

To: Advocates
From: Jane Perkins
Date: July 2007

RE: Medicaid EPSDT – Case Developments

This Q&A provides summaries of the major cases, summarizes case trends, followed by citations to cases published from 2004 to date.

Case Trends

Individual beneficiaries are successfully enforcing the EPSDT statutes (e.g. *S.F., Ekloff, Jacobus, S.D.*). In a number of cases, individuals challenge the state Medicaid agency's refusal to cover a needed service. These cases involve clear facts establishing the need for the service and that the service has been denied by the state or by a managed care organization contracting with the Medicaid program. While the service needed by the child may not be mentioned by name as a covered service in the Medicaid Act, these cases establish that the service can nevertheless be covered if it can be fit into a Medicaid box—that is, the service can properly be described as one of the Medicaid services listed in the Act, 42 U.S.C. § 1396d(a). For example, incontinence supplies may be covered as a home health, rehabilitative, or preventive service.¹

Individuals with behavioral health needs are looking to EPSDT for help (e.g. *Katie A., Rosie D.*). Children with mental and behavioral health needs can benefit from the comprehensive package of benefits that EPSDT offers. Case management, care consistency, and a range of home and community based services are essential ingredients to maximize outcomes for these children. The recent cases have reiterated that EPSDT will cover many of the behavioral health services that children need, provided that those services can be fit within a Medicaid box.²

Courts are requiring extensive evidentiary proof in cases alleging a systemic breakdown of the EPSDT program (e.g. *Frazer, Katie A., Memisovski, Rosie D.*). Advocates have obtained favorable decisions in cases challenging systemic problems with EPSDT programs.

¹ For discussion about how to fit a prescribed service within a Medicaid box, see, e.g., Jane Perkins, National Health Law Program, *Medicaid Early and Periodic Screening, Diagnosis and Treatment As A Source of Funding Early Intervention Services* (June 2002); Jane Perkins and Sarah Somers, National Health Law Program, *Toward a Healthy Future: Medicaid Early and Periodic Screening, Diagnosis and Treatment Services for Poor Children and Youth* (April 2003); Jane Perkins, National Health Law Program, *Q&A: EPSDT "Wraparound Services"* (Sept. 2006). All of these resources are available through <http://www.healthlaw.org>.

² *Id.*

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In contrast to much of the EPSDT advocacy of the 1980s, however, a number of these cases have involved years of hard work, including extensive discovery, evidence gathering, and expert testimony.

Judges are looking at whether children and their families should have access to the federal courts to enforce the EPSDT provisions (e.g. *Clark, Carson P., Ekloff, Health Care for All, Memisovski, Oklahoma Chap. of Am. Acad. of Pediatrics, S.D., Westside Mothers, Moore*). To date, courts have fairly consistently held or expressly assumed that the EPSDT provisions, 42 U.S.C. §§ 1396a(a)(10)(A), 1396a(a)(43), 1396d(a)(4)(B), and 1396d(r), can be privately enforced through 42 U.S.C. § 1983. An exception is the Florida case, *A.G. v. Arnold*. In that case, the court correctly refused to rule on the plaintiffs' state law claims (based upon current Supreme Court sovereign immunity doctrines) and also found that the plaintiff had failed to show that the EPSDT provisions "created a federal right to a power wheelchair."³

A disturbing string of recent cases raises another question: What is Medicaid? For example, in *Oklahoma Academy of Pediatrics* the Tenth Circuit finds that Medicaid is defined as "medical assistance," which is "payment for all or part of" the care and services listed in the Medicaid Act. See 42 U.S.C. § 1396d(a). According to the Court, the only obligation on the state Medicaid program is to provide for prompt payment of claims for care and services when (and if) they are submitted, and there is no obligation to see that the care and services are actually provided promptly. The effect of this reasoning on EPSDT is not clear. The EPSDT provisions call for the state to provide for screening and treatment services. See 42 U.S.C. § 1396a(a)(43). Notably, the Tenth Circuit expressly did not rule on the EPSDT provisions when it issued its otherwise negative decision.

In another disturbing development, states are increasingly asking the federal courts to abstain from deciding Medicaid claims to allow administrative law judges or state courts to rule on the issue (e.g. *Carson P., Moore*). To date, most courts have rejecting these requests; however, this issue should be monitored closely.

