

POLICY BRIEF

Early Periodic Screening Diagnosis and Treatment (EPSDT)

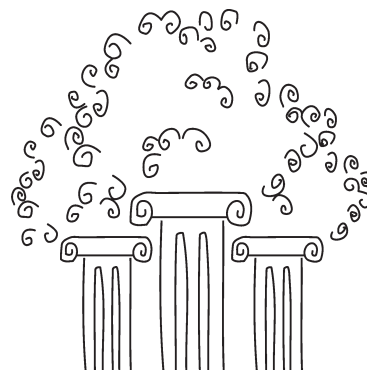
*Children's rights to preventative screening, diagnosis
and treatment under Medicaid in Nebraska*

FOSTER CARE REFORM LEGAL RESOURCE CENTER

Child Welfare System Accountability Program

Nebraska Appleseed Center for Law in the Public Interest

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What is EPSDT?

EPSDT, referred to as Health Check in Nebraska, is a comprehensive benefits package available to all Medicaid-eligible children under the age of 21.¹ This includes all children that have Medicaid coverage, regardless of the basis of eligibility (e.g., those who have poverty-level income, receive Supplemental Security Income, or receive federal foster care or adoption assistance).

During the mid 1960s, several studies on children's health indicated that many lifelong disabilities, caused by low birth weight and other problems pervasive among low-income children, could be ameliorated through early prevention.² Recognizing this reality Congress added the EPSDT component to the Medicaid program in 1967 (two years after enacting Medicaid) in an attempt to extend preventive medical services and coverage to children and adolescents in low-income households.

Specifically, EPSDT requires states to provide all children enrolled in Medicaid with:

- Periodic screening for physical and mental health conditions;
- Effective diagnosis of any conditions that need treatment; and
- Any medically necessary treatment to address conditions identified in the screenings that fall within the scope of services provided under the Medicaid Act³, even when these services are not available to Medicaid-eligible adults.

EPSDT also requires the state to establish a schedule for follow-up assessments, which in Nebraska is based on *Recommendations For Preventive Pediatric Health Care*, published by the American Academy of Pediatrics (AAP).⁴

EPSDT is intended to provide significant health and mental health benefits for many low-income children and children in the foster care system. For example, in a 2006 case, the U.S. District Court in Massachusetts described Congress's commitment to such children through EPSDT as follows:

“On July 30, 1965, the citizens of this country, through the enactment of the Medicaid Act...committed themselves to providing certain basic medical services to millions of low-income Americans. On December 19, 1989, Congress restated and deepened its commitment to eligible children by amending the Medicaid statute to promise that persons under twenty-one years of age would receive *all* reasonably necessary medical care regardless of ability to pay. From today's perspective, the scope of this commitment seems breathtaking: no Medicaid-eligible child in this country, whatever his or her economic circumstances, will go without treatment deemed medically necessary by his or her clinician.” *Rosie D. et al. v. Romney*, 410 F. Supp. 2d 18 (2006).

What is Required Under EPSDT?

Screenings

Under EPSDT, states must provide regularly scheduled screens (examinations and evaluations of the general physical and mental health of eligible children).⁵ An eligible child must receive an initial screening as soon as possible after it is determined that the child is eligible for EPSDT services, and at periodic intervals thereafter.⁶ The AAP recommends children be assessed at 3-5 days old, at age 1 month, 2 months, 4 months, 6 months, 9 months, 12 months, 15 months, 18 months, 24 months, 30 months, and then yearly thereafter.⁷ These are often referred to as “well child visits.”⁸

More specifically, four different types of screens are required: medical, vision, hearing, and dental.⁹ Medical screenings at a minimum must include a health and developmental history, an unclothed physical exam, immunizations, lab testing (including lead tests), and health education.¹⁰ States must also conduct periodic vision, hearing, and dental screens.¹¹

In addition, “interperiodic screens,” which occur outside the periodicity schedule, must also be conducted, as medically necessary.¹² This means that people outside the healthcare profession can determine if a need exists for an interperiodic screen and “any encounter with a health care professional acting within the scope of practice is considered to be an interperiodic screen, whether or not the provider is participating in the Medicaid program at the time those screening services are furnished.”¹³

