CMS's guidance on EPSDT Services for Children with ASD

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In July, 2014, the Centers for Medicare and Medicaid Services (CMS) issued guidance clarifying that evidence-based treatments for children with autism spectrum disorders (ASD), including behavioral and communication approaches to treatment, are eligible for federal financial participation under three State Plan authorities: (1) Other Licensed Practitioner (OLP), (2) Preventive Services, and (3) Therapies.[1] CMS explained that states are obligated to cover these services for children under 21, even if they are not covered for adults under the State Plan, when they are medically necessary.[2] In September, 2014, CMS issued an FAQ, further explaining states' obligation to cover services for children with ASD. [3]

Pre-2014 Limitations on Medicaid Services for Children with ASD

ASD is a developmental disability that can cause significant delays in social, communication, and other behavioral skills, and many services that treat ASD are aimed at building skills and reducing maladaptive behaviors.[4] Until recently, many states limited services to children with ASD because they considered those services "habilitative" services. Habilitative services are defined as those services "designed to assist individuals in acquiring, retaining, and improving the self-help, socialization and adaptive skills necessary to reside successfully" in community settings.[5]

Medicaid's Early and Periodic Screening, Diagnostic and Treatment EPSDT requires coverage of all Medicaid services that are necessary to "correct or ameliorate" a physical or mental condition of beneficiaries under age 21.[6] This includes any service that falls into one of the categories listed in the federal statute at 42 U.S.C. § 1396d(a), regardless of whether the state chooses to cover the service for adults. These categories include other licensed practitioner services, preventive services, and therapy services, along with physician services, hospital services, private duty nursing, personal care services, and others. Medicaid also allows states to offer home and community-based services to people who are at risk of institutionalization through programs known as "waivers."[7] These programs enable states to cover a range of services including services that are regularly covered under Medicaid as well as certain special services

that would not otherwise be covered, including housekeeping and respite.[8] Waivers may also cover "habilitative" services.[9] Because habilitative services do not fit into the categories of state plan services listed in the Medicaid Act, CMS has stated that they cannot be covered under EPSDT, but only through various home and community-based waiver options.[10]

Because they were considered habilitative services, some behavioral health treatments, such as Applied Behavioral Analysis (ABA) therapy, have only been available through home and community-based waiver programs, which may limit the number of children enrolled. Therefore, not all children with ASD in Medicaid have been able to access treatments they need. Moreover, other services that are routinely covered under EPSDT in state Medicaid programs, including speech and occupational therapy, have sometimes not been available to children with ASD. Some states claimed that such services were habilitative services for children with ASD, because for those children, the treatment goal was aimed at building new skills.[11] The CMS guidance and FAQ should now make clear to states that any such limitations are not permissible, and that all EPSDT services must be provided to children with ASD when they are medically necessary to correct or ameliorate the ASD.

ABA Therapy in Medicaid

Applied Behavioral Analysis (ABA) therapy is a common treatment modality for children with ASD. ABA therapy is an intensive behavioral intervention program based on a one-on-one teaching approach that relies on reinforced practice of various skills.[12] According to the federal Agency for Healthcare Research and Quality (AHRQ), ABA therapy can include a variety of components including: antecedent package, joint-attention intervention, naturalistic teaching strategies, peer training, schedules, and story-based intervention package.[13] It is typically provided by certified therapists and a team of behavior technicians, pursuant to a referral from a licensed practitioner such as a neurologist or psychologist.[14] Although state laws are beginning to change, in most states, the therapists and paraprofessional staff who administer ABA therapy, though certified by a national board, are not licensed under state law.[15]

For several years advocates around the county have been pushing CMS and state Medicaid agencies to cover ABA therapy for children with ASD under EPSDT, arguing that ABA therapy could be considered a rehabilitative service or a preventive service. In states where ABA therapy providers are licensed by the state, advocates theorized that it could also be covered under the Other Licensed Practitioner authority. Courts in a few states, including Florida and Ohio, held that the EPSDT requirement mandated states to cover ABA therapy for children in Medicaid.[16] In the months before releasing its July 2014 Guidance, CMS approved state plan amendments from Louisiana and

Washington to cover "services rendered by licensed behavior analysts," and "Applied Behavioral Analysis (ABA) Services provided by licensed practitioners," respectively, under the OLP authority.[17]

Many advocates hoped and expected that, after approving the state plan amendments from Louisiana and Washington, CMS guidance would clarify, once and for all, that ABA therapy was not always a habilitative service, and that states were required to cover it under EPSDT when it fit within a category of service listed in the Medicaid Act and was medically necessary for an individual child. But the July 2014 guidance never uses the word ABA. CMS's subsequent FAQ states explicitly that the guidance is not intended to mandate states to cover ABA per se; rather, CMS will require states to meet their "long-standing EPSDT obligation . . . [by] providing medically necessary services for the treatment of ASD," but it "is not endorsing or requiring any particular treatment modality for ASD."[18] As CMS noted in its July 2014 guidance, ABA therapy is not the only evidence-based treatment for children with ASD. Evidence also supports many other, non-ABA, behavioral health interventions for individuals with ASD, including communication supports, social skills training, cognitive therapies, and supported employment for young adults.[19] These interventions may be as effective, or even more effective, for some children with ASD, depending on their individual needs.

Next Steps

We understand the CMS FAQ to mean that, if states do not cover ABA therapy under EPSDT, they must cover comparable services that are expected to achieve comparable outcomes. States may be able to meet this requirement by covering individual components of ABA therapy in conjunction with other evidence-based therapies. If a particular treatment—including ABA therapy—is medically necessary to correct or ameliorate a child's ASD, and no alternative treatment is appropriate for that child, we believe that state Medicaid agencies must cover that treatment.

