 F. Supp. 2d 129 (D.D.C 2011) (finding the "under-21 exception" to federal funding exclusion for **institutions for mental diseases** applies

only to inpatient psychiatric hospital services and does not allow federal funding for acute care, pharmacy, clinic, physician and other medical services).

Kan. Health Pol. Auth. v. U.S. Dep't of Health & Human Servs., 678 F.3d 918 (D.C. Cir. 2012), *aff'g*, 798 F Supp. 2d 162 (D.D.C. 2011) (finding the “under-21 exception” to federal funding exclusion for **institutions for mental diseases** applies only to inpatient psychiatric hospital services and does not allow federal funding for laboratory tests, pharmacy, and outside medical providers).

Moore ex rel. Moore v. Reese, 637 F.3d 1220 (11th Cir. 2011) (*Moore I*) (establishing standards for determining **roles of state agency and treating providers** in deciding amount of covered services), *rev'g*, 674 F. Supp. 2d 1366 (N.D. Ga. 2009) (limiting state role to reviewing physician's order for fraud and whether services are within reasonable standards of care), *on remand sub nom.*, *Moore v. Cook*, No. 1:07-cv-631, 2012 WL 1380220 (N.D. Ga. Apr. 20, 2012) (entering declaratory judgment for plaintiff), *earlier decision*, 324 F. App'x 773 (11th Cir. 2009) (*Moore I*) (finding both state and treating physician have role in determining what measures are needed to “**correct or ameliorate**” medical conditions and private physician's word is “not dispositive”), *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).

Katie A. v. Douglas, No. 02-cv-05662 (C.D. Cal. Dec. 5, 2011) (settlement agreement), *earlier case history*, 481 F.3d 1150 (9th Cir. 2007) (holding that **wraparound services and therapeutic foster care** are within the State's EPSDT obligations under federal law, but that if all EPSDT-mandated components of these services are being provided through existing State programs, then the State does not need to take additional steps to repackage these services as wraparound and therapeutic foster care), *rev'g & remanding*, *Katie A. v. Bonta*, 433 F.Supp.2d 1065 (C.D. Cal. 2006).

Parents' League for Effective Autism Servs. v. Jones-Kelley, 339 F. App'x 542 (6th Cir. 2009) (affirming preliminary injunction of state administrative rule that restricted EPSDT coverage of **Applied Behavioral Analysis (ABA)** as **rehabilitative services**), *aff'g*, 565 F. Supp. 2d 905 (S.D. Ohio 2008), *same case*, 565 F.Supp.2d 895 (S.D. Ohio 2008) (holding EPSDT provisions enforceable under **§ 1983**) (additional case history omitted).

Rosie D. v. Romney, 410 F.Supp.2d 18 (D. Mass. 2006) (holding State's failure to provide for **service coordination, crisis services and home based services** for children with serious emotional disturbances violated EPSDT and reasonable promptness provisions of Medicaid Act), *subsequent case history sub nom.* 474 F. Supp. 2d 238 (D. Mass. 2007) (adopting state's proposed plan to remedy Medicaid

violations with provisos) *and same case*, *Rosie D. v. Patrick*, 599 F.Supp.2d 80 (D. Mass 2009) (allowing short delay in providing **In-Home Behavioral Services** and **Therapeutic Mentoring Services**, citing the Commonwealth's **financial crisis**), *same case*, 310 F.3d 230 (1st Cir. 2002) (denying state's motion to dismiss on **Eleventh Amendment** grounds) (additional case history omitted).

Westside Mothers v. Olszewski, 454 F.3d 532 (6th Cir. 2006) (finding § 1396a(a)(43)(A) enforceable under **§ 1983**) (additional case history omitted).

S.D. ex rel. Dickson v. Hood, 391 F.3d 581 (5th Cir. 2004) (holding EPSDT provisions enforceable under **§ 1983** and that **incontinence supplies** fit within the § 1396d(a) listing of coverable EPSDT services), *aff'g*, No. 02-2164, 2002 WL 31741240 (E.D. La Dec. 3, 2002).

