



EPSDT

Training for: Hawaii Disability Rights Center

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Training Overview

- # Session One: Medicaid Overview
- # Session Two: Focus on EPSDT
- # Session Three: Choice of Forum Issues



Session One

Medicaid Overview



Medicaid Basics

- # “Byzantine construction” makes Medicaid “almost unintelligible to the uninitiated”
- # Medicaid Act is “an aggravated assault on the English language”
- # Medicaid “regulations so drawn they have created a Serbonian bog”



Medicaid: citations

- # Social Security Act, Title XIX
- # 42 U.S.C. § 1396 et seq.
- # 42 C.F.R. § 400 et seq.
- # HHS, State Medicaid Manual
- # State laws and regulations
- # State manuals



Medicaid's basic structure

- # Cooperative federalism
- # Entitlement
- # Statewideness
- # Comparability



Medicaid-for young and old

- # Covers over 1/3 of all births
- # Covers over 22 million children (1 in 5)
- # Covers about 1/2 of all nursing home care



Medicaid Administration

- # Federal: Department of Health & Human Services
 - Centers for Medicare & Medicaid Services
- # Single state agency

Mandatory v. Optional

- # Eligibility – mandatory and optional
- # Services – mandatory and optional

Eligibility Categories:

Mandatory, e.g.:

- # Pregnant women, children up to 6 years, < 133% FPL
- # Children 6-19 years, < 100% FPL
- # Newborn children of Medicaid-eligible women
- # § 1931 – families deemed to be receiving AFDC because their current circumstances would have met the State’s AFDC standards in effect on July 16, 1996
- # Transitional Medical Assistance – families whose income exceeds the State’s eligibility limit due to an increase in earned income
- # Individuals receiving SSI *or* qualifying through 209(b)

Eligibility Categories: Optional, e.g.:

- # Pregnant women and infants with income, 133%-185% FPL
- # Children 1-6 > 133% FPL; 6-19 > 100% FPL
- # Optional targeted low-income children (SCHIP expansion of Medicaid)
- # Medically needy
- # Individuals receiving home and community based services
- # Non-institutionalized children with disabilities



Eligibility

- # Limited income and resources
- # US citizen or recognized immigrant
 - Exception: emergency medical services
- # State resident

Services: Mandatory, e.g.:

- # Physician services
- # Laboratory/x-ray
- # In-patient hospital
- # Outpatient hospital
- # EPSDT
- # Family planning services & supplies
- # FQHC & rural health clinic services
- # Nurse midwife services
- # Certified nurse practitioner services
- # Home health care*

Services: Optional, e.g.:

- # Prescription drugs
 - As of 9/9/04, HI in purchasing pool (incl. MN, MI, VT, NH, NV)
- # Home health care*
- # Private duty nursing
- # Dental
- # Physical therapy
- # Intermediate care facility services for MR
- # In-patient psychiatric hospital services for ind. < 21
- # Rehabilitative services
- # Case management
- # Personal care services

What services does Medicaid cover?

- # States have extensive flexibility
- # Approx. 2/3 of Medicaid spending is “optional” – for optional beneficiaries or optional services for mandatory beneficiaries

Medicaid services

- # “Amount, duration and scope” of service must be sufficient to achieve its purpose
- # No discrimination based on condition
- # “Nominal” cost sharing
- # Provider participation
 - “Equal access” requirement
 - Medicaid is payment in full



Medicaid: Administration

- # State Medicaid Plan
- # Medicaid “waivers”
 - § 1115 experimental, pilot or demonstration waivers (§ 1315)
 - § 2176 home and community care waivers (§ 1396n)

Medicaid waivers--

Section 1115 Demonstrations

Secretary Finds:

- Likely to assist in promoting the objectives of the Medicaid Act

Secretary May:

- Waive compliance with requirements of 1396a
- To extent and for period needed

NOTE: Provisions of the Medicaid Act not expressly waived remain in effect.

Medicaid waivers--§ 1396n(c)

Home and community based waivers

- # Individual who would require institutional level of care
- # Inform of alternatives and choice
- # Written plan of care
- # State may limit individuals provided benefits
- # NOTE: Provisions of the Medicaid Act not expressly waived remain in effect.

Administrative fair hearing

Right to a fair hearing

- The United States Constitution, 14th Amendment
- The Supreme Court, *Goldberg v. Kelly*
- Federal laws, 42 USC 1396a(a)(3); 42 CFR 431.200
- State laws



Session Two

Early and Periodic Screening,
Diagnosis and Treatment (EPSDT)



Reasons for EPSDT

- # Children are not little adults
- # Adolescents are not big children



EPSDT

- # Mandatory service for Medicaid-eligible children and youth up to age 21

Poor Children = Poor Health

Poor children are more likely to have:

- ✓ Vision, hearing and speech problems
- ✓ Untreated tooth decay
- ✓ Elevated lead blood levels
- ✓ Sickle cell disease
- ✓ Behavioral Health problems
- ✓ Anemia
- ✓ Asthma
- ✓ And many more . . .