Case Annotations

***A.G. ex rel. Giddens v. Arnold*, No. 5:05CV2790C10GRJ, 2006 WL 334218 (M.D. Fla. Feb. 13, 2006).**

Background: A Medicaid EPSDT recipient with various conditions, including developmental delay, scoliosis, paraplegia, hydrocephalus, and spina bifida, requested coverage of a power wheelchair with a lift system. The claims were based on 42 U.S.C. § 1396 (stating purpose of the Medicaid Act), § 1396d(r) (requiring coverage of all Medicaid coverable services needed to correct or ameliorate problems); and § 1396a(a)(10)(B)(I) and 42 C.F.R. § 440.220 (regarding amount, duration and scope of medical assistance). The plaintiff did not specifically base her claims on any of the EPSDT provisions. The defendant moved to dismiss, arguing that the provisions cited by the plaintiffs were not enforceable through Section 1983 because they did not create a federal right to the type of power wheelchair she sought.

The Court's Decision: The court dismissed the claims, holding that the Medicaid provisions were not enforceable because they did not provide evidence of Congressional intent

³ To learn more about the tests that courts use for determining whether a statute involves a "federal right" under § 1983, see, e.g., Jane Perkins, National Health Law Program, *Issue Brief: Update on § 1983 Enforcement of the Medicaid Act* (Jan. 2007), at <http://www.healthlaw.org>.

to impose a binding obligation on the defendant to provide the plaintiff with a power wheelchair. Moreover, according to the court, amendment of the complaint would be futile.

***C.F. v. Dep't Children and Families*, 934 So.2d 1 (Fl. Dist. Ct. App. 2005).**

Background: Plaintiff is a nine-year-old Medicaid EPSDT recipient with severe disabilities, including intellectual disability, brain damage, bronchopulmonary dysplasia and ADD. He receives numerous Medicaid-covered services including six hours of personal care services per day. After a review of his case, his personal care services hours were reduced to four per day, based on the state's medical necessity definition. Despite the testimony of the plaintiff's treating physician that six hours of services were medically necessary, the reduction was upheld by an administrative hearing officer.

The Court's Decision: The court reversed this decision, holding that it improperly applied a narrower definition of medical necessity than that contained in the federal EPSDT statute. Under the state's definition, in order for services to be medically necessary, they must meet the following conditions: (1) be necessary to protect life, to *prevent significant illness or significant disability, or to alleviate severe pain*; (2) be individualized, specific, and consistent with symptoms or confirmed diagnosis of the illness or injury under treatment, and not in excess of the patient's needs; (3) be consistent with *generally accepted professional medical standards* as determined by the Medicaid program, and not experimental or investigational; (4) be reflective of the level of service that can be safely furnished, and for which no equally effective and more conservative or less costly treatment is available; statewide; and (5) *be furnished in a manner not primarily intended for the convenience of the recipient, the recipient's caretaker, or the provider.* Fl. Admin. Code R. 59G-1.010(166) (emphasis added). The court held that this was significantly narrower than EPSDT's requirement that a service simply be necessary "to correct or ameliorate" a physical or mental illness or condition. 42 U.S.C. § 1396d(r)(5). In addition, the court held that the definition of "personal care services" applied was narrower than the federal statutory definition. Finally, the court held that the hearing officer failed to give appropriate deference to the opinion of the plaintiff's treating physician. In August, 2006, the judge denied a subsequent rehearing. *C.F., rehearing denied*, (Fla. App. Aug. 10, 2006).

***Clark v. Richman*, 339 F. Supp. 2d 631 (M.D. Penn. 2004), later decision, No. 4:00-CV-1306 (M.D. Penn. Aug. 17, 2005).**

Background: A class of individuals with disabilities (including children and youth under age 21) claimed that state Medicaid program denied access to Medicaid-covered dental services. Plaintiffs argued that defendant had violated a number of Medicaid provisions, including: 42 U.S.C. § 1396a(a)(10)(A), § 1396a(a)(8) and 42 C.F.R. § 435.930 (requiring that medical assistance be provided with reasonable promptness); 42 U.S.C. § 1396a(a)(30)(A) (requiring adequate rates); and 42 U.S.C. §§ 1396a(a)(10)(A), 1396a(a)(43), 1396d(a)(4)(B), and 1396d(r) (requiring EPSDT). Both sides filed motions for summary judgment.