Pediatric Specialty Care, Inc. v. Ark. Dept. of Human Servs., 364 F.3d 925 (8th Cir. 2004) (ordering State to cover early intervention Child Health Management Services (CHMS) until impact study on terminating services was completed), *earlier case*, 293 F.3d 472 (8th Cir. 2002) (holding EPSDT provisions enforceable under **§ 1983**, that a child has a right to **early intervention day treatment** recommended by their physician, that federal law did not require state plans to list every conceivable treatment service, and that state plan satisfied EPSDT mandate if it indicated state would provide other health care to correct or ameliorate conditions as described in § 1396d(r)(5)), *subsequent rulings*, 444 F.3d 991 (8th Cir. 2006) (refusing to require disclosure of identities of **peer review physicians** who make coverage determinations), *and* No. 4:01CV00830, 2005 WL 5660038 (E.D. Ark. Feb. 7, 2005) (finding individually named defendants not entitled to **qualified immunity** because they violated clearly established EPSDT rights), *aff'd in part and reversed in part*, 443 F.3d 1005 (8th Cir. 2006) (holding EPSDT provisions created enforceable rights under § 1983, that ADHS could not be sued because of **sovereign immunity**), *cert. granted, judgment vacated in part, remanded to dismiss appeal as moot sub nom. Selig v. Pediatric Specialty Care*, 551 U.S. 1142 (2007).

Collins v. Hamilton, 349 F.3d 371 (7th Cir. 2003) (requiring coverage of placements in **psychiatric residential treatment facilities**).

Antrican v. Odom, 290 F.3d 178 (4th Cir. 2002), *aff'g sub nom. Antrican v. Buell*, 158 F.Supp.2d 663 (E.D.N.C. 2001) (finding no **Eleventh Amendment** bar and provisions enforceable under **§ 1983**).

Tallahassee Mem'l Reg'l Med. Ctr. v. Cook, 109 F.3d 693 (11th Cir. 1997) (requiring coverage for **inpatient grace days** needed by adolescents during periods when alternative care settings were unavailable).

Texas v. U.S. Dep't of Health & Human Serv., 61 F.3d 438 (5th Cir. 1995) (affirming refusal to cover **inpatient residential chemical dependency treatment** (to include room and board) as EPSDT rehabilitation service).

Miller ex rel. Miller v. Whitburn, 10 F.3d 1315 (7th Cir.), *vacating*, 816 F. Supp. 505 (W.D. Wis. 1993) (**transplant** covered under EPSDT).

Pittman ex rel. Pope v. Sec'y Fla. Dep't of Health & Rehab. Servs., 998 F.2d 887 (11th Cir. 1993) (**transplant** and incidental service needs).

Pereira ex rel. Pereira v. Kozlowski, 996 F. 2d 723 (4th Cir. 1993), *aff'g* 805 F. Supp. 361 (E.D. Va. 1992) (**transplant**).

Mitchell v. Johnston, 701 F.2d 337 (5th Cir. 1983) (**dental** services)

Bond v. Stanton, 630 F.2d 1231 (7th Cir. 1980), *appeal after remand*, 655 F.2d 766 (7th Cir. 1981), same case, 372 F. Supp. 872 (N.D. Ind.), *aff'd*, 504 F.2d 1246 (7th Cir. 1974) (rejecting state's "somewhat casual approach" to **outreach and informing**).

Phila. Welfare Rights Org. v. Shapp, 602 F.2d 1114 (3d Cir. 1979) (**screening** goals contained in consent decree).

Federal District Courts

Pediatrica, PC v. Diopsys, Inc., No. 2:12-cv-1949-HRH, 2014 WL 684156 (D. Ariz. Feb. 21, 2104) (dismissing primary screening physician's fraud claims against manufacturer of visual evoked potentials (VEP) testing machine, after state Medicaid agency concluded VEP testing is not part of routine **vision screening** but can be covered as diagnostic testing by ophthalmic specialists).