EPSDT Citations

- # Medicaid Act: 42 U.S.C. §§ 1396a(a)(10)(A), 1396a(a)(43), 1396d(a)(4)(B), 1396d(r)
- # Medicaid Regulations: 42 C.F.R. § 441 et seq.
- # CMS, State Medicaid Manual § 2700, part 5
- # State statute, regulations, policy manuals
- # Medicaid managed care contracts

EPSDT Requirements—

Medical, vision, hearing, dental screening

Medical Screens

- Health and developmental history
- Unclothed physical exam
- Immunizations
- Lab tests, including lead blood tests
- Health education

EPSDT Requirements—

Medical, vision, hearing, dental screening

Additional Required Screens

- Vision, including eyeglasses
- Hearing, including hearing aids
- Dental, including relief of pain, restoration of teeth and maintenance of dental health

EPSDT Requirements—

Early and Periodic screening

Periodic Screens

- Set according to age
- Set by medical and dental experts
- Different for medical, dental, hearing and vision

Interperiodic Screens



Reminders about EPSDT screens

- # Medical screen = 5 components
- # Provider need not deliver all services
- # Up-to-date periodicity
- # No cost sharing
- # Assistance getting appointments & transport
- # No prior authorization
- # Any encounter=Interperiodic screen

Advocating for EPSDT Screening

- # Up-to-date periodicity schedules?
- # Separate medical, vision, hearing, dental periodicity schedules?
- # Age-appropriate screening forms?
- # Limiting providers to all EPSDT services?
- # Screening for substance abuse?

EPSDT Screening

Periodicity Schedules:

- # AAP – www.aap.org/policy/re9939.html
- # AMA Guidelines for Adolescent Preventive Services- www.ama-assn.org/ama/pub/category/2279.html
- # Bright Futures- www.brightfutures.org
- # AAPD – www.aapd.org
- # ADA – www.ada.org



EPSDT Requirements— Treatment

All necessary treatment within
1396d(a)

To “correct or ameliorate physical and mental illnesses and conditions,” even if the service is not covered under the state plan.

EPSDT Services—

Requirements

- # Prescription drugs
- # Dental services
- # Physical and other therapies
- # Private duty nursing
- # Home health care
- # Rehabilitation services
- # Personal care services
- # Case management
- # Transportation

Determining Medical Necessity Under EPSDT

- # “Necessary ... to correct or ameliorate”
- # Deference to treating provider

“...the physician is the key figure in determining utilization of health services . . . it is a physician who is to decide upon admission to a hospital, order tests, drugs and treatments and determine the length of stay.”

S. Rep. No. 404, 89th Congress, 1st Session

EPSDT Services--

Request for treatment should include:

- # Physician's orders (e.g. on Rx pad)
- # Written justification from physician & treatment team
 - Patient history
 - Diagnosis/prognosis
 - Medical justification
 - Description of benefits
 - Length of time service/treatment is needed
- # When appropriate: product information, photographs, comparable prices
- # Statement that request is under EPSDT to “correct or ameliorate” the child’s condition

EPSDT Services—

Responding to the rationales for “No”

- # Not diagnosed during an EPSDT screen
- # Not medically necessary
- # Less costly alternative
- # Not a covered service in 1396d(a)
- # Experimental

EPSDT Services—

Experimental service??

Investigate:

- Discuss with provider
- Review medical literature
- Look at other Medicaid programs
- Look at Medicare, private insurers
- Look at other countries

EPSDT Service—

Not listed in 1396d(a)

Fit service into a Medicaid box

Basic living skills=home health, rehabilitation

Swimming class=physical therapy

Crisis intervention=rehabilitation

Maintenance service=private duty nursing

Incontinence supplies=home health, durable
medical equipment

Reminders about EPSDT services

- # No cost-sharing for <18 (19-21, optional)
- # Necessary treatment to “correct or ameliorate” listed in 1396d(a)
- # Individualized determination of need
- # Broad base of qualified providers
- # Utilization controls consistent with EPSDT “preventive thrust”

EPSDT Requirements

Outreach and informing

- # Effective and aggressive
 - Oral and written
 - Translated
 - Targeted (e.g. pregnant teens, non-users)
- # Transportation and appointment assistance (prior to screen due date)
- # Coordinate with other entities



Session Three

Choice of forum: Enforcing
Medicaid's Guarantees

EPSDT Problems

Case examples

- # Inadequate outreach and informing
- # Out of date periodicity schedules
- # Denial of covered, necessary treatment services