The Court's Summary Judgment Decision: On October 7, 2004, the court denied plaintiff's summary judgment motion, and partially granted defendant's. It held that each of the provisions cited by the plaintiffs conferred rights enforceable through Section 1983. It granted defendant summary judgment on plaintiffs' reasonable promptness claim, reasoning that the statutory section only guaranteed the right to payment for services, not to the provision of services themselves. The court did, however, acknowledge that the EPSDT provisions require more than mere payment for services and impose affirmative obligations to "play a

more direct role.” The claims of inadequate rates and EPSDT violations were allowed to proceed to trial.

The Court’s Trial Decision: After an eight day trial, on August 17, 2005, the court ruled in favor of the defendant, finding that plaintiffs failed to carry their burden of proving violations of the EPSDT and equal access provisions. Among other things, the court held that: (1) the defendant had a proper periodicity schedule for screenings that had been formulated in consultation with the Pediatric Dental Association and the Academy of Pediatricians; (2) the defendant complied with the informing requirements, evidenced by managed care organizations’ compliance with the informing requirements in their contracts and the fact that defendant mailed out informational letters, handbooks and brochures; made and fielded phone calls from recipients; and maintained a website with “a wealth of information.” Slip. Op. at 85. Finding no violation of the treatment requirements, the court discounted general statements that recipients had difficulty finding treatment as “at best abstract observations of areas needing continued attention and improvement.” Slip. Op. at 85.

***Ekloff v. Rodgers*, 443 F. Supp. 2d 1173 (D. Ariz. 2006).**

Background: As a result of their disabilities, the Plaintiff children were bowel and/or bladder incontinent and needed briefs in order to avoid skin breakdown and infection and to enable them to participate in social, community, therapeutic, and educational activities. The question was whether briefs for preventive purposes fit within the EPSDT provision under the phrase "to correct or ameliorate." 42 U.S.C. § 1396d(r)(5). The U.S. Congressional record reflected the broad nature of the intent for the program to assure that health problems were diagnosed early, before they became more complex and costly. The briefs were meant to prevent skin sores before they became more open wounds, which would be more expensive to treat and painful to the children. There was a very strong inference that the provision was meant to be inclusive rather than exclusive.

The Court’s Decision: The court held that the State was obligated under § 1396d(r)(5) to cover the briefs and to reimburse the parents. A permanent injunction enjoined the State from denying the briefs for preventive purposes. Defendant was ordered to reimburse the parents for their out-of-pocket expenses for providing the briefs and for costs associated with litigation of the case.

***Frazar v. Ladd*, 457 F.3d 432 (5th Cir. 2006), cert denied, 127 S.Ct. 1039 (2007), later decision, No. 3:93CVO65WWJ (E.D. Tex. July 9, 2007) (settlement) (previous citations omitted).**

Background: In 2000, a class of more than one and one-half million indigent, EPSDT-eligible children in Texas moved to enforce multiple provisions of a consent decree with which defendants allegedly had not complied. The district court found that abundant evidence was presented showing defendants’ violations. The evidence was sorted into five categories: evidence of class members’ lack of knowledge of defendants’ services, evidence related to defendants’ transportation system, evidence that plaintiffs do not often obtain services after having received outreach contacts, evidence of plaintiffs’ low participation in defendants’ programs, and evidence of defendants’ insufficient staffing of their outreach programs.

The Courts’ Decisions: In 2002, Fifth Circuit Court of Appeals found that the district court had exceeded its jurisdiction by enforcing the consent decree where the plaintiffs had failed to show any violation of the Medicaid statute and the state did not waive sovereign immunity. The U.S. Supreme Court reversed the circuit court’s holding finding that the federal courts had

the authority to enforce their orders, and the case was remanded for further proceedings. *See Frew v. Hawkins*, 540 U.S. 431 (2004). On remand, the district court denied defendant's motion to dissolve the consent decree.

On appeal, the Fifth Circuit affirmed the trial court's refusal to dissolve the decree. Contrary to defendants' claim, compliance with federal law was not the sole object of the consent decree. Instead, the object was to require defendants to implement the Medicaid statute in a highly detailed way. Because the object of the decree was not satisfied, the court affirmed the denial of the motion.