N.B. v. Hamos, _ F. Supp. 2d _, 2014 WL 562637 (N.D. Ill. Feb. 14, 2014) (certifying **Rule 23(b)(2) class** of children whose providers have recommended intensive home- and community-based services to correct or ameliorate their diagnosed mental health or behavioral disorders), *same case*, No. 11 C 06866, 2013 WL 6354152 (C.D. Ill. Dec. 5, 2013) (finding § 1396a(a)(43) enforceable under **§ 1983**).

P.G. by and through K.G. v. Hamos, No. 13-3020 2014 WL 274130 (C.D. Ill. Jan. 24, 2014) (finding some plaintiffs lacked **standing** but allowing others to proceed in case alleging, in part, violations of EPSDT requirements to cover intensive home and community-based services, community residential services, and residential mental health services), *same case*, 2013 WL 393233 (C.D. Ill. Jan. 31, 2013) (granting TRO).

Hunter ex rel. Lynah v. Cook, No. 1:08-CV-2930-TWT, 2013 WL 5429430 (N.D. Ga. Sept. 27, 2013) (enjoining state from reducing nursing hours because reductions were not based on medical necessity) (on appeal), *same case*, 2013 WL 2252917 (N.D. Ga.

May 22, 2013) (granting in part and denying in part defendant's motion for summary judgment, finding defendant did not violate EPSDT informing requirements, plaintiffs had not established personal deprivation of case management, personal care services and incontinence supplies, and defendants were not discriminating on the basis of medical condition), *same case*, 2011 WL 4500009 (N.D. Ga. Sept. 27, 2011) (refusing to find case moot where plaintiffs were receiving some but not all requested **private duty nursing** hours and allowing plaintiff to add **Americans with Disabilities Act** claim), *and* 2010 WL 623475 (N.D. Ga. Feb. 18, 2010) (citing 324 F. App'x 773 (*Moore I*) to require coverage of private duty nursing hours), *and* 2009 WL 5062451 (N.D. Ga. Dec. 16, 2009) (finding § 1396a(a)(43)(B) enforceable under **§ 1983**), *and* 2008 WL 8874314 (N.D. Ga. Nov. 3, 2008)(preliminary inj. granted in part and denied in part).

Chisholm ex rel. CC v. Kliebert, No. 97-3274, 2013 WL 3807990 (E.D. La. July 18, 2013) (modifying contempt order to require state plan coverage of ABA therapy and reimbursement of Board Certified Behavior Analysts to provide ABA therapy), *same case*, 2013 WL 4089981 (E.D. La. Aug. 13, 2013) (denying motion to stay), 133 F. Supp. 2d 894 (E.D. La. 2001) (**community-based behavioral and psychological services for autism** fall under § 1396d(a)(6) and d(a)(13)), *same case*, 876 F. Supp. 2d 709 (E.D. La. 2012) (refusing to enjoin prior authorization criteria but finding notices of denial of prior authorization inadequate), *and* 110 F. Supp. 2d 499 (E.D. La. 2000) (restricting therapy services to schools and limiting home health services violates EPSDT), *and* 1998 WL 92272 (E.D. La. Mar. 2, 1998).

Royal ex rel. Royal v. Cook, No. 1:08-cv-2930, 2012 WL 2326115 (N.D. Ga. June 19, 2012) (preliminary injunction) (applying *Moore II* and finding reduction in skilled nursing hours likely violated EPSDT because it was not due to individualized determination of medical necessity but to policy and practice of Defendant's GAPP program to wean nursing care and shift burden of skilled care to his parent caregiver over time).

S.B. ex rel. W.B. v. Hamos, No. 12-cv-03077, 2012 WL 1901277 (C.D. Ill. May 25, 2012) (granting TRO requiring defendant to provide plaintiff with EPSDT coverage for placement in a **residential treatment facility**).

D.B. v. Dreyfus, No. C11-2017, 2012 WL 895399 (W.D. Wash. Mar. 15, 2012) (denying preliminary injunction to children challenging reductions in **personal care services**), *and* 2012 WL 1856513 (May 21, 2012) (denying motion to reconsider).

Smith ex rel. Smith v. Benson, 703 F. Supp. 2d 1262 (S.D. Fla. 2010) (requiring coverage of **incontinence supplies**), *same case*, No. 09-21543, 2009 WL 5173957 (S.D. Fla. Oct. 26, 2009) (denying motion to dismiss).

