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## The Action Heats Up on Medicaid Litigation

In Illinois, the governor recently proposed universal healthcare by expanding Medicaid to cover more populations. However, as dentists and physicians know all too well, in many states Medicaid has so abysmally under-paid providers that giving a family this insurance is akin to providing paper coverage with no access. Also, if Medicaid were such a wonderful program, why would there be a history of dental lawsuits to improve the program?

At the AAPD's first Advanced Legislative Workshop for Pediatric Dentistry Advocacy Leaders in the fall of 2006, Ms. Kay Drought (Litigation Director of New Hampshire Legal Assistance) provided an historical overview of state dental Medicaid lawsuits. We know that lawsuits have led to positive changes in some states, most notably in Michigan as it spurred the adoption of the "Healthy Kids Dental" program. This program was recognized as one of the successful models in the ADA's Oct. 2004 report *State and Community Models for Improving Access to Dental Care for the Underserved—A White Paper*. For a concise, updated summary of Medicaid dental success stories, see the analysis entitled Successful State Medicaid Dental Reforms at [www.cdhp.org](http://www.cdhp.org); this was compiled by former CMS Chief Dental Officer Dr. Don Schneider.

There are some recent legal developments that highlight both the opportunities and challenges in such lawsuits.

First of all, if a settlement or court ruling in a lawsuit is not enforceable, then the lawsuit will not accomplish much. Fortunately, on Jan. 14, 2004, the U.S. Supreme Court issued a favorable opinion in *Frew v. Hawkins*, a case that originated from a lawsuit brought by child advocates against the Texas Medicaid program. Reversing a Fifth Circuit Court of Appeals opinion, the Supreme Court issued a

unanimous opinion holding that federal courts could enforce consent decrees against state officials to enforce state obligations under the Medicaid Act. Contrary to the argument proposed by state officials and supported by state attorneys general in friends of the court briefs, the Eleventh Amendment does not create immunity for states from federal courts enforcing such consent decrees. The original lawsuit was based on violations of the Medicaid Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) program. Several AAPD members in Texas assisted the plaintiff's attorneys in the preparation of this lawsuit.

The case that sparked the model reform in Michigan actually resulted in a significant favorable federal appeals court decision. On May 15, 2002, a decision was handed down in *Westside Mothers v. Haveman* by the United States Sixth Circuit Court of Appeals. This case was an appeal from a District Court opinion dismissing Medicaid beneficiaries' claims that the state of Michigan had violated provisions of the Medicaid Act, on the grounds that states could not be sued for such violations.

**The Sixth Circuit decision reversed the District Court on all counts**, rejecting its arguments that Medicaid is essentially a contract between the federal government and states rather than federal law, that the Medicaid statute is not the supreme law of the land, that there is no private right of action under section 1983 (of the Civil Rights statutes), and that states are immune from suit for Medicaid violations. On Dec. 2, 2002, the U.S. Supreme Court declined to hear the state's appeal, solidifying the beneficiaries' appellate victory. This ruling was significant because if such legal causes of action are not permissible, then an important avenue to improving the oral health care of poor children would be lost.

The AAPD had signed onto a friend of the court brief urging a reversal of the District

Court opinion, and, along with other organizations, helped to underwrite the legal costs of arguing the appeal of this case. Pediatric dentistry was, in fact, involved in this case from the start. The Michigan Academy of Pediatric Dentistry was one of the plaintiffs in the original case, a 1999 class action lawsuit brought against Michigan for denial of essential medical, dental, developmental, and mental health services for children in violation of Medicaid law that requires these services be provided to eligible children. You can view more details on this case on the AAPD Web site at [www.aapd.org](http://www.aapd.org) in the Members-only Advocacy section under the topic of Medicaid and SCHIP.

