

Ensuring In-Home Services for Children with Medically Fragile Conditions

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Session Overview

- Introduction to B.W.
- Issues and Plaintiffs
- Legal Claims
- Available Remedies
- Q&A

Highlighted Cases

- *A.J. v. Gee* (M.D. La.)
- *S.J. v. Tidball* (W.D. Mo.)
- *I.N. v. Kent* (N.D. Cal.)
- *O.B. v. Norwood* (N.D. Ill.)
- *A.H.R. v. Wash. State Health Care Auth.* (W.D. Wash.)

B.W. and Family



Putting together the case: Example

- *A.J. v. Gee* – A history

Legal Claims

- Medicaid – Early and Periodic Screening, Diagnostic, and Treatment requirement (EPSDT)
- Medicaid – Reasonable Promptness
- Americans with Disabilities Act (ADA) & Section 504 – Integration Mandate, Methods of Administration

Legal Claims - EPSDT

- Statutory provisions:
 - Provision of listed services for eligible individuals - 42 U.S.C. § 1396a(a)(10)(A)
 - Description of EPSDT benefit - 42 U.S.C. § 1396d(a)(4)(B), 1396d(r)(5)
 - Requirement to provide for arranging for necessary covered services - 42 U.S.C. § 1396a(a)(43)(C)

Legal Claims - EPSDT

- States must provide for **arranging for** (directly or through referral) corrective treatment needed as a result of a screen
 - Federal scope of benefits
 - Federal definition of medical necessity

Legal Claims - EPSDT

States must cover:

“. . . necessary health care, diagnostic services, treatment, and other measures described in [the Medicaid Act] 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 USC 1396d (r)(5).

Legal Claims – EPSDT

“The goal of EPSDT is to assure that individual children get the health care they need when they need it—the right care to the right child at the right time in the right setting.”

CMS, EPSDT – A GUIDE FOR STATES: COVERAGE IN THE MEDICAID BENEFIT FOR CHILDREN AND ADOLESCENTS (June 2014)

Legal Claims – EPSDT

- Example, *S.J. v. Tidball*:
 - Defendant Tidball, while acting under the color of law,
 - has failed to provide Plaintiffs with private duty nursing services necessary to correct or ameliorate their conditions
 - in violation of the EPSDT provisions of the Medicaid Act, 42 U.S.C. §§ 1396a(a)(10)(A), 1396d(a)(4)(B), 1396d(r)(5), and 1396a(a)(43)(C).

Legal Claims – EPSDT

- Example, *S.J. v. Tidball*:
 - Defendant Tidball, while acting under the color of law,
 - has failed to “arrang[e] for (directly or through referral to appropriate agencies, organizations, or individuals) corrective treatment [in-home private duty nursing services]” to Plaintiffs and Class members
 - in violation of the EPSDT provisions of the Medicaid Act, 42 U.S.C. § 1396a(a)(43)(C).

Legal Claims – Reasonable Promptness

- Statutory provision: 42 U.S.C. § 1396a(a)(8)
 - The Medicaid Agency must “provide that all individuals wishing to make application for medical assistance under the plan shall have opportunity to do so, and that such assistance shall be furnished with reasonable promptness to all eligible individuals;”
 - “The term ‘medical assistance’ means payment of part or all of the cost of the . . . care and services or the care and services themselves, or both.” 42 U.S.C. § 1396d(a).

Legal Claims – Reasonable Promptness

- Example, *O.B. v. Norwood*
- The Defendant is engaged in the repeated, ongoing failure to arrange for (directly or through referral to appropriate agencies, organizations, or individuals) corrective treatment, despite the Defendant's acknowledgment that in-home shift nursing services are medically necessary for all named Plaintiffs and Class members.

Legal Claims – ADA/Section 504

- Statutory and regulatory provisions: ADA - 42 U.S.C. §§12131-32, 28 C.F.R. § 35.130; 504: 28 U.S.C. § 794, 28 C.F.R. §§ 41.51 (b), (d), 45 C.F.R. § 84.4.
- Integration mandate: “[a] public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.”
- Methods of Administration: prohibits methods that have the effect of discriminating against or defeating accomplishments of a program for people with disabilities.

Legal Claims – ADA/Section 504

- Defendant Kent is obligated under the ADA to administer DHCS' programs in a manner that enables qualified individuals with disabilities to live in the most integrated setting appropriate to their needs.
 - Defendant's failure to arrange for (directly or through referral to appropriate agencies, organizations, or individuals) corrective treatment (in-home shift nursing services)
 - for qualified individuals with disabilities such as Plaintiffs and Class members
 - has placed them at risk of institutionalization in violation of the ADA's integration mandate.

Legal Claims - ADA

- Defendant Kent has utilized criteria and methods of administration that
- subject Plaintiffs, Class members, and other qualified individuals with disabilities to discrimination on the basis of disability, including risk of unnecessary institutionalization,
- in ways that include failing to take the necessary steps to arrange for medically necessary in-home shift nursing.

Legal Claims – Enforceability

- Medicaid’s “rates” provision – 42 U.S.C. § 1396a(a)(30)(A)
 - *Armstrong v. Exceptional Child Center* (U.S.)
- Medicaid’s reasonable promptness provision – 42 U.S.C. § 1396a(a)(8)
 - *Does v. Gillespie*, 867 F.3d 1034 (8th Cir. 2017)

Relief—Form of an injunction

- “Take all steps within their power” to arrange services
 - Joint Status Reports
 - *A.H.R. v. Lindeblad* (W.D. Wash. 2016)
- “Take immediate and affirmative steps”
 - Report what steps have been undertaken to arrange for in-home shift nursing services
 - Provide identifying list which contains (a) each child currently approved level of in-home shift nursing care and (b) how much of their care was used or delivered during the preceding 90 days
 - *O.B. v. Norwood* (N.D. Ill. 2016)

Relief—Family Support

- Discharge planning as soon as child identified
- 2-way transition care, *i.e.* take child home overnight
- Case management
 - Dedicated care coordinator, *i.e.* no caseload
 - Crisis response team for accommodations
- Allow parents to self-direct child's care
- Licensed RN/LPN family member reimbursement
- Direct contracting with RNs, not through HHAs
- Multiple HHAs

Relief—Workforce Development

- Work with schools to increase pediatric home health, *e.g.* curriculum, shadowing, home health rotation
- Partner with child-focused health systems, *e.g.* vent training, central line training, CME

- Recent graduates with license pending
- Remove 1-year practice rules
- Out-of-network & out-of-state border providers
- Direct contracting with RNs, not through HHAs
- Expand telehealth, *e.g.* care coordination, training

Relief—Workforce Development

- Conduct a rate & workforce study
- Set rates based on blocks of hours, *e.g.* 8 hour shift
- Rate modifiers, *e.g.* overtime, weekends, location, complexity
- Longevity bonuses
- Reimbursement for mileage >25 miles each way
- Across-the-board rate increases
 - Ensure increases go to direct care workers
 - MLR for the HHAs

Resources

- Jane Perkins, *Q&A: Ensuring Timely EPSDT Services* (Feb. 2020) (available through TASC)
- Complaints and other pleadings in *A.J. v. Gee*, *S.J. v. Tidball*, *I.N. v. Kent*, *O.B. v. Norwood* (available from NHeLP)

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