Mazzitti & Sullivan Counseling Servs., Inc. v. Dep't of Pub. Welf., 7 A.3d 875 (Pa. Commw. Ct. 2010) (affirming denial of EPSDT outpatient mental health services payments to provider who engaged in **fraud**).

T.D. ex rel. Cathleen D. v. Dreyfus, No. C09-5379 RBL, 2009 WL 2390345 (W.D. Wash. July 2, 2009) (temporarily enjoining proposed cutback in child's in-home **personal care services**).

Summer H. v. Fukino, No. 09-00047 SOM/BMK, 2009 WL 455340 (D. Haw. Feb. 23, 2009) (denying motion for temporary restraining order where defendant agreed not to cut plaintiffs' EPSDT **home care services** by 15 percent pending their administrative appeals) (additional case history omitted).

D.W. v. Walker, No. 2:09-cv-00060, 2009 WL 1393818 (S.D.W.Va. May 15, 2009) (finding that Medicaid-eligible children can enforce EPSDT provisions under **§ 1983**).

Illinois Dep't of Health-Care & Family Servs. v. U.S. Dep't of Health & Human Servs., No. 06-C-6402/6412, 2008 WL 877976 (N.D. Ill. Mar.28, 2008) (affirming Departmental Appeals Board decision to disallow school-based administrative costs under the Medicaid program in part because the costs were properly associated with "child find" activities under the **Individuals with Disabilities Education Act**).

Carson P. ex rel. Foreman v. Heineman, 240 F.R.D. 456 (D. Neb. 2007) (finding EPSDT provisions enforceable under **§ 1983**; granting state's motion to dismiss based on **Younger abstention**).

G.D. v. Jones-Kelly, No. 2:05-CV-980 (S.D. Ohio Oct. 22, 2007) (on file with NHeLP) (finding § 1396a(a)(43) enforceable under **§ 1983**), *same case*, 2007 WL 2206559 (S.D. Ohio July 30, 2007) (finding neither Medicaid Act nor Health Insurance Portability and Accountability Act precluded disclosure of information and granting plaintiffs' motion to compel **discovery** in case alleging failure of state to provide for EPSDT).

A.G. ex rel. Giddens v. Arnold, No. 5:05CV2790C10GRJ, 2006 WL 334218 (M.D. Fla. Feb. 13, 2006) (holding Medicaid provisions cited by EPSDT recipient, 42 U.S.C. § 1396 (stating purpose of the Medicaid Act), § 1396d(r) (defining EPSDT); § 1396a(a)(10)(B)(regarding amount, duration and scope) and 42 C.F.R. § 440.220 (same) were not privately enforceable under **§ 1983**).

Ekloff v. Rodgers, 443 F. Supp. 2d 1173 (D. Ariz. 2006) (holding state obligated under § 1396d(r)(5) to cover **incontinence briefs** for children with bowel and/or bladder incontinence to avoid skin breakdown and infection).

Okla. Chapter of Am. Acad. of Ped. v. Fogarty, 366 F. Supp. 2d 1050 (N.D. Okla. 2005) (finding no EPSDT violation even though **participation goals** not met because goal is “hortatory”; “Failure to achieve a performance goal does not amount to a violation of federal law.”) (additional case history omitted).

Health Care for All v. Romney, No. Civ. A. 00-10833RWZ, 2005 WL 1660677 (D. Mass. July 14, 2005) (finding Medicaid **dental payments** so low as to effectively frustrate the reasonable promptness provision by foreclosing the opportunity for enrollees to receive care at all, much less in a timely manner and that lack of dentists caused enrollees to be unable to obtain treatment at reasonable intervals), *same case*, No. 00-10833-RWZ, 2004 WL 3088654 (D. Mass. Oct. 1, 2004) (holding § 1396a(a)(43) enforceable but § 1396d(r)(5) definitional and not enforceable under **§ 1983** and finding the obligation to provide and meet standards for delivery of EPSDT derives from § 1396a(a)(10)(A)).