On July 9, 2007, District Judge William Wayne Justice approved a settlement of the 14-year-old class action case. The approval followed a decision by the Texas Legislature to allocate more than \$700 million over the next two years to improving children's health services. The settlement contains eleven corrective actions, including agreements by the state to improve transportation services, increase dental and physician payments, provide case management services to children who request them, and to improve outreach efforts to families. The state also agreed to hire more case workers. The corrective actions plans are posted at <http://www.hhs.state.tx.us>.

***Hawkins v. Comm'r of the N.H. HHS*, 2004 DNH 23, No. 99-143-JD, 2004 WL 166722 (D. N.H. Jan. 23, 2004).**

Background and The Court's Decision: Plaintiff children filed suit on behalf of a class of current and future EPSDT-eligible individuals enrolled in New Hampshire's Medicaid program, alleging that defendants failed to adhere to EPSDT requirements in the provision of dental services. The parties reached a settlement that certified the class and required: (1) defendant to comply with federal EPSDT statutes and regulations, listing each requirement specifically in the settlement; (2) allocation of \$1.2 million for EPSDT dental services; (3) retained jurisdiction for five years, with an additional sixth year for measuring compliance. The court approved the class certification and the settlement.

***Health Care for All v. Romney*, No. 00-10833-RWZ, 2005 WL 1660677 (D. Mass. July 13, 2005).**

Background: Plaintiffs, children eligible for Medicaid and an organization representing Massachusetts residents seeking dental care, sued defendants. Plaintiffs alleged violations of a number of Medicaid provisions, including EPSDT requirements to inform individuals about EPSDT benefits and to provide for necessary treatment. In an earlier proceeding, the court found the Medicaid requirements at issue to be enforceable through Section 1983. *Health Care for All*, No. Civ.A.00-10833-RWZ, 2004 WL 3088654 (D. Mass., October 01, 2004).

The Court's Decision: The court held that Massachusetts' low Medicaid payment rates for dentists significantly contributed to a lack of available providers for children. This provider shortage, in large part, led the court to find the State in violation of the Medicaid Act requirements for prompt provision of EPSDT services.

Plaintiffs detailed the hardships they experienced in finding dentists who would accept Medicaid and who would do so in a timely manner. Defendants argued that their responsibility under the Medicaid Act was to provide prompt medical assistance (i.e. payment), not to ensure prompt receipt of medical care. They argued that any shortcoming on their part should be addressed by the federal government, not by the courts, insisting that they only had to substantially, not fully, comply with the statute. Finally, defendants asserted that any

differences between Medicaid recipients' and privately insured patients' use of dental care should be attributed, not to a lack of Medicaid providers, but to cultural and educational differences between the two populations.

The court disagreed with each of the Defendants' arguments. For example, while recognizing that there might be other contributing factors, the judge discussed at length the effect of low reimbursement rates on dentists' willingness to become Medicaid providers, finding that dentists will usually forgo this option because accepting Medicaid means accepting a loss. The court struck a middle ground between the Defendants' assertion that they had no responsibility to ensure the promptness of medical care and the Plaintiffs' argument that the Defendants should be "ultimately responsible" for service delivery, stating, "[a] state may not circumvent a statutory duty for prompt payment by under-funding a mandatory Medicaid service to the degree that no health care practitioners can afford to provide the service. Setting reimbursement levels so low that private dentists cannot afford to treat Medicaid enrollees effectively frustrates the reasonable promptness provision by foreclosing the opportunity for enrollees to receive medical assistance at all, much less in a timely manner."

Plaintiffs further alleged that the Defendants failed in their responsibility to inform them of the EPSDT program; to ensure adequate provision of dental screens and services; and to recruit and retain sufficient providers to meet the EPSDT dental needs. Finding for the Plaintiffs, the court, noting that the State's literature and customer service were often outdated and incorrect, said, "[n]otices that accurately inform an enrollee about the need for screening but then inaccurately explain the means to obtain such screening do not satisfy defendants' obligation to notify." The court noted that its holding did not rely on the theory of inadequate reimbursement to providers; instead, the judge relied on the evidence of inadequate and inaccurate materials, the high volume of customer complaints, and the "shockingly low" numbers of children enrolled in Medicaid versus children enrolled in a private insurance plan who received dental services.

