# When Advocacy Isn't Enough – Successful Mental Health Class Action Lawsuits

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# Overview of Presentation

- Purpose of Presentation
- Underlying Questions
- Class Action (and related) Cases by Topic
- Minnesota's Children's Comprehensive Mental Health Law
- Concluding Thoughts

# Purpose of Presentation

- Identify a number of concerns and questions about the provision of mental health services to children
- Show how courts have dealt with class action lawsuits and other legal actions on similar issues
- Assist audience members in understanding how the legal process may work when advocacy isn't enough

# Underlying Questions

- Is EPSDT screening occurring?
- If EPSDT is done, are mental health disorders being identified?
- Are services really available? (geographical access, waiting lists, thresholds, provider availability, adequate services, residential, PCA, CTSS)
- Are a variety of services available? (e.g. community based wraparound alternatives to residential treatment)

# Underlying Questions

- What is the threshold for services?
- What is medical necessity?  And, how can/do patients/consumers appeal an adverse decision?
- What is the effect of existing reimbursement rates?
- How do schools fit in? (OHD v. EBD, screening, MH services)

# EPSDT:
# Early, Periodic Screening, Diagnosis and Treatment

Known in Minnesota as "Child Teen Checkup"

This is an entitlement for all children and adolescents on Medicaid (Medical Assistance in MN), aged 0-21.

In Minnesota, it also is an entitlement for children and adolescents on Minnesota Care

It has clear timelines for periodic Medical, Dental and Social/Emotional/ Behavioral (Mental Health) Screenings

Developmental/Behavioral Screens are to be done 6 times during the first year of life, then ages 15 mos, 18 mos, 24 mos, 3 yrs, 4 yrs, 5 yrs, 6 yrs, 8 yrs, 10 yrs, 12 yrs, 14 yrs, 16 yrs, 18 yrs and 20 yrs.

# Prevention Principles: Primary Prevention Secondary Prevention (Early Intervention) Tertiary Prevention

Primary: We don't know how to prevent bipolar, ADHD, schizophrenia

Secondary: The most effective- clinically and cost-effective

Tertiary: "Wraparound"- expensive, and often would not have been necessary if early intervention had taken place

EPSDT is a very effective Secondary Prevention activity, if it is done with appropriate screening tools (reliable, valid, sensitive and specific)

Full Array of Mental Health Services:

Outpatient
Day Treatment
Partial Hospitalization
Residential Treatment
In-Patient Hospitalization

Are the services available?
Is treatment provided for an adequate duration?
Are children and adolescents discharged for the very reasons that they were admitted?

Are services being denied because they are determined to not be medically necessary? What are the criteria for that decision?

Are mental health services accessible? Are they close enough to the patient's home? Are they available in a timely manner?

- **How have courts dealt with these questions?**

# Key Terms:

- **Class Action**
- **Plaintiff, Appellant**
- **Defendant, Respondent**
- **Consent Decree**

# Screening

- Rosie D. v. Romney, 410 F. Supp. 2d 18 (D. Mass 2006).
  - A class action brought by Medicaid eligible children with SED, claiming that they did not receive adequate EPSDT services. The court held that the state failed to meet "reasonable promptness" standards by not doing comprehensive assessments and not authorizing enough services for children to stay at home. The court ordered Massachusetts to restructure its children's mental health program to provide better services.
- John B. v. Menke, 176 F. Supp. 2d 786 (M.D. Tenn. 2001). John B. v. Goetz 2009 WL 3055281 (2009)
  - A Tennessee consent decree in which the court affirmed children's right to an EPSDT program and included multi year plan regarding statewide medical and MH screening, DD screening, improving access, and integration of health for children in foster care. In 2009, the court rejected the state's request to vacate the consent decree.

# Availability/Scope of Services

- Emily Q. v. Bonta, 208 F. Supp. 2d 1078 (C.D. Cal. 2001).
  - A class action that alleged that the California Medicaid system failed to provide Medicaid eligible children with the full range of mental health services, especially therapeutic behavioral services (TBS). The court agreed, and ordered the state to inform all Medicaid participants under 21 of the availability of these services and to screen those who request screenings.
- Katie A v. Bonta, 433 F. Supp. 2d 1065 (C.D. Cal. 2006), *rev'd* Katie A. v. L.A. County, 481 F.3d 1150 (9th Cir. 2007).
  - A case that ended with a consent decree, setting out a test to determine whether wraparound services are a part of mental health services. The district court found that they are included.