Choice of Forum—

The Options:

- # Administrative fair hearing
 - Individual claim
 - Shared group claim
- # State court case
 - Enforce state and/or federal Medicaid statutes
 - Enforce APA
- # 42 U.S.C. § 1983
- # Supremacy clause case

Administrative fair hearing

Right to a fair hearing

- The United States Constitution, 14th Amendment
- The Supreme Court, *Goldberg v. Kelly*, 397 U.S. 254 (1970)
- Federal laws, 42 USC 1396a(a)(3); 42 CFR 431.200
- State constitution and laws



Fair hearing

Written notice

- Statement of and reasons for action
- Specific legal authority
- Explanation of hearing rights
- Explanation of continued benefits

Opportunity to be heard

- Impartial decision



Federal court: Roadblocks

- # State sovereign immunity in federal court
- # Private enforcement of federal statutes

Sovereign Immunity

Eleventh Amendment: The judicial power of the U.S. does not extend to suits against a state by citizens of another state

- *Hans v. Louisiana*, 134 U.S. 1 (1890)—applies to state’s own citizens
- *Ex Parte Young*, 209 U.S. 123 (1908)—allows suits in against state officials to enjoin ongoing violations of federal law
- Congress may abrogate sovereign immunity
- State can waive sovereign immunity

The Supreme Court's recent cases

- # Series of 5-4 decisions expand state sovereignty
- # E.g., *Alden v. Maine*, 527 U.S. 706 (1999)—“sovereign immunity neither derives from, nor is limited by, the 11th Amendment”
- # Cf. *Verizon Md. v. Public Serv. Comm’n of Md.*, 122 S.Ct. 1753 (2002)—“straightforward inquiry”

42 U.S.C. § 1983

- # “Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.”

Section 1983—

Express cause of action for:

- # Deprivation of a federal rights secured by the Constitution and laws
 - By a “person” acting under color of law
 - Legal and equitable remedies, and attorneys fees available
 - Can be filed in federal or state court
 - Does not allow enforcement of regulations
 - *Save Our Valley*, 335 F.3d 932 (9th Cir. 2003)

Section 1983—early S.Ct. cases:

- # *King v. Smith*, 392 U.S. 309 (1968) (enforced federal law under § 1983)
- # *Maine v. Thiboutot*, 448 U.S. 1 (1980) (“laws” include federal statutes standing alone)
- # *Wright v. Roanoke Redevelopment & Hous. Auth.*, 479 U.S. 418 (1987) (“federal right” conferred under a federal regulation)
- # *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103 (1989) (plaintiff must allege “federal right”)

Section 1983

If there is a state deprivation of a right secured by a federal statute, § 1983 provides a remedial cause of action *unless the state actor demonstrates by express provision or other specific evidence from the statute itself* that Congress intended to foreclose such private enforcement.”

■ *Wright*, 479 U.S. at 423 (emphasis added)

Section 1983—

Enforcement of federal statute:

■ The “traditional” test:

- Was provision intended to benefit plaintiff?
- Does provision establish clear requirements for the court to enforce?
- Is the provision mandatory on the state?
- If so, does the statute evidence the lack of a comprehensive enforcement scheme?
 - *Blessing v. Freestone*, 520 U.S. 329 (1997); *Wilder v. Va. Hosp. Ass’n*, 496 U.S. 498 (1990)

Section 1983–

Recent Supreme Court case

Gonzaga Univ. v. Doe (2002)

- Private enforcement of spending clause is rare
- Enforcement typically left to federal government
- Statute must unambiguously confer individual right
 - Look to “text and structure” of statute
 - Statutes that focus on person regulated rather than the individuals protected create no enforceable rights
 - Administrative enforcement scheme evidences lack of Congressional intent

Cases to watch

- # *PHARMA v. Walsh*, 123 S.Ct. 1855 (2003)
 - Justice Scalia: Use fund termination “process”
 - Justice Thomas: No third party contract enforcement
- # 9th Circuit Court of Appeals
 - *Clayworth/CMA v. Bonta*, 295 F. Supp. 2d 1110 (ED Ca. 2003)
 - *Sanchez v. Johnson*, 301 F Supp. 2d 1060 (ND Ca. 2004)
 - *Watkins v. Thorne*, 2004 US Dist. LEXIS 12855 (D. Ore. 2004)
- # EPSDT cases
 - *Frew v. Hawkins*, 124 SCt 899 (2003), rev’g 300 F.3d 530 (5th Cir. 2002), remand, 2004 U.S. App. LEXIS 13762 (5th Cir. 2004)
 - *Charlie & Nadine v. Whitman*, 83 F. Supp. 476 (D.N.H. 2000)
 - *S.D. v. Hood*, 2002 US Dist. LEXIS 23535 (E.D. La. 2002)