Clark v. Richman, 339 F.Supp.2d 631 (M.D. Pa. 2004) (finding EPSDT provisions enforceable under **§ 1983** and finding that **timeliness standard** regulation, 42 C.F.R. § 441.56(e), while setting outer limit for initiating treatment, did not supplant the need for additional timeliness standards).

A.M.H. v. Hayes, No. C2-03-778, 2004 U.S. Dist. LEXIS 27387 (S.D. Ohio, Sept. 30, 2004) (holding § 1396a(a)(43) enforceable but § 1396d(r)(5) definitional and not enforceable under **§ 1983** and finding EPSDT does not require coverage of **community-based services** addressed in § 1396n waiver provision).

Memisovski v. Maram, No. 92 C 1982, 2004 WL 1878332 (N.D. Ill. Aug. 24, 2004) (following trial, court held the **EPSDT** and **equal access payment** provisions enforceable under **§ 1983**, discussing expert review of **CMS Form 416**, and holding EPSDT and pediatric payment rates violated the Medicaid Act), *same case*, 2001 WL 1249615 (N.D. Ill. Oct. 17, 2001) (rejecting state’s **Eleventh Amendment** immunity claims).

Emily Q. v. Bonta, 208 F. Supp. 2d 1078 (C.D. Cal. 2001) (requiring state to provide notice of EPSDT **mental and therapeutic behavioral health services**, develop forms to request services, provide compensatory benefits to class members wrongfully denied services).

J.K. v. Eden, No. CIV-91-261-TUC-JMR (D. Ariz. Mar. 20, 2001) (settlement describing principles for improving **mental health** system), *same case sub. nom J.K. v. Dillenberg*, 836 F. Supp. 694 (D. Ariz. 1993).

Charlie H. v. Whitman, 83 F. Supp. 2d 476 (D.N.J. 2000) (EPSDT provisions not enforceable under **§ 1983**).

Kirk T. v. Houstoun, No. 99-3253, 2000 WL 830731 (E.D. Pa. June 27, 2000) (granting summary judgment on claim that EPSDT **behavioral health services** were not being initiated in a timely manner in **managed care settings**).

French v. Concannon, No. 97-CV-24-B-C (D. Me. July 16, 1998) (agreement to implement policies for outreach, informing, and treatment to improve **community-based behavioral health services**).

Hunter v. Chiles, 944 F. Supp. 914 (S.D. Fla. 1996) (coverage of **augmentative communication device**; discussing other state funding agencies and school districts).

Hinds v. Blue Cross & Blue Shield of Tenn., No.3:95-0508 (M.D. Tenn. Jan. 3, 1996) (coverage of **transplant services** by **managed care organization** pursuant to EPSDT and managed care contract).

T.L. v. Belshe, No. CV-S-93-1782 LKKPAN (E.D. Cal. 1995) (settlement to promulgate regulations for covering **treatments** not included in state Medicaid plan for adults).

Sanders v. Lewis, No. 2:92-0353, 1995 WL 228308 (S.D. W.Va. Mar. 1, 1995) (consent order and compliance plan requiring EPSDT **outreach to and screening for children in out-of-home placement**), *same case*, **Sanders v. Lewis**, No. 2:92-0353, 1995 WL 228308 (S.D. W.Va. Mar. 1, 1995).

Scott v. Snider, No. 91-CV-7080 (E.D. Pa. Dec. 2, 1994) (order and stipulation requiring state and **managed care organizations** to meet specific performance standards for screening services), *earlier decision*, No. 91-CV-7080 (E.D. Pa. Aug. 11, 1993), *reprinted in* MEDICARE & MEDICAID GUIDE (CCH) ¶ 42,056 (stipulated settlement requiring **outreach to mother at time of child's birth** and before mother is discharged from care).

G.L. v. Stangler, 873 F. Supp. 252 (W.D. Mo. 1994) (modified consent decree), *same case*, 731 F. Supp. 365 (W.D. Mo. 1990) *and* 564 F. Supp. 1030 (W.D. Mo. 1983) (consent decree regarding **children in out of home placement**).