# Availability/Scope of Services

- Parents' League for Effective Autism Services v. Jones-Kelley, 339 Fed.Appx. 542 (6th Cir. 2009).
  - Children with autism claim that the state Medicaid agency denied them benefits through EPSDT when CMS voted to limit the mental health services available to children. The court held that ABA is available through EPSDT as a rehabilitative service.
- Blue Cross case
  - Blue Cross/Blue Shield of Minnesota settled a case brought by the parents of a girl who died of an eating disorder. The insurance company settled, admitting that they did not provide mental health services that may have helped the plaintiffs' daughter.

# Availability/Scope of Services

- T.R. v. Dreyfus, still pending, see Nat'l Ctr for Youth Law website for complaint.
  - Plaintiffs are Medicaid eligible children who claim they are not receiving adequate mental health services, and instead are cycled in and out of institutions and psychiatric facilities. The plaintiffs are seeking an injunction requiring the state's Department of Social and Health Services to provide the services they need. Court granted class certification on July 23, 2010.

- Jacobus v. Dept' (Ver. 2004)
  - Plaintiffs appealed decision by Dept that interceptive orthodontic treatment was not covered on the grounds that the problem did not meet listed coverage criteria. Court ordered treatment on grounds that coverage cannot be denied according to a "pre-determined list of criteria."

# Admission Threshold

- J.K. v. Dillenberg, 836 F. Supp. 694 (D.Ariz. 1993).
  - Plaintiffs were terminated from their psychiatric care facilities without reason. The state never authorized J.K. for services mandated by EPSDT to treat him. Plaintiffs requested court to order that terminations must be made based upon a determination of "medical necessity" and must follow procedural guidelines, including notice and a fair hearing. Parties settled and formed a consent decree requiring the state to redevelop its children's behavioral health system, including performing more accurate assessments and authorizing services in a timely manner.

# Residential Treatment

- Katie A. v. Bonta, *supra*.
  - A class action case where plaintiffs alleged that they were denied community-based services that could have kept them out of institutions or other residential treatment facilities.
- T.R. v. Washington, *supra*.
  - The plaintiffs are claiming that if they were to receive proper services, they would not have to be "cycled" in and out of residential treatment facilities, and could live at home.
- J.B. v. Barbour, still pending, see Bazelon Center for Mental Health Law website
  - The plaintiffs are Medicaid eligible children who claim that they have been subjected to institutionalization because the state refuses to provide necessary mental health services. The plaintiffs want the state to comply with the Medicaid statute and provide services that allow these children to remain in the community as much as possible.

# Parity/Medical Necessity

- Collins v. Hamilton, 349 F.3d 371 (7th Cir. 2003).
  - The plaintiffs claimed that the state failed to provide long-term residential treatment in psychiatric facilities, asking for an injunction to order the State of Indiana to provide these services, as "medically necessary" through EPSDT. The court agreed that it is "medically necessary."
- Parents' League, *supra*.
  - The court held that ABA services for children with autism may be "medically necessary", and so must be provided through the state. It does not matter if they are considered more to be "habilitative" than "rehabilitative."

# Parity/Medical Necessity

- CF v, FL Dep't of Children and Families, 2005
  - Court ruled that state law provisions to determine medical necessity was "significantly lower" than EPSDT's requirement
- Romney
  - .
- Hawkins v. NH
  - Class action settlement – add more here.

# Transition Services

- Grooms v. Maram, 563 F. Supp. 2d. 840 (ND. Ill. 2008)
  - Court held that the ADA requires a reasonable accommodation to maintain in home services after plaintiff reached age 21 and EPSDT services ended.

# Reimbursement

- Portland Residence, Inc. v. Steffen, 34 F.3d 669 (8th Cir. 1994).
  - Plaintiffs claimed that federal law requires Minnesota to guarantee a specific minimum level of payments to facilities for people with DD. "The Boren Amendment changed Medicaid reimbursement procedures so that, in place of the original Medicaid Act's "all-reasonable-costs" reimbursement standard, the affected facilities [hospitals, nursing facilities, and ICF/MRs] were to be paid sums "reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities in order to provide care and services in conformity with applicable State and Federal laws, regulations, and quality and safety standards."

