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EPSDT Survives the Deficit Reduction Act of 2005: A Statement by the Public Interest Law Center of Philadelphia

Many of our friends and advocates for children have asked us whether the Deficit Reduction Act of 2005, signed into law by President Bush on February 8, 2006, eliminated states' obligations to provide Early Periodic Screening Diagnosis and Treatment (EPSDT) to children enrolled in Medicaid. The answer is an emphatic no. To the contrary, the Deficit Reduction Act reaffirms states' obligations to provide these services, although it does permit states to require some covered children to pay premiums and co-payments. We offer this statement for providers and other advocates as background to use in responding to those who assert the contrary.

States' obligations to provide EPSDT is embodied in Title XIX of the Social Security Act, codified at 42 U.S.C. § 1396. Title XIX requires states that accept funding from the federal government to prepare and adhere to a state plan that must offer certain services, including children's health services. The statute details these services in section 1396d(r); the services include comprehensive physical examinations, immunizations; vision, hearing and dental screening; diagnostic tests and treatment for any conditions disclosed during the examinations. These services, among others, are included within the definition of "medical assistance" laid out in section 1396d(a). "Medical assistance" must be furnished to all eligible children under sections 1396a(a)(8) and (a)(10); and the state must pay providers at a rate sufficient to enlist enough providers so that children actually receive the services under section 1396a(a)(30)(A).

The Act discusses and reaffirms these obligations in a new section 1937 of the Social Security Act, entitled "State Option of Providing Benchmark Benefits." This allows states to decide that, instead of paying for all of the medical services required under the Social Security Act, they can offer certain specified pre-existing insurance or other health benefits coverage. The statute calls these types of pre-existing insurance policies "benchmark benefits." This option to provide benchmark benefits applies to all persons enrolled in Medicaid, not just children.

Congress made clear its continued support of EPSDT in language that follows the description of benchmark benefits. There, new section 1937 directs that, regardless of the benchmark coverage the state selects, the state must provide "wrap-around" benefits. These wrap-around benefits are explicitly described as EPSDT services for children under 19: "coverage consisting of early and periodic screening, diagnostic, and treatment services defined in section [1396d(r)]." The description of the

benchmark and wrap-around benefits is contained in a section entitled “Authority--In General.” (Section 1937(a)(1)(A) of the Social Security Act.)

Certain people may argue incorrectly that section 1937 somehow eliminates the states’ obligation to furnish EPSDT to children. They would point to a section that follows the “Authority—In General” section described above and that is entitled “Option of Wrap-Around Benefits.” (Section 1937(a)(1)(C) of the Social Security Act.) This “optional” section refers back to the benchmark and wrap-around coverage described above and then allows a state, at its option, to “provide such wrap-around or additional benefits” as the state may specify. Their argument would then point to this provision and argue that it *releases* states from the requirement of providing EPSDT to children under 19 which is clearly set forth a few sentences earlier. In other words, they would then assert that the flexibility for providing “such wrap-around...as the state may specify” refers back to the earlier description of “wrap-around” coverage and then gives states the power to ignore it.

This cannot be correct. To begin with, there would be no reason for subsection 1937(a)(1)(A)(ii)’s requirement of “EPSDT” wrap around benefits for children under 19, if states had the option to provide whatever they wanted by 1937(a)(1)(C). Secondly, it must be recalled that there are many Medicaid enrollees other than children under 19. Therefore any reasonable reading of Section 1937(a)(1)(C) must refer to the option to provide wrap around or additional benefits to those other Medicaid recipients. In other words, where Section 1937 (a)(1)(C) says that the states may provide “*such* wrap-around or additional benefits the State may specify,” the words “*such wrap-around*” are not being used to refer back to the required EPSDT coverage for children under 19. Instead, they are used in the sense of being unspecified; that is, the statute does not dictate what wrap-around or additional services the state may add for all adult beneficiaries who are not entitled to the EPSDT wrap-around benefits. A state may choose to add the EPSDT services to individuals 19 and over; or it may choose to add other services over and above the services contained in the benchmark coverage.

We are not alone in our interpretation. On February 1, 2006, the Honorable Joe Barton (R-Texas), Chairman of the Committee on Energy and Commerce that considered this bill in the House of Representatives, submitted a statement to be included in the Congressional Record entitled “Clarifying Medicaid’s Coverage for EPSDT Services.” Congressman Barton stated, “[t]his language reflects the clear legislative intent by both the House and Senate that all children should continue to

receive access to coverage of early and periodic screening, diagnostic, and treatment services ('EPSDT') services. That was what Members agreed to and the language was drafted accordingly." Congressman Barton concluded, "Congress clearly intended for all children under Medicaid to continue to receive EPSDT services and we will work with Administrator [Mark] McClellan [the administrator of the Centers for Medicare & Medicaid Services, Department of Health and Human Services] to ensure that all children will continue to receive access to these important services."

Administrator McClellan confirmed the same understanding in a separate statement issued January 30, 2006. He referred to "questions" about whether the new section 1937 of the Social Security act still entitles children under age 19 to receive EPSDT. According to Administrator McClellan, "the short answer is: Children under 19 will receive EPSDT benefits." Administrator McClellan characterized the new law as "clear" in requiring states to provide EPSDT and he, too, interpreted the "optional" provision as permitting a state to *add* types of coverage over and above those required in the "Authority—In general" section.

About the Public Interest Law Center of Philadelphia

The Public Interest Law Center of Philadelphia is counsel for clients in three states --- Oklahoma, Florida and Michigan -- who are suing state officials for failing to provide the EPSDT services. In Oklahoma, the district court has ordered the state to comply and, among other things, to raise rates for providers to a level that is sufficient to attract enough providers so that children actually receive the services; this level was provisionally set at 100% of Medicare rates. The lawsuits in Michigan and Florida are ongoing. The Law Center was also lead counsel in a completed case in Pennsylvania. Visit us at <http://www.pilcop.org>.