**Unfortunately, there is a split among federal circuit courts on the issue of the right to sue Medicaid. Hence**, *Westside Mothers* is not the law of the land everywhere, and the issue may ultimately be decided by the Supreme Court. There was a recent negative decision in *OKAAP et. al. v. Fogarty et. al* as summarized by Children's Dental Health Project Founding Director Dr. Burton Edelstein at [www.cdhp.org](http://www.cdhp.org):

"2007 started out with a new and disappointing Federal Appeals Court decision on Medicaid EPSDT . . . On Jan. 3, 2007, the U.S. Court of Appeals (10th District in Okla.) reversed a lower Court and made the following determinations:

1. The state "did not violate the 'reasonable promptness' requirement by . . . allowing system-wide delays in treatment for Medicaid beneficiaries..."
2. The state "did not violate the 'reasonable promptness' requirement by . . . paying providers insufficient rates for services rendered to Medicaid beneficiaries..."
3. The state is not required to directly provide specified medical (including dental) services under Medicaid EPSDT but only to pay for care.
4. Individuals covered by Medicaid have no "private right of action" (a determination that is consistent with its earlier and controversial decision in 2006.)

This ruling is particularly disappointing because the District Court decision had required the state to conduct a study to determine the proper reimbursement rates necessary to ensure reasonably prompt access to health care for Medicaid-eligible children, and to revise their fee schedule in accordance with that

study. There are efforts to have the Supreme Court hear this case, as well as to have Congress modify the Medicaid statute to make it clear that such lawsuits can proceed.

Let me conclude this column with some good news. The plaintiffs in Florida's pending Medicaid lawsuit recently had a favorable

court ruling. A summary was reported in AAPD E-News and in Latest Advocacy News on the AAPD Web site at [www.aapd.org/hottopics/advocacy/detail.asp?NEWS\\_ID=647](http://www.aapd.org/hottopics/advocacy/detail.asp?NEWS_ID=647), and is included below.

This is hardly the last word on Medicaid dental litigation, and hopefully there will be more positive news to report from the above pending cases.

### U.S District Court Allows Medicaid Lawsuit on Behalf of Florida's Children to Proceed

In January 2007, the United States District Court for the Southern District of Florida ruled that the Medicaid lawsuit filed against Florida on behalf of children can proceed. The court rejected the state's motion to dismiss the class action complaint that was filed in late 2005 by the Florida Academy of Pediatric Dentistry (FAPD), the Florida Chapter of the American Academy of Pediatrics, and the families of six children on Medicaid. The lawsuit alleges that Florida has failed in its legal duty to provide 1.6 million children of low-income families with adequate healthcare, because the state does not inform their families of the basic healthcare services they are entitled to, sends them to HMOs too full to accept them, and refuses to pay physicians and dentists at a rate that covers their expenses.

The case is based on the legal requirement under the federal Medicaid Early and Periodic Screening, Diagnostic and Treatment (EPSDT) program that children must have access to care from doctors that is equal to the access to care received by privately insured children and must receive preventive health services.

Attorneys for the State of Florida argued that pediatricians, pediatric dentists, and parents of children on Medicaid do not have the right to sue Florida officials to enforce federal law because the federal statutes under which this suit was brought do not allow individuals to bring such a lawsuit. **In his 6-page decision, Judge Adalberto Jordan rejected that argument and stated that the lawsuit can proceed because "the statutes under which the plaintiffs bring suit confer individually enforceable rights."**

President of the Florida Academy of Pediatric Dentistry Dr. Paul Werner, stated:

"For too long, the State of Florida has shortchanged the state's economically disadvantaged children by inadequately funding Medicaid dental access. We hope that now the federal court has given credence to our request, perhaps the Florida Legislature will properly address this crisis in the upcoming legislative session. The real winners in this [court decision] were the kids of Florida."

On the AAPD Web site, you can access a copy of the original complaint and a copy of the court's decision.

For further information on this lawsuit, contact Legislative Advocate and General Counsel John Grant for the Florida Academy of Pediatric Dentistry at (813) 787-9900.

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