IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE

JOHN B., *et al.*	)	
Plaintiffs,	)	
v.	)	CASE NO. 3-98-0168
MARK EMKES, Commissioner, Tennessee Department of Finance and Administration, *et al.*, Defendants.	)	Judge Thomas A.Wiseman, Jr.

STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA

The United States respectfully submits this Statement of Interest pursuant to 28 U.S.C. § 517[1] to address issues identified in the Sixth Circuit's recent decision, *John B. v. Goetz*, 626 F.3d 356 (6th Cir. 2010), vacating one portion of the parties' consent decree and remanding the case for a determination of the validity of certain other provisions of the decree. The consent decree remedies alleged failures by the defendants to provide adequate health services and treatment to thousands of Medicaid-eligible children in violation of the early and periodic

[1] Under 28 U.S.C. § 517, "[t]he Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States."

screening, diagnostic and treatment ("EPSDT") provisions of title XIX of the Social Security Act (the "Medicaid Act"), 42 U.S.C. §§ 1396 to 1396w-5.

The denial of adequate EPSDT services results in significant harm to children with disabilities, including lack of access to necessary services and supports, as well as unnecessary institutionalization. (*See* Compl. ¶¶ 11, 14, 69-77, 81-83, 85-86, 93-96, 102-08 (alleging numerous instances of unjustified institutionalization).) Because the Sixth Circuit's remand to this Court concerns important issues regarding the enforceability of the Medicaid Act EPSDT provisions and the availability of medical services to children under the Medicaid Act, the United States has a strong interest in the resolution of this matter. Accordingly, it respectfully submits this Statement of Interest to address two prominent issues identified by the Sixth Circuit. First, notwithstanding the defendants' arguments to the contrary, it is well-settled that plaintiffs have a private right of action under 42 U.S.C. § 1983 to enforce the EPSDT provisions at issue in this case. Second, the long-standing meaning of the Medicaid Act's EPSDT provisions requires participating states to ensure that medically necessary services are provided to eligible beneficiaries under the age of twenty-one.

PROCEDURAL BACKGROUND

Upon the motion of the parties, this Court entered a consent decree in 1998, remedying claims of plaintiff John B. and other Medicaid-eligible children that defendants fail to screen, properly diagnose and provide required health services in violation of the EPSDT provisions of the Medicaid Act. The consent decree is based primarily on Subsections (A), (B) and (C) of 42 U.S.C. § 1396a(a)(43) and, among other things, requires defendants to conduct outreach informing Medicaid-eligible individuals of the services available under the EPSDT program, and

to provide for periodic screening, vision, hearing, dental and diagnostic services, as well as corrective treatment. (*See* Consent Decree for Medicaid-Based Early and Periodic Screening, Diagnosis and Treatment Services, entered Feb. 25, 1998, ECF No. 12.)

Several years after the consent decree was entered, defendants moved to vacate the decree in its entirety based upon the Sixth Circuit decisions in *Westside Mothers v. Olszewski*, 454 F.3d 532 (6th Cir. 2006) ("*Westside Mothers II*") and *Brown v. Tennessee Department of Finance and Administration*, 561 F.3d 542 (6th Cir. 2009). (Defs.' Mots. dated Nov. 20, 2006 and May 11, 2009, ECF Nos. 738 and 1293, respectively.) On September 18, 2009, Judge William J. Haynes denied defendants' motion to vacate the consent decree, holding that neither *Westside Mothers II* nor *Brown* required vacating or modifying the consent decree. *John B. v. Goetz*, 661 F. Supp. 2d 871, 903 (M.D. Tenn. 2009).