Finally, the court found that, because of the negative effect of the Defendants' reimbursement on the availability of Medicaid providers, Medicaid enrollees were unable to find participating providers and thus unable to take advantage of the periodic treatment at reasonable intervals outlined in the State's EPSDT dental protocol. Recognizing the similarity between the reasonable intervals and reasonable promptness issues, the judge said, "A child who cannot find a participating provider certainly cannot obtain dental care at the prescribed intervals." The court ordered the parties to confer and develop a joint remedial program.

The Joint Remedial Program: The parties submitted a First Joint Report on Proposed Remedial Program which outlined the program. Further details were provided in the court's Judgment, dated February 3, 2006. Among other measures, the Remedial Program requires:

- member assistance and intervention, which includes assistance in making and keeping appointments and with transportation;
- developing and maintaining a provider network, including instituting a practice of contacting any provider announcing intent to withdraw and attempting to discover why and to convince them not to do so;
- appropriations in FY 2007 to increase reimbursement rates, followed by subsequent study to determine whether further increase is necessary;
- instituting a practice of sending out information at six month intervals, 60 days after eligibility determination and redetermination, and sending targeted information to individuals for whom there has been no Medicaid claim in the past year;

- appointing a monitor; and
- requiring reports from the parties and the monitor to the court

Jacobus v. Dep't of PATH, 177 Vt. 496, 857 A.2d 785 (S.Ct. 2004).

Background: Three children appealed defendant's denial of interceptive orthodontic treatment. Each child had persistent pain and malocclusions. Defendant found them ineligible for orthodontic services because their malocclusions did not meet the listed coverage criteria that they "carry with them real functional deficits." The plaintiffs argued that limiting coverage to the exact conditions listed in the criteria, without conducting an individualized assessment of each child's medical need, violated state regulations as well as the federal EPSDT statutes and regulations. The Human Services Board held that the services should be covered, but this decision was reversed by the Secretary of the department. Plaintiffs appealed to the Supreme Court.

The Court's Decision: The court upheld the appeals board's original findings, agreeing that even if the listed criteria were not met, there was no medically significant difference between plaintiffs' conditions and those covered pursuant to the criteria. "The assessment of medical need for treatment of a given condition . . . cannot be limited to a pre-defined list of criteria." Exercise of professional judgment is also required. In sum, defendants were ordered to provide coverage of interceptive orthodontic treatment whenever an eligible beneficiary's conditions meet listed criteria or when the evidence reveals conditions of equal or greater severity.

Katie A., ex rel. Ludin v. L.A. County, 481 F.3d 1150 (9th Cir. 2007), rev'g & remanding, 433 F.Supp.2d 1065 (C.D. Cal. 2006).

Background: This case was filed on behalf of foster children with serious emotional disturbances. The plaintiffs argued that the State was required to provide them medically necessary EPSDT "wraparound services" and "therapeutic foster care" (TFC) that would allow children to obtain treatment and live in the home and community based settings rather than institutions. The district court ruled for the plaintiff and entered a preliminary injunction.

The Court's Decision: On appeal, the state argued that it did not have to provide "wraparound services" or TFC as the bundled package of services described by the plaintiffs. In its ruling, the Ninth Circuit held that wraparound services and TFC are within the State's EPSDT obligations under federal law. However, it held that if all of the EPSDT-mandated component services of wraparound and TFC are being effectively supplied through the State's existing programs, then the State was not required to take the additional step of packaging the services as wraparound and TFC. While the states must live up to their obligations to provide all EPSDT services, the statute and regulations afford them discretion as to how to do so. The preliminary injunction was reversed and the case remanded for proceedings consistent with the opinion.

Memisovski ex rel. Memisovski v. Maram, No. 92-C-1982, 2004 WL 1878332 (N.D.Ill. Aug. 23, 2004).

Background: This case was filed on behalf of Medicaid-eligible children in Cook County, Illinois who alleged that Medicaid provider participation and EPSDT requirements were being violated because they could not find pediatric care providers.