Treatment

In addition to medical, vision, hearing, and dental services, states are also required to cover all medically necessary services listed in the Medicaid statute at 42 U.S.C. § 1396d(a) “whether or not such services are covered under the State plan.”¹⁴ Simply put, even though a Medicaid service may not be covered by Nebraska’s State Plan for adults, it must be provided for children when discovered in the course of an EPSDT exam. This is one of the primary advantages of EPSDT and why it is important that the EPSDT process occurs and is enforced. States must also ensure timely EPSDT treatment, generally within an outer limit of six months after the request for screening services.¹⁵

Moreover, EPSDT requires states to do more than merely offer to cover services. States are obligated to actively arrange for treatment, either by providing the service itself or through referral to appropriate agencies, organizations or individuals.¹⁶ Also note that in addition to provide treatment, states are also obligated to provide necessary assistance in transportation and scheduling of appointments.¹⁷ A state must comply with federal EPSDT requirements even when utilizing a managed care company.¹⁸ Therefore, even though the State of Nebraska contracts with Magellan to provide mental health services, the state remains ultimately responsible for enforcing its contract with Magellan and ensuring that EPSDT services are being provided to beneficiaries as required by the Medicaid Act.

42 U.S.C. § 1396d(a) specifically requires that the state must provide the following services under EPSDT:

- Inpatient hospital services
- Outpatient hospital services
- Laboratory and X-ray services
- Skilled nursing facility services for persons over age 21
- Physician’s services (including medical and surgical services furnished by a dentist)
- General medical or other recognized remedial care recognized under state law
- Home health care services
- Private duty nursing services
- General non-physician clinical services
- Dental services
- Physical therapy and related services
- Prescribed drugs, dentures, prosthetic devices, and eyeglasses prescribed by a physician
- Early and periodic screening, diagnosis, and treatment for persons under age 21 (“EPSDT”)
- Services for persons age 65 or older in mental institutions
- Intermediate care facility services for persons with mental retardation or developmental disability related conditions
- Inpatient psychiatric services for persons under age 21
- Nurse midwife services
- Hospice care
- Case-management services
- Respiratory care services
- Pediatric and family nurse practitioner services
- Home and community-based services for individuals with disabilities and chronic medical conditions
- Community supported living arrangements services
- Personal care services
- Program of All-Inclusive Care for the Elderly (PACE) services
- Sickle Cell Disease treatment services
- Any other medical care, and any other type of remedial care recognized under State law, specified by the Secretary.¹⁹

Medical Necessity

EPSDT only covers medically necessary services. However, most case law provides that the determination of medical necessity lies primarily with the child’s treating physician or other health care provider.²⁰ The state may review the physician’s determination as to medical necessity; however, the state must defer to the recommendation of the treating physician.²¹

In addition, under EPSDT, the Nebraska Medicaid Program must cover medically necessary “health care, diagnostic services, treatment and other measures . . . to correct or ameliorate defects and physical and mental illnesses and conditions.”²² Services must be covered if they correct, compensate for, or improve a condition, or prevent a condition from worsening-even if the condition cannot be prevented or cured.²³

Duty to Inform

Federal Medicaid regulations also require the state to inform all Medicaid-eligible residents under the age of 21 of the availability of EPSDT services²⁴ through the use of written and oral methods.²⁵ This information must be simple and effective in order to communicate the availability and cost-free nature of services, where services can be obtained, and that transportation and scheduling assistance is available.²⁶ According to the State Medicaid Manual, the duty to inform extends “no later than 60 days following the date of a family’s or individual’s eligibility determination.”²⁷ Nebraska regulations state that a client should be informed of EPSDT “at the time of application and redetermination.”²⁸ The client should be provided with: 1) a verbal explanation of EPSDT (referred to as Health Check in Nebraska), including a review of the Health Check pamphlet; 2) a pamphlet explaining Health Check; and 3) an opportunity to ask questions.²⁹

Mental Health Treatment and Services

EPSDT covers not just medical services or services to address physical conditions, but also medically necessary services and treatment to address mental and behavioral health conditions. The Nebraska State Plan specifically addresses Mental Health Benefits under the state’s EPSDT program.³⁰

Nebraska regulations include the following requirements for obtaining mental health treatment under EPSDT:

- The beneficiary must participate in an EPSDT screening either six months prior to the initiation of the mental health services or within eight weeks after the initiation of the mental health services;
- The “supervising practitioner” must be a licensed physician, doctor of osteopathy or a licensed psychologist; and
- The services must be rendered by the supervising practitioner or under the direction of a supervising practitioner.