The defendants appealed, and on December 16, 2010, the Sixth Circuit issued an opinion, vacating the discrete portion of the consent decree remedying violations of 42 U.S.C. § 1396a(a)(30), and remanding for further proceedings. *John B. v. Goetz*, 626 F.3d 356, 365 (6th Cir. 2010). The Sixth Circuit rejected defendants' argument that the consent decree should be vacated in its entirety, noting that the provisions of § 1396a(a)(43)—one of which was explicitly held to be privately enforceable in *Westside Mothers II*—"are an important basis for the decree." *John B.*, 626 F.3d at 362. Thus, aside from the provisions of the decree remedying violations of § 1396a(a)(30), which the *Westside Mothers II* Court found unenforceable through a § 1983 action, the Sixth Circuit remanded for a determination whether the other provisions of

§ 1396a(a)(43) are privately enforceable and require a participating state to ensure the provision of—as opposed to solely payment for—medical services.[2] *John B.*, 626 F.3d at 363, 365.

STATUTORY AND REGULATORY BACKGROUND

Congress enacted the Medicaid Act in 1965, establishing a medical assistance program cooperatively funded by the federal and state governments. State participation in Medicaid is voluntary, but once a state elects to participate it is required to administer the Medicaid program in conformity with federal law. *Alexander v. Choate*, 469 U.S. 287, 289 n.1 (1985); s*ee* 42 U.S.C. § 1396 *et seq.* While participating states maintain significant discretion in defining what benefits they offer under their state plans for adults, the EPSDT provisions of the Medicaid Act require participating states to provide coverage of all care and services allowable under federal law to Medicaid-eligible individuals under the age of twenty-one for whom the services are medically necessary. 42 U.S.C. § 1396a(a)(43); 42 U.S.C. § 1396d(r)(1)-(5).

In adding the EPSDT requirements to the Medicaid Act in 1967, Congress "intended to require States to take aggressive steps to screen, diagnose and treat children with health problems." *Stanton v. Bond*, 504 F.2d 1246, 1249 (7th Cir. 1974). A fundamental purpose of the EPSDT mandate is thus to "[a]ssure that health problems found are diagnosed and treated early, before they become more complex and their treatment more costly." U.S. Dep't of Health and Human Servs., Centers for Medicare and Medicaid Servs., Pub. No. 45, State Medicaid Manual (hereinafter "State Medicaid Manual") § 5010.B. The EPSDT mandate also addressed Congress'

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[2] The Sixth Circuit also remanded for a determination of (1) "whether *Westside Mothers II*'s determination about waiting lists is applicable to the waiting list provision of § 1396a(a)(43)(C)" and (2) whether any provisions of the consent decree must be set aside because the Adoption Assistance Act cannot be enforced under § 1983. *John B.*, 626 F.3d at 363. The United States does not address these issues in this submission.

concern about "the variations from State to State in the rates of children treated for handicapping conditions and health problems that could lead to chronic illness and disability." *Stanton*, 504 F.2d at 1249. As originally drafted, the EPSDT provisions of Medicaid entitled all Medicaid-eligible individuals under the age of twenty-one to *screening* and *diagnosis*, but Congress directed the Secretary of Health and Human Services to promulgate regulations defining the specific services that would be available for *treatment* of conditions identified during a health screen. *See* Social Security Amendments Act of 1967, Pub. L. No. 90-248, 81 Stat. 821 §§ 224, 302 (1967).

In 1989, Congress amended the Medicaid Act to clarify that states must ensure that comprehensive treatment services are available under the EPSDT program. Omnibus Budget and Reconciliation Act of 1989, Pub. L. No. 101-239, 103 Stat. 2219 § 6403 (1989); *see also* Senate Finance Committee Report, read into Congressional Record at 135 Cong. Rec. S13057-03 at *S13233, 1989 WL 195142 (Oct. 12, 1989) (noting that the 1989 amendments were intended to "require that states provide to children *all treatment items and services that are allowed under federal law* and that are determined to be necessary . . . even if such services are not otherwise included in the State's plan") (emphasis added); H.R. Rep. No. 101-386, at 453 (1989) (Conf. Rep.); *S.D. ex rel. Dickson v. Hood*, 391 F.3d 581, 589-90 (5th Cir. 2004) ("Congress in the 1989 amendment imposed a mandatory duty upon participating states to provide EPSDT-eligible children with all the health care, services, treatments and other measures described in § 1396d(a) of the Act, when necessary to correct or ameliorate health problems discovered by screening, regardless of whether the applicable state plan covers such services.").

