

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
PARIS DIVISION

JENEVA FRAZAR, as next friend of her minor children, JAMES CURTIS BROWN, CRYSTAL NOELEVOL BROWN, JEREMIAH DeMARK PHILLIPS, RUSSELL KLINE WALTON, and DOMINIQUE SHANTEL FRAZAR, and LINDA FREW, as next friend of her minor child, CARLA FREW,

Plaintiffs,

v.

RICHARD LADD, Commissioner of the Texas Health and Human Services Commission, in his official capacity, the TEXAS HEALTH AND HUMAN SERVICES COMMISSION, DAVID SMITH, Commissioner of the Texas Department of Health, in his official capacity, and the TEXAS DEPARTMENT OF HEALTH,

Defendants.

Vertical line of dollar signs separating plaintiff and defendant names.

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF TEXAS

SEP 1 - 1993

Signature of David S. Williams, Clerk, with 'BY DEPUTY' text.

CIVIL ACTION NO. 3:93cv65

PLAINTIFFS' ORIGINAL COMPLAINT

INTRODUCTION

1. Despite a Congressional mandate, Defendants do not provide adequate health care services to indigent Texas Medicaid recipients who have not reached the age of 21. Defendants do not adequately provide Early, Periodic, Screening, Diagnosis and Treatment (EPSDT) services to young Medicaid recipients, as required by 42 U.S.C. §§ 1396a(a)(43); 1396d(r).

2. EPSDT is intended to provide comprehensive, timely and cost effective health care services to indigent youth. By failing to meet EPSDT requirements, Defendants leave some of the most

vulnerable children in Texas without adequate health care services and at risk for increasingly severe and costly health problems.

3. Plaintiffs challenge Defendants' policies and procedures, which deprive Plaintiffs under color of state law of rights, privileges and immunities guaranteed by 42 U.S.C. §§ 1396a(a)(43); 1396d(r), which are sufficiently clear to allow enforcement by this Court. Plaintiffs seek declaratory and injunctive relief, 28 U.S.C. §§ 2201, 2202; 42 U.S.C. § 1983; F.R.Civ.P. 57, 65; certification of this case as a class, F.R.Civ.P. 23, attorney's fees and costs. 28 U.S.C. § 1920; 42 U.S.C. § 1988.

#### JURISDICTION

4. This Court has jurisdiction in accordance with the provisions of 28 U.S.C. §§ 1331, 1343(3) and (4).

#### VENUE

5. Venue is proper because a substantial part of the events or omissions that form the basis of this claim occurred in this judicial district. 28 U.S.C. § 1391(b).

#### PARTIES

6. Plaintiff Jeneva Frazar and her children reside at 202 W. Washington, Paris, Lamar County, Texas 75460. She appears in this case as next friend of her minor children, James Curtis Brown (born April 30, 1986), Crystal Noevelol Brown (born October 4, 1987), Jeremiah DeMark Phillips (born December 4, 1989), Russell Kline Walton (born October 27, 1990) and Dominique Shantel Frazar (born November 15, 1992).

7. Plaintiff Linda Frew and her daughter reside at 650 N.W. 1st Street, Cooper, Delta County, Texas 75432. Linda Frew appears in this case as next friend of her minor daughter, Carla (born June 28, 1980).

8. Defendant Richard Ladd is the Commissioner of the Texas Health and Human Services Commission. He is sued in his official capacity only. He may be served with process at the offices of the Texas Health and Human Services Commission, 4807 Spicewood Springs Road, Building 4, Austin, Texas 78759. As Commissioner, Defendant Ladd is responsible for the policies and administration of the Texas Health and Human Services Commission.

9. Defendant Texas Health and Human Services Commission may be served with process at its offices at 4807 Spicewood Springs Road, Building 4, Austin, Texas 78759. The Texas Health and Human Services Commission is the "single state agency," 42 U.S.C. § 1396a(a)(5), that administers or supervises the administration of the Texas Medicaid program, including EPSDT. The Commission also has final authority over the policies of the Texas Medicaid program, including EPSDT.