The Nebraska State Plan lists numerous mental health services, as long as they are medically necessary, which are covered under the state’s EPSDT program.³¹

The services specifically listed are:

- Outpatient Mental Health Treatment:
 - Evaluation by a supervision practitioner;
 - Psychiatric evaluation;
 - Psychological evaluation;
 - Physiological testing;
 - Individual psychotherapy;
 - Individual substance abuse counseling;
 - Group psychotherapy;
 - Group substance abuse counseling;
 - Family psychotherapy services;
 - Family substance abuse counseling;
 - Family assessment;
 - Conference with family or other responsible persons on who to assist the client;
 - Mileage for home-based family therapy and home-based family counseling services;

- Mental Health Community Treatment Aids;
- Intensive out-patient services, and
- Medication by physician or physician extender
- Treatment Crisis Intervention Services
- Day Treatment Services
- Treatment foster care services
- Treatment group home services
- Residential Treatment Services
- Inpatient Hospital services (subject to certain limitations set forth in the Nebraska State Plan).

Nebraska-Specific Requirements

Nebraska regulations state that treatment services, or “follow-up services necessary to diagnose or treat” a condition identified during an EPSDT examination will be covered if the following criteria are met:³²

- 1) The service must be required to correct or ameliorate defects and physical or mental illnesses or conditions identified during an EPSDT screening
- 2) The provider must be Medicaid-enrolled
- 3) The service must be consistent with applicable laws
- 4) The service must be medically necessary, safe and effective, not considered experimental/ investigational (see 471 NAC 10-004.05), and must be generally employed by the medical profession
- 5) Non-medical supplies will not be covered
- 6) If alternative and medically appropriate modes of treatment exist and are available the NMAP may choose among the alternatives which services are available based on cost-effectiveness
- 7) Services covered by NMAP will be governed by NMAP guidelines
- 8) Services not covered by NMAP but defined in § 1905(a) of the Social Security Act must meet the criteria outlined in 1-6 (above). Unless otherwise stated, the Medical Services Division, Department of Social Services must authorize all services that NMAP does not cover.³³

Enforcement

There are several options to enforce EPSDT if it is not being followed in an individual case. A client or provider may file an administrative appeal of a denial or an individual may file a separate federal civil rights action. In situations involving children who are state wards, these issues may also come up in the context of an ongoing juvenile court case.

Administrative Appeal

Whenever the State denies, reduces, or terminates benefits, a client must receive due process,³⁴ or the opportunity to have a fair hearing if his or her Medicaid claim is denied or not acted upon with reasonable promptness.³⁵ In this context, due process includes the right to written notice of the opportunity to request a fair hearing, the right to a

hearing before an impartial decision-maker, and the right to the continuation of benefits pending the hearing decision.³⁶ If the state denies services, it must state the reason for the action, the specific regulation supporting the action, and an explanation to the individual of his or her right to request a hearing.³⁷ A petition for review must be filed in the district court of the county where the action is taken, within thirty days after the service of the final decision by the agency.³⁸

Section 1983

Section 1983 provides a federal remedy for the deprivation of Constitutional or federal rights by an actor acting under the color of state law.⁴⁰ If the state does not meet federal EPSDT requirements, Section 1983 is an avenue to challenge that failure. Whether Section 1983 provides a private right of action depends on whether the EPSDT provisions are enforceable. However, federal circuits, including the 8th Circuit, have already made such a finding.⁴¹ Thus, Section 1983 may provide a viable remedy where the appropriate EPSDT services are denied.⁴²

Please contact Nebraska Appleseed if you have a case in which you believe EPSDT has not been followed. If you are a guardian ad litem or are representing a child in a juvenile matter who you believe has not received appropriate services under EPSDT, please contact our Foster Care Reform Legal Resource Center at 402-438-8853, ext. 106.

Endnotes

¹ 42 U.S.C. § 1396d(a)

² See The Commonwealth Fund, *EPSDT: An Overview*, available at: <http://www.commonwealthfund.org/Content/Publications/Data-Briefs/2005/Sep/EPSTDT—An-Overview.aspx#1> (2005).

³ See 42 U.S.C. § 1396d(e) for the scope of services that are required.

⁴ 471 NAC 33 § 002.03

⁵ 42 C.F.R. § 441.56(b)

⁶ 471 NAC 33-001.04 (defining “early” and “periodic”); 42 USC 1396d(r)(1)(A).

⁷ The American Academy of Pediatrics updates its periodicity schedule for EPSDT screenings yearly. In order to stay current on these screening requirements, available at: <http://aap.org/>.