Thus, in its current form, the EPSDT mandate requires states to ensure that EPSDT-eligible children receive comprehensive and regular health screening, vision, dental and hearing

services, and "[s]uch other necessary health care, diagnostic services, treatment, and other measures . . . to correct or ameliorate defects and physical and mental illnesses and conditions discovered by the screening services . . . ." 42 U.S.C. § 1396d(r)(1)-(5); *see also* 42 C.F.R. § 440.130.

ARGUMENT

I. The Screening, Diagnostic and Treatment Provisions of the EPSDT Mandate Are Privately Enforceable Through 42 U.S.C. § 1983

In *Westside Mothers II*, the Sixth Circuit held that 42 U.S.C. § 1396a(a)(43)(A) is privately enforceable through 42 U.S.C. § 1983, finding that the statutory provision and its implementing regulations "obligate States to provide for written and oral methods designed to 'effectively' inform all eligible individuals about the EPSDT program." *Westside Mothers II*, 454 F.3d at 543. Because Subsections (B) and (C) of § 1396a(a)(43) explicitly focus on the children addressed in Subsection (A) and similarly obligate states to provide or arrange for such services, they too are privately enforceable under the reasoning of *Westside Mothers II* and the standards established by the Supreme Court in *Blessing v. Freestone*, 520 U.S. 329 (1997) and *Gonzaga University v. Doe*, 536 U.S. 273 (2002). *See Blessing*, 520 U.S. at 340-41 (holding that for a statutory provision to be privately enforceable under § 1983, (1) "Congress must have intended that the provision in question benefit the plaintiff[,]" (2) the right protected by the provision must not be "so 'vague and amorphous' that its enforcement would strain judicial competence[,]" and (3) the provision must "unambiguously impose a binding obligation on the States."); *Gonzaga*, 536 U.S. at 283 (holding that it is "rights, not the broader or vaguer 'benefits' or 'interests'" that are enforceable under § 1983.) (emphasis omitted).

As required by the first prong of the *Blessing/Gonzaga* framework, the provisions at issue use rights-creating language that demonstrates Congress' clear intent to confer individual rights. Subsections (B) and (C) of § 1396a(a)(43) require states to provide screening services to all children addressed in Subsection (A) who request such services and to arrange for (either directly or through other agencies) treatment, the need for which is discovered by the screening.[3] Thus, they focus on the children protected by the EPSDT provisions and evince a clear intent to confer rights on a particular class of persons.[4]

Second, it is clearly within the Court's capacity to determine whether the state (i) has screened individual children who requested such services and (ii) is providing covered services to eligible EPSDT recipients, such that the screening, diagnostic and treatment provisions are not

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[3] Section 1396a(a)(43)(B) provides that: "A State plan for medical assistance must . . . provide for . . . providing or arranging for the provision of such screening services in all cases where they are requested . . . ."
Section 1396a(a)(43)(C) provides that: "A State plan for medical assistance must . . . provide for . . . arranging for (directly or through referral to appropriate agencies, organizations, or individuals) corrective treatment the need for which is disclosed by such child health screening services . . . ."

