NHeLP
NATIONAL HEALTH LAW PROGRAM

Q & A[1]
EPSDT Coverage of Nutrition Services

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Q: We represent a family with two young children, Mary and Sue. Mary, a pre-schooler, is overweight. Sue, her three-year-old sister, has intellectual disabilities, microencephaly, and epilepsy. She cannot swallow food without a risk of choking and is fed through a gastric tube. Sue's doctor has prescribed a nutritional supplement. The state Medicaid program is not covering nutritional services, for example denying coverage of the nutritional supplement on grounds that this is a common grocery store item. What are rules governing Medicaid coverage of nutritional services?

A: Nutritional assessments and medically necessary nutrition services should be covered through the Medicaid Early and Periodic Screening, Diagnostic, and Treatment (EPSDT) service.

Background on EPSDT

EPSDT is a mandatory Medicaid service for children and youth under age 21. Congress clarified and strengthened the EPSDT provisions in 1989, adding, among other things, an explicit "correct or ameliorate" treatment requirement. *See* 42 U.S.C. §§ 1396a(a)(10)(A), 1396a(a)(43), 1396d(a)(4)(B), 1396d(r).

States must effectively inform all Medicaid-eligible persons under age 21 about the availability of EPSDT. *Id*. at § 1396a(a)(43)(A). The Medicaid Act requires states to cover four separate EPSDT screens: medical, dental, vision, and hearing. The medical screen must be comprehensive, with five required components: a comprehensive health and developmental history, unclothed physical exam, immunizations, laboratory testing,

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and health education. Screening services must be provided according to "periodicity schedules," pre-set by the state in consultation with child health experts, and at other intervals when needed to determine whether a child needs care. *Id.*at §§ 1396a(a)(43)(B), 1396d(r)(1)-(4).

The Medicaid Act requires states to arrange for corrective treatment. *Id.* at § 1396a(a)(43)(C). It also establishes the scope of covered benefits and the medical necessity standard for assessing each child's needs. The scope of benefits includes all mandatory and optional services listed in the Act at 42 U.S.C. § 1396d(a) (listing 29 service categories), whether or not such services are covered for adults. The Act requires coverage of "necessary health care, diagnostic services, treatment, and other measures [described in § 1396d(a)] … to correct or ameliorate defects and physical and mental illnesses and conditions[.]" *Id*. at § 1396d(r)(5). The state Medicaid agency must "make available a variety of individual and group providers qualified and willing to provide EPSDT services," 42 C.F.R. § 441.61, and ensure the timely provision of screening and treatment services, *id.* at § 441.56.

In sum, the EPSDT provisions are designed to ensure "that poor children receive comprehensive health care at an early age ... [and] provide health education, preventive care, and effective follow-up care for conditions identified during check-ups." *Salazar v. District of Columbia,* 954 F. Supp. 278, 303 (D.D.C.1996); *Antrican v. Buell*, 158 F. Supp. 2d 663, 672 (E.D.N.C. 2001) (same).

EPSDT and nutritional services

Medicaid-eligible children may need a range of nutrition services, including assessments, nutritionist/dietician services, and nutritional supplements. As discussed below, the EPSDT service offers a pathway for obtaining coverage of these services.

Nutritional assessments. The Medicaid statute does not contain a specific requirement for nutritional assessment. However, the EPSDT regulations and federal guidance documents do.

States must provide nutritional assessment as a mandatory element of the comprehensive EPSDT medical screen. *See* 42 C.F.R. § 441.56(b)(1) (requiring periodic screening to include "regularly scheduled examinations and evaluations of the … nutritional status of infants, children and youth").[2]

[2] For discussion of the request a screen requirement, see Jane Perkins, *NHeLP, Q&A: The EPSDT "request a screen" requirement* (Nov. 27, 2013) (available from TASC or NHeLP).