Chappell ex rel. Savage v. Bradley, 834 F. Supp. 1030 (N.D. Ill.), *clarified sub nom. Chappell ex rel. Savage v. Wright*, No. 91 C 4572, 1993 WL 496700 (N.D. Ill. Nov. 24, 1993) (**orthodontia** and informing).

Thompson v. Raiford, No. 3:92-CV-1539-R, 1993 WL 497232 (N.D. Tex. Sept.24, 1993) (**lead blood screening**).

McLaughlin ex rel. McLaughlin v. Williams, 801 F. Supp. 633 (S.D. Fla. 1992) (transplant).

Maher v. White, No. 90-4674, 1992 WL 122912 (E.D. Pa. June 2, 1992) (EPSDT coverage of **children in foster care placement**).

Barajas v. Coye, No. CIV-S-92 (E.D. Cal. Oct. 29, 1992) (consent decree for **dental sealants**).

L.J. ex rel. Darr v. Massinga, 778 F. Supp. 253 (D. Md. 1991), *modifying* 699 F. Supp. 508 (1988) (consent decree requiring initial and periodic examinations for **children in out-of-home placement**).

Montoya v. Johnston, 654 F. Supp. 511 (W.D. Tex. 1987) (**transplant; caps** on EPSDT services).

Doe v. Pickett, 480 F. Supp. 1218 (S.D. W.Va. 1979) (parental consent, **contraceptives**).

Wis. Welfare Rights Org. v. Newgent, 433 F. Supp. 204 (E.D. Wis. 1977) (refusing to grant plaintiffs' motion of summary judgment regarding EPSDT **screening** and **outreach** where primary responsibility was delegated by state to counties and the delegation was not attacked).

Woodruff v. Lavine, 399 F. Supp. 1008 (S.D.N.Y. 1975), *same case*, 417 F. Supp. 824 (S.D.N.Y. 1976) (state in **substantial compliance** with EPSDT law).

State Courts

Freeman v. State, Dep't of Soc. & Health Servs., 173 Wash. App. 729 (Wash. App. Div. 2013) (affirming Dep't decision finding **general supervisory services** for a severely disabled child did not qualify as personal care or diagnostic, screening, preventive or rehabilitative services and, thus, was not medical assistance under EPSDT).

Tex. Health & Human Servs. Comm'n v. Advocates for Patient Access, No. D-1-GN-12-001297, 2012 WL 6840151 (Tex. Dist. Ct. Aug. 31, 2012), appeal dismissed, 399 S.W.3d 615 (Tex Ct. App. 2013) (affirming, with modification, injunction prohibiting State from enforcing rule that denied medical **transportation** services to children under age 18 who were not accompanied by a parent or guardian) (additional case history omitted).

E.B. v. Agency for Health Care Admin., 94 So.3d 708 (Fla. App. 4 Dist. 2012) (per curiam) (remanding to ALJ for reconsideration, finding ALJ failed to consider E.B.’s request for personal care services under the EPSDT **correct or ameliorate** standard).

I.B. v. State, 87 So.3d 6 (Fla. App. 3 Dist. 2012) (reversing decision to exclude **personal care services** that included transportation to and from therapy sessions, finding Agency erroneously applied state medical necessity standard rather than federal ESDPT statute).

A.M.T. v. Gargano, 781 F. Supp. 2d 798 (S.D. Ind. Feb. 10, 2011) (requiring coverage of physician-prescribed **physical, occupational, respiratory and speech therapy** as maintenance therapy and to prevent regression).

Fuller ex rel. Smith v. Emkes, No. M2010-01590-COA-R3-CV, 2011 WL 2571537 (Tenn. Ct. App. June 28, 2011) (following *Semerzakis* and affirming lower court decision to deny **orthodontia** coverage)

Lee ex rel. Lee v. Emkes, No. M2010-01909-COA-R3-CV, 2011 WL 2552660 (Tenn. Ct. App. June 27, 2011) (following *Semerzakis* and affirming trial court decision to deny **orthodontia** coverage)

Comprehensive Advocacy v. Idaho Dep’t of Health & Welf., No. CV OC 0815034 (Idaho Dist. Ct. 4th Dist. May 13, 2009) (on file with NHeLP) (finding Department’s **school based health service rules** impermissibly restricted necessary and mandatory services for children who are eligible for EPSDT services provided by their public school districts).