[4] Defendants argue that the Supreme Court's analysis in *Blessing* of the enforceability of title IV-D of the Social Security Act requires this Court to find that Subsections (B) and (C) of § 1396a(a)(43) do not create a right that is privately enforceable through § 1983. (Defs.' Supp'l Br. 14-15.) Defendants' reliance on *Blessing* for this purpose is misplaced. There, unlike here, the plaintiff custodial parents failed to identify the specific rights created by the statute that were privately enforceable. *Blessing*, 520 U.S. at 346 (remanding to district court for determination of what rights plaintiffs were asserting in their complaint). Moreover, the statute at issue there "was not intended to benefit individual children and custodial parents, and therefore it [did] not constitute a federal right." *Id.* at 343. *Hughlett v. Romer-Sensky*, 497 F.3d 557 (6th Cir. 2006), provides no more support to defendants' arguments. There, the Sixth Circuit addressed the same statute at issue in *Blessing* and found that the plaintiffs did not have a privately enforceable right to receive child support payments within two days and free of administrative fees. *Hughlett*, 497 F.3d at 563-64. The Sixth Circuit found that the administrative provisions in question were "intended to provide instruction to the States and [did] not contain the rights-creating language necessary to create an enforceable individual right." *Id.* at 563. By contrast here, the EPSDT provisions' use of rights-creating language clearly establishes Congress' intent to directly benefit plaintiffs.

vague or amorphous and would not strain judicial competence. *See Blessing*, 520 U.S. at 340-41. Finally, the provisions' use of the terms "must . . . provide for" unambiguously imposes a binding obligation on states. *Id.* at 341; *see also* 42 C.F.R. § 441.56(b)-(c) (implementing regulations providing, respectively, that states "must provide to eligible EPSDT recipients who request it, screening (periodic comprehensive child health assessments) . . ." and that states "must provide to eligible EPSDT recipients, [certain covered] services, the need for which is indicated by screening, even if the services are not included in the plan . . . ."). These provisions are clearly couched in mandatory, as opposed to precatory, terms, as required by the third prong of the *Blessing/Gonzaga* standard. [5]

Defendants' contention that Subsections (B) and (C) of § 1396a(a)(43) do not confer privately enforceable rights ignores the vast body of case law that holds otherwise. Indeed, every case that has addressed the issue post-*Gonzaga* has held that these provisions create privately enforceable rights. *See S.D. ex rel. Dickson v. Hood*, 391 F.3d 581, 603-06 (5th Cir. 2004) (holding that (1) "the EPSDT treatment provisions of the Medicaid Act contains[sic] the 'rights-creating language critical to showing the requisite congressional intent to establish a new right[,]'" (2) "the right asserted by [plaintiff] is not so 'vague and amorphous' that its enforcement would 'strain judicial competence[,]'" and (3) "the Medicaid statute unambiguously imposes EPSDT obligations on the participating states."); *Parents' League for Effective Autism Servs. v. Jones-Kelley*, 565 F. Supp. 2d 895, 903-04 (S.D. Ohio 2008) (holding that various

[5] Defendants' argument that there is no right of action under § 1983 because the claims and relief at issue address the individual rights of thousands of children, as opposed to a single child, was rejected by the Sixth Circuit as a failure to "[distinguish] between rights and remedies." *John B.*, 626 F.3d at 362 n.3 (rejecting defendants' argument and explaining that "remedies vindicating individual rights may be both systemic and nonsystemic; the form of relief says nothing about the nature of the right.").