The Court's Decision: The court held that the EPSDT provisions and the equal access provision (§ 1396a(a)(30)(A)) were privately enforceable through section 1983. After an eleven-day trial, the court ruled in favor of the plaintiffs. The court held that defendants had failed to effectively inform plaintiffs of the availability of EPSDT services, that defendants had failed to provide screenings in compliance with its periodicity schedule, and that pediatric care was not adequately available to the Medicaid children.

The evidence presented showed severe inadequacies. Some of the primary entities had no written policies for informing, nor did they monitor or track the effect of any informing policies. In addition, any of the notices used were far too difficult for the target population to read. The court found that very low percentages of plaintiffs received the appropriate level of screening services - with nearly half of children receiving no medical screens. Even fewer children received lead blood screens, and almost none received vision screens.

A consent decree was entered on November 18, 2005 that set forth Defendants' agreement to, among other things: (1) conduct public information campaigns; (2) provide additional notices and handbooks in English and Spanish; (3) develop and maintain an information and referral program to recruit additional providers; (4) develop a bonus program for providers to encourage proper billing; (5) provide additional training for caseworkers; and (6) provide reports.

***Okla. Chapter of Am. Acad. of Pediatrics v. Fogarty*, 472 F.3d 1208 (10th Cir. 2007), *rev'g*, No. 01CV0187CVE-SAJ 2006, WL 1623529 (N.D. Okla. June 6, 2006), *petition for cert. filed*, 75 U.S.L.W. 3622 (U.S. May 7, 2007) (No. 06-1482).**

Background: The plaintiffs—providers, Medicaid beneficiaries and an organization representing beneficiaries—filed suit alleging widespread failure of the state's EPSDT system. The trial court previously found that a number of Medicaid provisions §§ 1396a(a)(8), 1396a(a)(10)(A), 1396a(a)(30)(A), 1396d(a)(4)(B) and 1396d(r)—were enforceable. 205 F. Supp. 2d 1265 (2002). The case went to trial in May 2004.

The Courts' Decisions: The trial court found that defendants had violated the equal access provision (§ 1396a(a)(30)(A)) and the reasonable promptness provision (§ 1396a(a)(8)). Section 1396a(a)(8) states that “assistance shall be furnished with reasonable promptness to all eligible individuals.” The court required the agency to study rates, costs and services. Based on the results of the study, called the Mercer Report, the agency moved for dismissal of court supervision. However, the district court found the Mercer Report to be invalid and not indicative of defendant's compliance with federal law and, thus, denied the motion.

On appeal, the Tenth Circuit reversed. The court said that “medical assistance” as used in § 1396a(a)(8) is merely payment for services, not provision of services, thereby concluding that the agency satisfied its responsibility under federal law if it promptly paid providers who submitted claims. The Circuit Court also found that the plaintiffs could not enforce § 1396a(a)(30)(A).

***Pediatric Specialty Care v. Ark. Dep't Human Servs.*, 443 F.3d 1005 (8th Cir. 2006), *cert. granted, judgment vacated in part, remanded with instructions to dismiss appeal as moot sub nom. Selig v. Pediatric Specialty Care*, _ S.Ct. _, 2007 WL 1802012 (June 25, 2007).**

Background: Providers and recipients sued the Arkansas Department of Human Services (ADHS) and officials, alleging that the ADHS's cutbacks of pediatric day treatment services

would violate their federal rights to Medicaid services. They cited the EPSDT and equal access requirements.

The Courts' Decisions: The United States District Court for the Eastern District of Arkansas permanently enjoined ADHS from using a prior authorization process that, as a cost saving measure, resulted in across-the-board cuts to the day treatment service. The district court also required disclosure of information about ADHS' process for approving/denying services. Defendants appealed the decision.⁴

The Eighth Circuit reversed that part of the lower court injunction that required ADHS to disclose the names of physicians who make service determinations for Medicaid recipients, accepting the agency's argument that their confidentiality was protected by 42 U.S.C. § 1320c-9(a)(2). The Court also held that ADHS could not be sued because of sovereign immunity; however, the suit for injunctive relief against the directors of the state program in their official capacity remained. Citing "law of the case," the panel continued to find that the provisions at issue created federal rights that could be enforced under section 1983.

The state appealed the Court's decision allowing enforcement of the equal access requirement, § 1396a(a)(30)(A). The Supreme Court asked the Solicitor General to advise whether to accept the case. After the plaintiffs' notified the Court that the issues had become moot, the Court granted cert., vacated parts of the Eighth Circuit's decision, and remanded for consistent enforcement.