Advocates should be aware that evidence-based treatments for children with ASD are often very intense, provided for multiple hours per day.[20] While there is strong evidence that services provided in home and community-based settings, such as in children's homes and schools, are more effective for most children, some children with ASD receive services in a disability-specific clinical environments.[21] The Supreme Court's *Olmstead* decision prohibits public programs, like Medicaid programs, from unnecessarily segregating people with disabilities.[22] Thus, state Medicaid agencies should provide services to children with ASD in a home or community-based setting whenever possible.

In the coming months, CMS will be working with states to update and expand the menu of services available to children with ASD. States that currently only offer certain EPSDT services for children with ASD through a Medicaid waiver must transition provision of those services to the state plan.[23] CMS has not set a particular deadline by which states must come into compliance with its guidance, but has indication that states should "work expeditiously and should not delay or deny provision of medically necessary services."[24] Advocates should contact their state Medicaid agencies for more information about what the state is doing to comply with CMS's guidance. In particular, advocates should work with their state Medicaid agencies and CMS to ensure that services provided to children with ASD under EPSDT are provided in home and community-based settings whenever possible.

Notes

[1] CINDY MANN, DIRECTOR, CENTERS FOR MEDICAID & CHIP SERVICES, CLARIFICATION OF MEDICAID COVERAGE OF SERVICES TO CHILDREN WITH AUTISM 2-3 (2014), *available at* http://www.medicaid.gov/Federal-Policy-Guidance/Downloads/CIB-07-07-14.pdf.
[2] *Id.* at 5.
[3] CENTERS FOR MEDICAID & MEDICARE SERVICES, MEDICAID AND CHIP FAQS: SERVICES TO ADDRESS AUTISM (2014), *available at* http://www.medicaid.gov/Federal-Policy-Guidance/Downloads/FAQ-09-24-2014.pdf.
[4] *See* MANN, *supra* note 1 at 1.
[5] 42 U.S.C. § 1396n(c)(5)(A); *see also* SARAH SOMERS, NAT'L HEALTH LAW PROG., Q & A: HABILITATION COVERAGE AND MEDICAID SERVICES, INCLUDING IMPACT OF THE DRA OF 2005 (2006), *available at* http://209.203.251.64/conf09/QA%20HAB%20REHAB.pdf.
[6] 42 U.S.C. § 1396d(r)(5).
[7] *Id.* § 1396n(c).
[8] *Id.* § 1396n(c)(4)(B).
[9] *See supra* note 5.
[10] *See supra* note 5.
[11] *See* SARAH SOMERS, NAT'L HEALTH LAW PROG., Q & A: MEDICAID COVERAGE OF THERAPEUTIC TREATMENT FOR CHILDREN WITH AUTISM 2-4 (2009), *available at* http://www.healthlaw.org/issues/disability-rights/medicaid-coverage-of-behavioral-therapy-for-children-with-autism;
[12] SOMERS, *supra* note 11 at 2; *see also* AMY S. WEITLAUF, *ET AL.*, AGENCY FOR HEALTHCARE RESEARCH & QUALITY, THERAPIES FOR CHILDREN WITH AUTISM SPECTRUM DISORDER: BEHAVIORAL INTERVENTIONS UPDATE 6 (2014), *available at* http://effectivehealthcare.ahrq.gov/ehc/products/544/1945/autism-update-report-140929.pdf.
[13] *See* WEITLAUF, *supra* note 12 at 6.
[14] *See* SOMERS, *supra* note 12 at 2.
[15] *Id.; see also* Behavioral Analyst Certification Board, Behavior Analyst Licensure/Certification Statutes, http://www.bacb.com/index.php?page=100170 (last visited Oct. 10, 2014).
[16] *See, e.g., Garrido v. Dudek,* 731 F.3d 1152 (11th Cir. 2013) (upholding District Court's holding that ABA was a rehabilitative service mandated under EPSDT for Florida Medicaid); *Parents League for Effective Autism Treatment v. Jones-Kelley*, 339 Fed. Appx. 542 (6th Cir. 2009) (upholding District Court's holding that ABA was likely mandated in Ohio Medicaid under EPSDT as either a rehabilitative or preventive service).
[17] CENTERS FOR MEDICAID & MEDICARE SERVICES, STATE PLAN AMENDMENT # 14-06 at 3 (2014) (Louisiana), *available at* http://www.medicaid.gov/State-resource-center/Medicaid-State-Plan-Amendments/Downloads/LA/LA-14-06.pdf; CENTER FOR MEDICAID & MEDICARE SERVICES, STATE PLAN AMENDMENT # 13-05 at 2 (2014) (Washington), *available at* http://www.medicaid.gov/State-resource-center/Medicaid-State-Plan-Amendments/Downloads/WA/WA-13-05.pdf.
[18] CENTERS FOR MEDICAID & MEDICARE SERVICES, *supra* note 3 at 1.
[19] *See* JULIE YOUNG *ET AL.,* IMPAQ INTERNATIONAL, AUTISM SPECTRUM DISORDERS (ASDS) SERVICES: FINAL REPORT ON ENVIRONMENTAL SCAN (2010) (cited in MANN, *supra* note 1 at 1), *available at* http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Long-Term-Services-and-Supports/Downloads/Autism-Spectrum-Disorders.pdf; *see also* WEITLAUF, *supra* note 12.
[20] *See* YOUNG, *supra* note 19 at 25-27.
[21] *Id.* at 23, 28.
[22] *Olmstead v. L.C.*, 527 U.S. 581, 607 (1999).
[23] CENTER FOR MEDICAID AND MEDICARE SERVICES, *supra* note 3 at 2.
[24] *Id.* at 1.