EPSDT provisions, including § 1396a(a)(10) and (43), and § 1396d(a)(4)(B) and (r), "confer an unambiguous right on Plaintiffs that is enforceable through a § 1983 claim" that is "not so 'vague and amorphous' as to defeat judicial enforcement[,]" and that "imposes EPSDT obligations on the participating states."); *Salazar v. District of Columbia*, 729 F. Supp. 2d 257, 268-71 (D.D.C. 2010) (holding that "§ 1396a(a)(43) does 'unambiguously' confer a private right of action[,]" the "right is not too vague and amorphous to be enforced[,]" and the "Defendants' obligation is both clear and enforceable[.]"); *Clark v. Richman*, 339 F. Supp. 2d 631, 640 (M.D. Pa. 2004) (finding that "§ 1396a(a)(43) affords plaintiffs vindicable private rights."); *Kenny A. v. Perdue*, 218 F.R.D. 277, 293-94 (N.D. Ga. 2003) (holding that, *inter alia*, § 1396a(a)(43) confers privately enforceable rights); *Hunter ex rel. Lynah v. Medows*, No. 1:08-CV-2930, 2009 WL 5062451, at *2-3 (N.D. Ga. Dec. 16, 2009) (holding that § 1396a(a)(43) "satisf[ies] the three-factor test . . . in *Blessing* and *Gonzaga*."); *Memisovski v. Maram*, No. 92-C-1982, 2004 WL 1878332, at *10-11 (N.D. Ill. Aug. 23, 2004) (concluding that "the EPSDT provisions[of § 1396a(a)(43)] also confer individual rights on plaintiffs which may be enforced pursuant to 42 U.S.C. § 1983.").[6] Given the above, this Court should reject defendants' argument that plaintiffs do not have a private right of action under § 1983 to enforce § 1396a(a)(43)(B) and (C).

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[6] *Cf. Westside Mothers II*, 454 F.3d at 543-44 (holding that "Plaintiffs have stated a cognizable claim under § 1983 for violations of § 1396a(a)(43)(A)[.]"); *Harris v. Olszewski*, 442 F.3d 456, 461 (6th Cir. 2006) (holding that "Medicaid's freedom-of-choice provision[, § 1396a(a)(23)(A),] creates enforceable rights that a Medicaid beneficiary may vindicate through § 1983."); *Sabree ex rel. Sabree v. Richman*, 367 F.3d 180, 183 (3d Cir. 2004) (holding that "the provisions invoked by plaintiffs-42 U.S.C. §§ 1396a(a)(8), 1396a(a)(10), and 1396d(a)(15)-unambiguously confer rights vindicable under § 1983."); *Bryson v. Shumway*, 308 F.3d 79, 89 (1st Cir. 2002) (holding that "there is a § 1983 cause of action arising from the 'reasonable promptness' provision of 42 U.S.C. § 1396a(a)(8) under the state model waiver plan as approved.").

II. States Are Required to Ensure that EPSDT Services Are Provided to Eligible Individuals

Relying on the Sixth Circuit's decision in *Westside Mothers II*, defendants argue that § 1396a(a)(43)(C) requires a state "only to *pay* for medical assistance that has been rendered." (Defs.' Supp'l Br. in Supp. of Defs.' Mot. to Vacate Consent Decree ("Defs.' Supp'l Br.") 17-18.) Defendants' attempt to expand the holding of *Westside Mothers II* finds no support in that decision and is squarely contrary to the legislative intent and purpose of the EPSDT provisions of the Medicaid Act.

Westside Mothers II's holding that the term "medical assistance" encompasses only payment for medical services—as opposed to the provision of services—applied solely to two provisions of the Medicaid Act not at issue here, namely § 1396a(a)(8) (requiring medical assistance to be delivered with 'reasonable promptness') and § 1396a(a)(10) (providing that medical assistance to Medicaid recipients shall not be less in amount, duration or scope than the medical assistance made available to any other individual).[7] *Westside Mothers II*, 454 F.3d at 541. Relying on dicta from the Seventh Circuit Court of Appeals,[8] the Sixth Circuit held that, as

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[7] Subsections (8) and (10) were similarly at issue in *Brown v. Tennessee Department of Finance and Administration*, 561 F.3d 542 (6th Cir. 2009). Unlike here, where the Sixth Circuit left the relevant portions of the consent decree in place and remanded for further proceedings, the Sixth Circuit in *Brown* vacated certain provisions of a consent decree relying on 42 U.S.C. § 1396a(a)(8) and (10). *Id*. at 547-48.