⁸ 471 NAC § 33-003.03

⁹ 42 U.S.C § 1396d(r)

¹⁰ 42 U.S.C § 1396d(r)(1)(B)

¹¹ 42 U.S.C § 1396d(r)(2)-(4)

¹² See 471 NAC § 33-002.04

¹³ See e.g., Memorandum from Director, Health Care Financing Administration Medicaid Bureau, to Region III Administrator, Health Care Financing Administration (Apr. 12, 1991) (on file with author).

¹⁴ 42 U.S.C. § 1396d(r)(5). EPSDT includes “[s]uch other necessary health care, diagnostic services, treatment, and other measures described in [42 USC 1936d(a)’s definition of medical assistance] 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

¹⁵ See 42 C.F.R. § 441.56(e)

¹⁶ See 42 U.S.C. § 1396a(a)(43)(C)

¹⁷ 42 C.F.R. § 441.62

¹⁸ See *John B.*, 176 F.Supp. 2d 786 (M.D. Tenn. 2001) (The Court held that the State of Tennessee failed to ensure that the TennCare managed care system provide EPSDT screening and diagnostic services and provide needed treatment, from wheelchairs to home-based mental health services.).

¹⁹ 42 U.S.C. § 1396d(a)

²⁰ *Weaver v. Reagen*, 886 F.2d 194 (8th Cir. 1989) (“The Medicaid statute and regulatory scheme create a presumption in favor of the medical judgment of the attending physician in determining the medical necessity of treatment”); *Pinneke v. Preisser*, 623 F.2d 546, 550 (8th Cir. 1980) (“The decision of whether or not certain treatment or a particular type of surgery is ‘medically necessary’ rests with the individual recipient’s physician and not with clerical personnel or government officials”); *Hilburn by Hilburn v. Maher*, 795 F.2d 252 (2d Cir. 1986).

²¹ See generally S.Rep. No. 404, 89th Cong., 1st Sess., reprinted in 1965 U.S.C.C.A.N. 1943, 1986 (“the physician is to be the key figure in determining the utilization of health services. . . it is the physician who is to decide upon admission to a hospital, order tests, drugs, and treatments[.]”).

²² 42 U.S.C. § 1396d(r)(5)

²³ NHeLP, *An Advocate’s Medicaid EPSDT Reference Manual*, at p. 6 (1993).

²⁴ See 42 U.S.C. § 1396a(a)(43)(A). See also *Stanton v. Bond*, 504 F.2d 1246, 1251 (7th Cir. 1974) (stating that “EPSDT programs must be brought to the recipients; the recipients will not ordinarily go to the programs until it is too late to accomplish the congressional purpose.”).

²⁵ 42 C.F.R. § 441.56(a)

²⁶ 42 C.F.R. § 441.56(a)

²⁷ *Id.*

²⁸ 479 NAC 5 § 003

²⁹ *Id.*

³⁰ The Nebraska Medicaid State Plan is available on the DHHS website at: <http://www.dhhs.ne.gov/med/XIXstateplan/index.htm>

³¹ The list of services covered by the Nebraska Medicaid Program is available on the DHHS website at: <http://www.dhhs.ne.gov/med/medserv.htm>

³² This list of Nebraska-specific requirements is available at 471 NAC § 33-001.04

³³ 475 NAC § 2-001

³⁴ *Goldberg v. Kelly*, 397 U.S. 254 (1970) (holding that the state must provide beneficiaries of public benefits with a pretermination hearing before discontinuing their aid); 475 NAC § 2-001.

³⁵ 42 C.F.R. §431.200-.250 (listing requirements of a fair hearing for applicants).

³⁶ *Id.*

³⁷ 42 C.F.R. § 431.210

³⁸ Neb. Rev. Stat. § 84-917

³⁹ *Id.*

⁴⁰ 42 U.S.C. § 1983

⁴¹ *Pediatric Specialty Care, Inc. v. Ark. Dep't. of Human Servs.*, 443 F.3d 1005 (8th Cir. 2006) (upholding plaintiff's right to a private cause of action for EPSDT services); *S.D. v. Hood*, 391 F.3d 581 (5th Cir. 2004).

⁴² 42 U.S.C. § 1983 (providing a cause of action against any person who, under the "color of state law," deprives a U.S. citizen of any "rights, privileges, or immunities secured by the Constitution and laws.")