The *State Medicaid Manual* discusses nutritional assessments in greater depth. Published by the Centers for Medicare & Medicaid Services (CMS), the *Manual* contains mandatory guidance for Medicaid-participating states. As part of the comprehensive medical screening, the *Manual* requires states to accomplish a nutritional assessment by obtaining information from the child or responsible adult that includes:

- Questions about dietary practices to identify unusual eating habits (such as pica or extended use of bottle feedings) or diets which are deficient or excessive in one or more nutrients.
- A complete physical examination including an oral dental examination, paying special attention to such general features as pallor, apathy and irritability.
- Accurate measurements of height and weight (which are among the most important indices of nutritional status).
- A laboratory test to screen for iron deficiency.
- If feasible, serum cholesterol determinations for children over age one, especially those with a family history of heart disease and/or hypertension and stroke.

See CMS, *State Medicaid Manual* § 5123.2.A(2). If information suggests dietary inadequacy, obesity or other nutritional problems, the *Manual* instructs states to ensure that follow-up occurs, including:

- Assessment of the quality and quantity of the child's diet (e.g., dietary intake, food acceptance, meal patterns, methods of food preparation and preservation, and utilization of food assistance programs),
- Physical and laboratory diagnostic examinations, and
- Preventive, treatment and follow-up services, including dietary counseling and nutrition education.

Id.

Finally, it is important to note that the federal Medicaid agency has stated that it would be inappropriate to enroll nutritionists to provide a separate screening service identified as assessment of nutritional status. This is because the nutritional assessment is supposed to be part of every comprehensive EPSDT screen. *See* Dep't of Health & Human Services Region VII, *Medicaid State Bulletin-225* (July 30, 1992) (nutritional assessment is a part of the comprehensive screen, not a "separate component") (on file with NHeLP); Letter from Ronald Preston, HCFA [CMS] Assoc. Reg. Admin., to Robert J. Palumbo, Acting Assoc. Dir. for Med. Servs., Rhode Island Dep't of Human Servs. (Mar. 26, 1992) (on file with NHeLP) (same). Thus, states must ensure that nutritional assessment is included as a mandatory component of each child's initial and periodic EPSDT medical screen.

Nutritionist/dietician services. Some children, such as Mary in the example above, may need additional attention, for either diagnostic or treatment purposes. The *State Medicaid Manual* indicates that the state agency should cover further evaluation if information obtained through a screening assessment indicates dietary inadequacy, obesity or other nutritional problems. See CMS, *State Medicaid Manual* § 5123.2.A(2). In these cases, the child may need the services of a nutritionist or dietician. These services should be covered through EPSDT.

As noted above, the EPSDT benefit includes all mandatory and optional services listed in the Act when needed to "correct or ameliorate" the child's condition, whether or not such services are covered for adults. 42 U.S.C. § 1396d(r)(5) (incorporating the service listing at 42 U.S.C. § 1396d(a)). Federal regulations also require participating states to make available a variety of providers who are qualified and willing to provide EPSDT services. *See* 42 C.F.R. § 441.61.

Under these broad coverage mandates, nutritionist/dietician services can fit neatly into a number of Medicaid service "boxes." For example, these providers can be covered as part of the clinic service in situations where the clinic benefit includes nutrition services. 42 U.S.C. § 1396d(a)(2)(B); 42 CFR § 440.20. These services may be covered as "outpatient hospital services." 42 U.S.C. § 1396d(a)(2)(A); 42 CFR § 440.20. If nutritionists or dieticians are licensed by the state, their services can be covered as medical or remedial care or services furnished by "licensed practitioners within the scope of practice as defined by state law." 42 U.S.C. § 1396d(a)(6); 42 CFR § 440.60. Depending on the circumstances of the child, nutritionist and dietician services may also be covered as "rehabilitative" services when recommended by a physician or other licensed practitioner "for the maximum reduction of physical or mental disability and restoration of an individual to the best possible functional level." 42 U.S.C. § 1396d(a)(13); 42 CFR § 440.130(d). Still other children may need these services as "preventive" services. 42 U.S.C. § 1396d(a)(13); 42 CFR § 440.130(c) (eff. Jan. 1, 2014) (defining preventive services to mean services recommended by a physician or other licensed practitioner to prevent health conditions or their progression, prolong life, and promote physician and mental health and efficiency).