# Reimbursement

- Clark v. Richman (M.D. Penn. 2004)
  - Allegations that the state's system denied access to covered dental services with regard to "reasonable promptness" and failure to have adequate rates. Court determined allegations were "at best abstract observations of areas needing continued attention and improvement."
- Health Care for All v. Romney (2005 WL 1660677, D. Mass)
  - Court held Medicaid reimbursement rates for dental services were so low as to frustrate reasonable promptness provision

# Education/Medicaid

- Felix Consent Decree, (Felix v. Cayetano) Civil No. 93-00367 DAE (August 2000).
  - A class action brought on behalf of a Hawaii public school student, alleging that the state was not providing federally-guaranteed mental health and educational services as required by law. The state settled the case with a consent decree ordering it to abide by federal law in reference to EPSDT services.

- Illinois Dept of Health Care v. USDHHS
  - School-based administrative costs under Medicaid are disallowed because costs were really "child find" activities under the IDEA.

# What about Minnesota's Law

- Minnesota's Comprehensive Children's Mental Health Act, Minn. Stat. 245.487-.4889
- Mission of the Act (245.487, subd.3)
  - Identification, preventative services available to all children, continuum of services, early screening and intervention, services in appropriate life context, payment, family involvement, and transition from child to adult services

# MN Children's Mental Health Act

- Important Points
- Availability under CMHA can be limited: "Nothing shall require the commissioner [of DHS] or county boards to fund…services beyond the limits of legislative appropriations" Minn. Stat. §245.486.
- No independent right of action under CMHA:

"[CMHA does] not independently establish a right of action on behalf of recipients of services or service providers…"Minn. Stat. §245.485

# Minnesota Issues

# "Why Do We Wait? EPSDT: Mental Health Prevention and Early Intervention Services" MN Mental Health Ombudsman's Report, 1999

http://www.ombudmhdd.state.mn.us/reports/whywait.htm

"Only 15 percent of the eligible population received an EPSDT screening"

And, although research indicates that 25-30% of this population has evidence of significant mental health disorders,

“No more than 4.6 percent of the children and adolescents screened received a mental health referral"

# The 1999 External Quality Review Study Child and Teen Checkups Participation Rate Review Final Report, contracted by MN DHS:

"Only 6% of children in Minnesota's public health programs received comprehensive developmental screens"

Most of the screens were done with children under the age of 2

Only 1.7% of the 2-6 year old group received complete screens

.3% (3 out of a 1000) of the 6-15 year old group received complete screens

.3% of the 15-21 year old group received complete screens

# Access to Mental Health Services in Minnesota

# Minnesota Statutes 62D.124 Geographic accessibility: Subd. 1 Primary Care; mental health services; general hospital services.

"Within the health maintenance organization's service area, the maximum travel distance or time shall be the lesser of 30 miles or 30 minutes to the nearest provider of each of the following services: primary care services, mental health services, and general hospital services."

Minnesota Rules 4685.1010 Availability and Accessibility Subp. 2E

"The health maintenance organization shall contract with or employ sufficient numbers of qualified providers of outpatient mental health services and chemical dependency services to meet the projected needs of its enrolees consistent with generally accepted practice parameters."

# Subp. 6 Timely access to health care services

A. "The health maintenance organization, either directly or through its provider contracts, shall arrange for covered health care services, including referrals to participating and non participating providers, to be accessible to enrollees on a timely basis in accordance with medically appropriate guidelines consistent with generally accepted practice parameters"

# 62Q.53 Mental health coverage; minimum standards for medically necessary care.

Subd. 2. **Minimum definition.** "Medically necessary care" means health care services appropriate, in terms of type, frequency, level, setting, and duration, to the enrollee's diagnosis or condition, and diagnostic testing and preventive services.

Medically necessary care must be consistent with generally accepted practice parameters as determined by health care providers in the same or similar general specialty as typically manages the condition, procedure, or treatment at issue

Minnesota Rules re: Health care programs (9505.0175 subp.25) regarding the medical necessity criteria for mental health services that must be used by the health plans defines "medical necessity" as:

"A health service that is consistent with the recipient's diagnosis or condition and is recognized as the prevailing standard or current practice by the provider's peer group."

How is Minnesota doing?
Early Intervention?
Timely access to services?
Geographic access to services?
Are services medically authorized according to providers' standards?

# Other Considerations

- Since state court actions are limited, litigation is generally in federal court
- Litigation may take years
- Consent decrees with state-wide impact can come from one plaintiff or a small group of plaintiffs, or a class action that represents a large group.
- Outcome not guaranteed; somewhat conflicting decisions based on particular facts of situation