***Rosie D. v. Romney*, No. 01-30199MAP, 2007 WL 51340 (D. Mass. July 16, 2007) (judgment), earlier decision, 474 F. Supp. 2d 238 (2007) (adopting state's proposed plan with provisos), same case, 410 F.Supp.2d 18 (2006) (judgment for children as to liability), same case, 256 F.Supp.2d 115 (2003) (regarding discoverable documents), same case, 310 F.3d 230 (1st Cir. 2002) (denying state's motion to dismiss).**

Background: Children with serious emotional disturbances claimed that the state had failed to make community-based services adequately available through EPSDT.

The Court's Decision: Following a trial, the court granted a verdict in favor of the plaintiff class of children with behavioral, emotional or psychiatric disabilities. It held that defendant's violated both the EPSDT and reasonable promptness provisions. Among other findings, the court held that the defendants failed to provide service coordination, crisis services and adequate in-home supports. The judge observed that the "defendants' failure to provide adequate [services] for Medicaid-eligible children with serious emotional disturbances was glaring from the evidence and, at times, shocking in its consequence."⁵

In February 2007, following a hearing, the court accepted the state's proposed compliance plan with provisos. 474 F. Supp. 2d 238. The decision included the following findings: (1) The governing definition for an eligible child suffering a serious emotional disturbance would include children meeting the Individuals with Disabilities Education Act and/or in the Substance Abuse and Mental Health Services Administration definitions; (2) the remedial plan

⁴ For discussion of the lower court decisions, see Jane Perkins, National Health Law Program, *Q & A: Pediatric Specialty Care EPSDT Case* (March 2005), at <http://www.healthlaw.org>.

⁵ For discussion of this decision, see Center for Public Representation, *Summary of the Court's Decision in Rosie D. v. Romney* (Feb. 2006), at <http://www.centerforpublicrep.org/children>.

and timelines are part of the court order's regulations; and (3) the court would exercise ongoing jurisdiction.

Most recently, on July 16, 2007, the court entered a judgment which clarified aspects of the February ruling. Importantly, the court eliminated restrictive clinical criteria that the state described for children needing comprehensive home-based assessments, care coordination, and integrated treatment planning. The court also addressed screening requirements to assure that evaluations of children's needs will be consistent with broad eligibility criteria for home-based services.

***S.A.H. ex rel. S.J.H. v. Dep't of Soc. & Health Servs.*, 149 P.3d 410 (Wash. Ct. App. 2006).**

Background and The Court's Decision: The mother of a Medicaid-eligible child appealed the Department of Social and Health Services (DSHS) Board of Appeals' determination that she was no longer entitled under Medicaid law to financial assistance with transportation and lodging so that her autistic child could receive Applied Behavioral Analysis (ABA) therapy outside her geographic area. The agency said equivalent services had become available in family's area. The Superior Court affirmed the Board's order. The Court of Appeals held that mother was no longer entitled to state-funded transportation services, once services became available locally.

***S.D. ex rel. Dickson v. Hood*, 391 F.3d 581 (5th Cir. 2004).**

Background: The plaintiff, a 16-year-old Medicaid recipient with spina bifida causing total bowel and bladder incontinence, was prescribed disposable incontinence underwear by his physician. The agency denied the claim based on an exclusion for adult recipients.

The Courts' Decisions: The district court concluded that the state agency violated the Medicaid Act by denying the recipient a service necessary for ameliorative purposes under the EPSDT program. The appellate court affirmed, holding that the Medicaid provisions created enforceable rights and that the incontinence services fit within the list of coverable EPSDT services.⁶

***Semerzakis v. Wilson-Coker*, 873 A.2d 911 (Conn. 2005), rev'g, No. CV030520876S, 36 Conn. L. Rptr. 237, 2003 WL 23177501 (Conn. Super. Dec 24, 2003).**

Background: The plaintiff sought payment for orthodontic treatment for her daughter, an EPSDT recipient with an overbite. The State Department of Social Services uses a tool known as the Salzmann Assessment as one component of its process for determining whether the orthodontia sought in any given case is medically needed and thus subject to EPSDT coverage. If a recipient reaches the statutory minimum on the tool, her orthodontia is considered per se medically necessary. If, however, she falls short of the bar, the Department will consider "additional information of a substantial nature" in its deliberations. The EPSDT recipient in *Semerzakis* did not meet the bar; nor did she, according to the State, present sufficient additional information proving medical necessity.