Nutritional supplements. Some children will be prescribed nutritional supplements to treat their health conditions. Nutritional supplements come in a variety of forms. There are a number of commercial supplements, such as Ensure and Pediasure. Supplements can also be produced by or under the supervision of health care practitioners. Both commercial and non-commercial supplements are sold by grocery stores and other retail vendors. As a result, some states have refused coverage of nutritional supplements on the grounds that they are groceries and not medical assistance. Indeed, the federal Medicaid agency has stated, "Nutritional supplements,

per se, are not covered under Medicaid." *See*, *e.g*., Dallas Reg. Med. Servs. Letter No. 92-77 (Aug. 5, 1992) (on file with NHeLP).

However, nutritional supplements that are a necessary part of a child's treatment become medical in nature and should be covered under EPSDT. *Id*. Coverage should occur, for example, when the nutritional product is expected to have a "healing or curative effect on the patient beyond that which would be provided by ordinary food." *Id*.

As with all other services under EPSDT, the determination of medical necessity should be made on a case-by-case basis, asking whether the service has been prescribed by a provider within their scope of practice to correct or ameliorate the child's condition. Of course, the nutritional supplement will also need to meet the description of at least one of the Medicaid services listed in 42 U.S.C. § 1396d(a). In addition to the services discussed in the nutritionist/dietician services discussion, above (e.g. clinic, preventive, other licensed practitioner services), nutritional supplements may be needed by a child as home health medical supplies. *See* 42 CFR § 440.70(b); *see also* 42 U.S.C. § 1396a(a)(10)(D) (mandatory home health coverage); *Id*. at § 1396d(a)(7) (optional home health coverage); *see generally Hodges v. Smith*, 910 F. Supp. 646 (N.D. Ga. 1995) (noting that "liquid diet" needed by an adult Medicaid recipient was not a "drug" for Medicaid purposes but could be a "medical supply"). Nutritional supplements could also be included as part of an individualized plan for a child enrolled in a home and community based waiver. *See* 42 U.S.C. § 1396n(c); 42 C.F.R. §§ 441.300-.310 (waivers for individuals with an intermediate care facility level of care); 42 U.S.C. § 1396n(e) (waivers for children born with AIDS or drug dependency).

In April 1997, the federal agency attempted to limit coverage of nutritional products to "specialized medical products." Mem. from Richard Fenton, Director, HCFA [CMS] Medicaid Bureau, to Assoc. Reg. Admin. Reg. VI (Apr. 1, 1997) (on file with NHeLP). According to this letter, "food items that are readily available to the general public in grocery or other retail stores … basically baby food, various oils and vitamins or herbs … would [not] be considered primarily a medical item or product." *Id*.[3]

The letter was written in response to a lawsuit, *Simpson v. Jindal*. *Simpson* was filed after the state denied coverage of nutritional supplements on the grounds that they were food and not "medical assistance" described in § 1396d(a) of the Medicaid Act.

[3] *Compare* Mem. from Patricia N. Daniels, Dir., Supp. Food Programs, to Reg. Directors (Sept. 17, 2001) (Reissue Final WIC Policy Mem. #2001-6) (advising that Medicaid will be primary payer for WIC-eligible exempt infant formulas and medical foods issued to WIC participants who are on Medicaid and who have a diagnosed medical condition that precludes or restricts use of conventional foods; instructing WIC and Medicaid to "work collaboratively to ensure that the nutritional needs of mutual clients are met") (on file with NHeLP).