[8] *See Bruggemann v. Blagojevich*, 324 F.3d 906, 910 (7th Cir. 2003) (stating in dicta that the "statutory reference to 'assistance' appears to have reference to *financial* assistance rather than to actual medical *services*" and observing that "Medicaid is a payment scheme, not a scheme for state-provided medical assistance, as through state-owned hospitals."); *see also Brown*, 561 F.3d at 545 (describing the genesis of this analysis and noting that it emerged from Seventh Circuit dicta).

applied to § 1396a(a)(8) and (10), the Medicaid Act requires only payment for, not the actual provision of, medical services. *Id*. at 540 (citing § 1396d(a)).[9]

This interpretation of the term "medical assistance" differed from the interpretation of the term by other circuit courts holding that the Medicaid Act requires the actual provision of medical services. *Westside Mothers II*, 454 F.3d at 540 (noting "disagreement among the courts of appeals as to whether, pursuant to the Medicaid Act, a State must merely provide financial assistance . . . or provide the services directly."); *see also Bryson v. Shumway*, 308 F.3d 79, 81, 88-89 (1st Cir. 2002); *Doe v. Chiles*, 136 F.3d 709, 714, 717 (11th Cir. 1998) (requiring states to provide services, rather than merely providing "financial assistance").

Nonetheless, the *Westside Mothers II* Court did not apply its definition of "medical assistance" to § 1396a(a)(43), the EPSDT provision at issue in this case. With respect to Subsection (A)—the only provision of § 1396a(a)(43) at issue in *Westside Mothers II*—the court held that it gives rise to a private right of action and "obligate[s] States to provide for written and oral methods designed to 'effectively' inform all eligible individuals about the EPSDT program." *Westside Mothers II*, 454 F.3d at 544.

Like Subsection (A), Subsections (B) and (C) of § 1396a(a)(43) on their face require states to provide or ensure the provision of the services addressed in those provisions. Subsection (B) states that a state plan must "provide for . . . providing or arranging for the provision of such screening services in all cases where they are requested[.]" 42 U.S.C. § 1396a(a)(43)(B). Similarly, Subsection (C) states that a state plan for medical assistance must

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[9] The *Westside Mothers II* Court, however, permitted the plaintiffs to amend their claims for violation of §§ 1396a(a)(8) and 1396a(a)(10) to allege that "inadequate payments effectively den[ied] the right to 'medical assistance.'" *Westside Mothers II*, 454 F.3d at 541.

"provide for . . . arranging for (directly or through referral to appropriate agencies, organizations, or individuals) corrective treatment the need for which is disclosed by such child health screening services." 42 U.S.C. § 1396a(a)(43)(C). The statute thus explicitly contemplates that states will either directly provide or arrange for the provision of services required by the EPSDT provisions.

Defendants argue that interpreting the EPSDT provisions to require the actual provision of services would require the State "to step into the shoes of a medical provider ensuring actual diagnosis and treatment." (Defs.' Supp'l Br. 18.) Defendants argument is baseless. The EPSDT provisions do not require state agencies or employees themselves to conduct the screening, diagnosis or treatment of Medicaid-eligible children, or to otherwise become direct providers of medical treatment or medical supplies and services. For example, if it is medically necessary for a Medicaid-eligible child to use an oxygen tank, the EPSDT provisions do not require the State to go out and purchase the tank and deliver it to the child's home, but the State must arrange for the service. As is evidenced by the plain language of the statutory provisions and their implementing regulations, the EPSDT provisions obligate states to ensure that medically necessary services are available, accessible and provided, either by providing them directly or by arranging for them through "appropriate agencies, organizations, or individuals[.]" 42 U.S.C. § 1396a(a)(43)(C).