Urban v. Meconi, 930 A.2d 860 (Del. Super. Ct. 2007) (**breast reduction surgery**).

Cook ex rel. Cook v. Agency for Persons with Disabilities Dist., 967 So.2d 1002 (Fla. Dist. Ct. App. 2007) (holding that a more restrictive state definition of medical necessity than the federal “**correct or ameliorate**” definition is impermissible for services listed in § 1396d(a), but affirming hearing officer’s decision to approve only six hours of **personal care assistance** rather than the requested nine hours).

In re Erena, No. 2007-162, 2007 WL 5313358 (Vt. Nov. Term 2007) (affirming order of Health Services Board denying the parents’ request for reimbursement for a **wheelchair lift** for van and denying them reimbursement as “personal choice drivers” for their disabled son).

S.A.H. ex rel. S.J.H. v. Dep’t of Soc. & Health Servs., 149 P.3d 410 (Wash. Ct. App. 2006) (holding mother was no longer entitled to state-funded **transportation services**)

for her autistic child to receive Applied Behavioral Analysis therapy outside her geographic area, once equivalent services became available locally).

C.F. v. Dep't Children and Families, 934 So.2d 1 (Fl. App. 3 Dist. 2005) (holding administrative hearing officer improperly applied narrower definition of “medical necessity” and **personal care services** than contained in the federal EPSDT statute and failed to give appropriate **deference** to the opinion of plaintiff’s treating physician).

Semerzakis v. Wilson-Coker, 873 A.2d 911 (Conn. 2005) (holding because EPSDT coverage of **dental services** is explicitly addressed in § 1396d(r)(3), the “correct or ameliorate” standard of § 1396d(r)(5) does not apply), *rev’g*, No. CV030520876S, 2003 WL 23177501 (Conn. Super. Ct. Dec 24, 2003).

Jacobus v. Dep’t of PATH, 857 A.2d 785 (Vt. 2004) (requiring coverage of “**interceptive**” **orthodontic treatment** to prevent a developing malocclusion and rejecting state’s attempt to limit coverage to orthodontic treatment which targets already existing “handicapping malocclusions.” Citing EPSDT but also focusing on amount, duration and scope requirements and prohibitions on differing treatment based on condition; finding coverage cannot be limited to predefined list of criteria, as individualized review and deference to **treating physician** are required).

Lawson v. Dep’t. of Health & Soc. Servs., No. Civ. A. 02A09002HDR, 2004 WL 440405 (Del. Super. Ct. Feb. 25, 2004) (hearing officer’s decision to deny coverage of child’s **orthodontic treatment** under Medicaid invalid because federal and state Medicaid requirements for a **fair hearing** not followed).

N.Y. City Coalition to End Lead Poisoning v. Giuliani, 720 N.Y.S.2d 298 (N.Y. Sup. Ct. 2000) (EPSDT provisions enforceable under § **1983** and **exhaustion** not required).

Sullivan v. Bullen, No. 94-0972, 1994 WL 878826 (Mass. Super. Ct. Dec. 15, 1994) (refusing coverage of **orthodontics** when family income increased).

Tomorrow’s Hope, Inc. v. Idaho Dep’t of Health & Welf., 864 P.2d 1130 (Idaho 1993) (EPSDT as reimbursable cost for **ICF/MRs**).

N.Y. City Coalition to End Lead Poisoning v. Koch, 524 N.Y.S.2d 314 (N.Y. Sup. Ct. 1987) (finding violation of EPSDT **lead blood screening** requirements).

Persico v. Maher, 465 A.2d 308 (Conn. 1983) (**orthodontia**).

Biewald v. State, 451 A.2d 98 (Me. 1982) (**diabetic supplies**).

Brooks v. Smith, 356 A.2d 723 (Me. 1976) (**orthodontia**).