

Question: *My client is a child on Medicaid with multiple physical disabilities who receives personal care services. Currently, he receives twelve hours of services and his personal care attendant accompanies him to school. Among other things, the attendant helps him to get on and off the school bus, to eat lunch, and to use the bathroom. I understand that personal care services are an optional Medicaid service but that my state covers them. However, as a cost saving measure, the state Medicaid agency recently reduced coverage to six hours per day, maximum, and also limited that coverage to the home. My client has received a notice that her child will be subject to these reductions in services. Is this correct?*

In addition, my client lives with a family friend who has guardianship over him. The guardian often has difficulty finding qualified personal care providers. She has applied to be a personal care provider, so that she can be compensated for some of the hours that she takes care of my client. The state Medicaid agency has informed her that, because she is acting in the position of a parent, she cannot be a paid provider. Is this correct?

Brief answer: No. Personal care services for children and youth under age 21 should be provided in places other than the home when the need for this service is justified. In addition, only legally responsible family members are prohibited from being paid providers.

Discussion: Personal care services are an optional Medicaid service. 42 U.S.C. § 1396d(a)(24). Personal care services are those services furnished to an individual who is not a resident of a hospital or institution that are: (1) authorized for the individual by a physician in accordance with a plan of treatment or (at state option) otherwise authorized in a service plan approved by the state; (2) provided by a qualified individual who is not a member of the individual's family; and (3) furnished in the home or other location. *Id.*

Federal regulations further define personal care services. See 42 C.F.R. § 440.167. The regulations parrot the statute, except in one significant aspect: Section 440.167(a)(3) allows personal care services to be furnished in a home, and "at the state's option," in another location.

For children, the discrepancy between the statute and regulations should not be a significant issue. This is because coverage of children's services is controlled by the federal requirements for Early and Periodic Screening, Diagnostic and Treatment (EPSDT) services. Specifically,

children and youth under age 21 who are Medicaid beneficiaries are entitled to EPSDT services. See 42 U.S.C. §§ 1396a(a)(10)(A), 1396a(a)(43), 1396d(a)(4)(B), 1396d(r). EPSDT is a comprehensive benefit that includes a broad array of diagnostic and treatment services, including "necessary ... treatment, and other measures described in subsection (a) of this section [§ 1396d(a)] to correct or ameliorate" physical and mental conditions, "whether or not such services are covered under the State plan" for adults. *Id.* at 1396d(r)(5). As stated by the Centers for Medicare & Medicaid Services (called HCFA at the time):

[U]nder EPSDT requirements, a State must cover any medically necessary services that could be part of the basic Medicaid benefit if the State elected the broadest benefits permitted under federal law (not including HCBW [home and community based waiver] services, which are not a basic Medicaid benefit). Therefore, EPSDT must include access to case management, home health, and personal care services to the extent coverable under federal law.

U.S. Department of Health and Human Services, Health Care Financing Administration, Dear State Medicaid Director at 11 (Jan. 10, 2001) (Olmstead Update No. 4, Att. 4-B). See generally Health Care Financing Administration, Transmittal Notice MCD-90-90 (Region IV) (Sept. 18, 1990); Memorandum from Christine Nye, Health Care Financing Administration Medicaid Director, to Regional VIII Administrator, Health Care Financing Administration (1991) [transmittals available at <http://www.healthlaw.org>]. See generally *Chisholm v. Hood*, 110 F. Supp. 2d 499 (E.D. La. 2000) (finding a violation of EPSDT to restrict therapy services to schools and to limit home health services to only those mandated by federal regulations).

The EPSDT laws can be applied to the fact situation at hand to maintain personal care services for the child during school hours and for twelve hours. The federal statute defines personal care services to include services furnished at locations other than the home, e.g. the school. This coverage applies whether or not the State plan for adults is covering the service to the full extent authorized by the § 1396d(a). See *id.* at 1396d(r)(5). Similarly, while the State may place limits on the number of hours of services for adults, it cannot automatically do so for children (because the federal statute does not contain such a limit). Thus, if your client needs twelve hours per day of personal care services to ameliorate his condition, then EPSDT should cover those services to the extent your client needs them — even if the state places a quantitative limit on personal care services (e.g., six hours per day) or does not cover them at all for adults.

Regarding Medicaid provider status of the guardian, under the federal law, personal care services can only be provided by a qualified individual "who is not a member of the individual's family." See 42 U.S.C. § 1396d(a)(24); 42 C.F.R. § 440.167(a)(2). The regulation further

defines a family member as "a legally responsible relative." 42 C.F.R. § 440.167(b). Therefore, your client's guardian should not be prohibited from being a care provider for him.

For information about when Medicaid coverage of services in school, see NHeLP's January 2003 Q & A.