At the time of the case, Heather Simpson was a three-year-old child who suffered from epilepsy, intellectual disabilities and could not swallow food without a risk of chocking. She was fed by a g-tube. Her doctor prescribed a ketogenic diet, a high-fat, low-carbohydrate diet, to control her epilepsy. The Louisiana Medicaid agency agreed that Heather's condition met the requirements for Medicaid coverage of nutritional therapy services. However, it would only cover commercially available nutritional formulas. Heather's digestive track could not tolerate the commercial formula, and she continued to have epileptic seizures when using it. Her doctor prescribed an alternative ketogenic diet with ingredients mixed by Heather's mother under the direction of the treating providers. The alternative diet consisted of a blend of flax and almond oils, vitamins, acidophilus, laxatives, glutamine and baby food. The success of the alternative diet was well-documented in the record. Her neurologist testified that, on this diet, Heather had seizure free days was able to substantially reduce her pharmacological medications. Moreover, the alternative diet did not reduce Heather's awareness the way that pharmaceuticals did. In addition, the noncommercial formula did not produce the life-threatening complications—such as profuse diarrhea—caused by the commercial supplement. The record also included published medical literature supporting the efficacy of medically-supervised ketogenic diets for intractable childhood seizures.

After reviewing the law and facts, the court ordered coverage. *See Simpson v. Jindal*, No. 96-7518-B-M3 (M.D. La.) (Magistrate Judge's Report Nov. 14, 1997) (on file with NHeLP). The court reasoned:

> Where a physician … has prescribed a nutritional supplement and the supplement is expected to have a healing or curative effect on the patient beyond that which would be provided by ordinary food, federal Medicaid law permits the State to include the nutritional supplement in the discretionary portions of its plan as an integral part of the … service and, as such, reimbursable under Medicaid. And the EPSDT provisions dictate that where the State "could" include the supplements within covered services for adults, it *must* do so for Medicaid recipients under 21 years of age.

Id. at 12-13 (emphasis in original) (some internal quotations omitted). The court concluded that the State's decision to deny coverage for the alternative treatment "simply because it comes not from a can but, rather, by way of a mother's (medically supervised) hand, is both legal error and arbitrary and capricious." *Id*. at 15. The case ended with a consent judgment for the plaintiff. See Simpson, No. 96-7518-B-M3 (M.D. La.) (Consent Judgment Dec. 9, 1997) (on file with NHeLP).

To sum up, when seeking Medicaid coverage of nutritional supplements, a clear line between covered and non-covered services can be drawn. Medicaid funding is not

available to pay for ordinary food for a person who can properly be sustained on ordinary food. Nor is Medicaid coverage available to cover the purchase of food that is considered to be, for example, “heart healthy” food that helps otherwise healthy individuals avoid coronary disease. However, Medicaid EPSDT coverage is mandatory when the nutritional supplement is a therapeutic agent for life and health maintenance and a necessary component of the child’s treatment.

Conclusions and recommendations

Here are some steps you can take to ensure that your state is covering necessary nutritional services:

1. Review your state’s EPSDT screening policies to verify that nutritional assessments are included in every EPSDT periodic medical screening, including health education and anticipatory guidance for the child and the caregivers. If this coverage is not clearly described, ask your state to issue a bulletin or web-site posting reminding participating health care providers of the importance of these assessments and that they are integral components of EPSDT screening.

2. Review your state’s EPSDT coverage policies to verify that nutritionist/dietician services are covered for children. If they are not, inform the state of the discrepancy and suggest Medicaid services categories that can be used by the state to cover the services. Note that recently revised federal regulations amending the definition of preventive services may apply.

3. Advocates should verify the interplay between Medicaid and other child-serving programs, particularly WIC, to ensure that coverage and payment are operating effectively. As noted in the *State Medicaid Manual*,

   > WIC provides specific nutritious supplemental food and nutrition education at no cost to low-income pregnant, postpartum, and breastfeeding women, infants and children up to their fifth birthday. WIC serves as an adjunct to good health care. Referrals by EPSDT of all categories of WIC’s target population is required. CMS, *State Medicaid Manual* § 5230.2.C.

4. If seeking coverage of a nutritional supplement through EPSDT, make sure to tie the service to the appropriate Medicaid service box(es). Also, have the facts of the child’s case well-developed and include published medical research that supports your claim. The evidence produced on behalf of the plaintiff in *Simpson v. Jindal*, summarized above, is exemplary.

5. While this Q&A focuses on nutritional services for children whose conditions need follow-up, age-appropriate information about diet and exercise should be a part of every medical screening.