Defendants' interpretation of what is required of states under the EPSDT provisions is not only inconsistent with the provisions' plain language, but it also flies in the face of the legislative history of those provisions. Prompting the enactment of and amendments to these provisions was Congress' concern that Medicaid-eligible children were not *actually receiving* the screening, diagnosis and treatment services to which they were entitled, despite the availability

of funding. *See* Senate Finance Committee Report, read into Congressional Record at 135 Cong. Rec. S13057-03 at S13233, 1989 WL 195142; *see also Stanton*, 504 F.2d 1250 ("Senate and House Committee reports emphasized the need for extending outreach efforts to create awareness of existing health care services, to stimulate the use of these services, and to make services available so that young people can receive medical care before health problems become chronic and irreversible damage occurs.") Thus, the EPSDT provisions require participating states to ensure that Medicaid-eligible children receive the "screening" services and "corrective treatment" to which they are entitled. Requiring only payment for services already "rendered" would not have addressed Congress' concerns and would run counter to the legislative purpose of the EPSDT provisions.

Consistent with this clear Congressional intent, numerous courts have recognized that the EPSDT provisions of the Medicaid Act mandate states to ensure that Medicaid-eligible individuals under the age of twenty-one actually receive medical assistance. *See e.g., S.D. ex rel. Dickson v. Hood*, 391 F.3d 581, 589-90 (5th Cir. 2004) ("Congress in the 1989 amendment imposed a mandatory duty upon participating states to provide EPSDT-eligible children with all the health care, services, treatments and other measures described in § 1396d(a) of the Act, when necessary to correct or ameliorate health problems discovered by screening, regardless of whether the applicable state plan covers such service."); *Katie A. v. Bonta*, 481 F.3d 1150, 1161 (9th Cir. 2007) (state has obligation to ensure that all services required by the EPSDT provisions are being provided to Medicaid-eligible children effectively); *Pediatric Specialty Care, Inc. v. Ark. Dep't of Human Servs.*, 293 F.3d 472, 480 (8th Cir. 2002) (state must provide coverage for early intervention day treatment); *Rosie D. v. Romney*, 410 F. Supp. 2d 18, 26 (D. Mass. 2006) ("Congress' firm intent to ensure that Medicaid-eligible children actually receive services is

powerfully underlined by provisions in the statute that place explicit duties on states to: (a) inform eligible children of the availability of [EPSDT] services, (b) provide or arrange for screening services . . . and (c) arrange for whatever corrective treatments are discovered to be needed."); *Disability Rights New Jersey v. Davey*, No. 3:05-cv-04723, ECF No. 90, Opinion and Order at 2 (D.N.J. Dec. 12, 2010) (holding that the Medicaid Act's definition of "medical assistance" requires provision, not merely payment, for services); *cf. Parents' League for Effective Autism Servs. v. Jones-Kelley*, 339 F. App'x 542, 547-50 (6th Cir. 2009) (Applied Behavioral Analysis treatment for EPSDT-eligible children with autism).

Decades of regulatory interpretations of the Medicaid Act also demonstrate states' responsibility for ensuring the provision of medically necessary EPSDT services to eligible individuals under the Medicaid Act. The Centers for Medicare and Medicaid Services ("CMS"), the federal agency charged with administering the Medicaid Act, outlines this mandate in its State Medicaid Manual. In guidance to State Medicaid Agencies, CMS explains that:

> You must *provide for* screening, vision, hearing and dental services at intervals which meet reasonable standards of medical and dental practice established after consultation with recognized medical and dental organizations involved in child health care. You must also *provide for* medically necessary screening, vision, hearing and dental services regardless of whether such services coincide with your established periodicity schedules for these services.
>
> Additionally, the Act requires that any service which you are permitted to cover under Medicaid that is necessary to treat or ameliorate a defect, physical and mental illness, or a condition identified by a screen, must be provided to EPSDT participants regardless of whether the service or item is otherwise included in your Medicaid plan.

State Medicaid Manual, § 5110 (emphasis added). Accordingly, this Court should reject defendants' assertion that § 1396a(a)(43)(C) requires only payment for services rendered and uphold the portions of the consent decree requiring the provision of EPSDT services.

CONCLUSION

For the foregoing reasons, we respectfully request that the Court deny defendants' motion to vacate the consent decree.

DATED: February 18, 2011

Respectfully submitted,

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