The plaintiff persuaded the trial court that the State's decision was incorrect because the State should have adhered to the EPSDT requirement that states provide "[s]uch other

⁶ For more discussion, see Jane Perkins, National Health Law Program, *Q&A: Medicaid Early and Periodic Screening Diagnosis and Treatment Services* (Dec. 2004), at <http://www.healthlaw.org>.

necessary health care, diagnostic services, treatment, and other measures...to correct or ameliorate defects and physical and mental illnesses and conditions discovered by the screening services, whether or not such services are covered under the State plan.” 42 U.S.C. § 1396d(r)(5). The plaintiff argued that the State’s eligibility requirements were stricter than those authorized by Congress.

The Court’s Decision: The State Supreme Court reversed. It held that, because EPSDT coverage of dental services is explicitly addressed in section 1396d(r)(3), the catch-all provision, 1396d (r)(5), setting forth the “correct or ameliorate” standard, did not apply. In addition, the Court found that Connecticut’s procedure for determining medical necessity (using the Salzman Assessment and the “substantial nature” savings clauses) was “valid as a reasonable utilization control that does not cause recipients to receive less care than was envisioned” by Congress when it addressed dental care with subsection (r)(3). Thus, the Supreme Court reversed the earlier judgment for the plaintiff.

***Westside Mothers v. Olszewski*, 454 F.3d 532 (6th Cir. 2006), *aff’g in part and rev.g in part*, 368 F.Supp.2d 740 (E.D. Mich. 2005) (previous citations omitted).**

Background: The plaintiffs in this case are children and providers alleging widespread failure of Michigan’s EPSDT program. The plaintiffs claim that state Medicaid officials violate a number of Medicaid provisions, including sections 1396a(a)(8), 1396a(a)(10), 1396a(a)(43), 1396d(a)(4) and 1396d(r). The case has been mired in motion practice since it was filed in 2001.

The Courts’ Recent Decisions: After a remand, the district court held that the EPSDT-related provisions at issue conferred enforceable rights, but found that Plaintiffs failed to state a claim for violations to the extent that they alleged failure to ensure the actual provision of, or arrangement for, medical services. According to the court, the scope of rights to "medical assistance" under §§ 1396a(a)(8) and 1396a(a)(10) does not include the provision of actual medical services (as opposed to Medicaid payment); nor does it include a right to force Defendants to ensure 100% participation by all potentially eligible individuals.

Plaintiffs’ appealed the decision to the Sixth Circuit, which resulted in that court affirming most of the district court’s dismissals of the plaintiffs’ claims (specifically, 1396a(a)(8), (a)(10), and (a)(30)). The Court dismissed the (a)(8) claim, finding that it only provides for medical assistance, which is payment for all or part of the service, not actual services. The Court remanded to allow the plaintiffs to amend the complaint to allege that medical assistance had been denied. The Court found that § (30)(A) could not be enforced under section 1983. The Court found that § 1396a(a)(43)(A), requiring the state to inform all eligible persons of the availability of EPSDT, was enforceable by the plaintiffs.

Case Citations

A.G. ex rel. Giddens v. Arnold, No. 5:05CV2790C10GRJ, 2006 WL 334218 (M.D. Fla. Feb. 13, 2006).

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

C.F. v. Dep't Children and Families, 934 So.2d 1 (Fl. Dist. Ct. App. 2005).

Clark v. Richman, 339 F. Supp. 2d 631 (M.D. Penn. 2004), *later decision*, No. 4:00-CV-1306 (M.D. Penn. Aug. 17, 2005).

Ekloff v. Rodgers, 443 F. Supp. 2d 1173 (D. Ariz. 2006).

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Katie A., ex rel. Ludin v. L.A. County, 481 F.3d 1150 (9th Cir. 2007), *rev'g & remanding*, 433 F.Supp.2d 1065 (C.D. Cal. 2006).

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S.A.H. ex rel. S.J.H. v. Dep't of Soc. & Health Servs., 149 P.3d 410 (Wash. Ct. App. 2006).

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