10. Defendant David Smith is the Commissioner of the Texas Department of Health. He is sued in his official capacity only. He may be served with process at the offices of the Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756. As Commissioner, Defendant Smith is responsible for the policies and administration of the Texas Department of Health.

11. Defendant Texas Department of Health may be served with process at its offices, 1100 West 49th Street, Austin, Texas 78756. On September 1, 1993, the administration of health and human services programs in Texas was reorganized. As a result of the reorganization, the Department is now responsible for proposing policies for the Texas Medicaid program, including EPSDT. The Department of Health now also administers the Texas Medicaid program, including EPSDT.

#### CLASS CERTIFICATION

12. Plaintiffs bring this action on behalf of themselves and a class of those who are similarly situated. The class consists of present and future Texas Medicaid recipients who are eligible for EPSDT services because they have not reached the age of 21. F.R. Civ. P. 23. According to official reports of the Texas EPSDT program, about 1,200,000 Texans were eligible for EPSDT services in fiscal year 1992. The number of children who are eligible for EPSDT services should be even larger in the coming years.

13. A class action is appropriate because 1) the class is so numerous that joinder of all members is impracticable, 2) this case involves questions of law or fact that are common to the class, 3) Plaintiffs' claims are typical of the claims of the class, and 4) Plaintiffs will fairly and adequately protect the interests of the class. F.R. Civ. P. 23(a).

14. Further, this case should be maintained as a class action because Defendants have acted or refused to act on grounds generally applicable to the class, so final injunctive and

declaratory relief is appropriate with respect to the class. F.R. Civ. P. 23(b)(2).

#### FACTS

##### The Plaintiffs

##### Jeneva Frazar and her Children

15. Jeneva Frazar is a young, single mother. Her five minor children live with her: James Curtis Brown (born April 30, 1986), Crystal Noelevel Brown (born October 4, 1987), Jeremiah DeMark Phillips (born December 4, 1989), Russell Kline Walton (born October 27, 1990) and Dominique Shantel Frazar (born November 15, 1992).

16. Even though Jeneva Frazar's children have received Medicaid benefits continuously since birth, none of them has received all of the health screens that the Texas EPSDT periodicity schedule envisions. For example, the infant, Dominique, was born on November 15, 1992 and is 9 months old. According to the EPSDT periodicity schedule for health screens, she should have had 6 screens by now. But, she has only been to the doctor once since she left the hospital after her birth.

17. Further, even though the EPSDT periodicity schedule indicates that children should begin to see a dentist for preventive and palliative care, if needed, at age 1 and continue every six months thereafter, only James and Crystal have ever been to the dentist. They have seen a dentist once. Crystal had a cavity. Neither has returned for follow-up visits.

18. Jeneva Frazar's children further suffer from health problems for which there has not been proper follow up. Crystal had lead poisoning, which was treated. The source of Crystal's poisoning was the leaded paint on the porch of the house where all of the children once lived with their mother. But, Crystal's siblings never received lead blood tests to determine accurately if they had been poisoned, even though their access to the porch was the same as Crystal's.

19. Further, Jeremiah has several health problems. He has asthma and bronchitis. His mother frequently takes him to the emergency room at St. Joseph's Hospital in Paris for care. Once, she took him to the emergency room because his gums were swollen and bleeding. It is particularly difficult for the Frazar family to make trips to the emergency room; they do not have child care, so Ms. Frazar has to take all of the young children to the hospital. They do not have a car or a telephone so arrangements are difficult at best. Further, many times, Jeremiah could probably receive care at another location, which might prevent worsening problems and would be safer, more consistent with principles of continuity of care, less traumatic and less expensive. Further, although Jeremiah's speech is slurred, he has not been treated for speech problems.

20. Russell has problems with his right leg. Instead of pointing forward in a normal direction, his foot angles toward the side. It frequently causes him pain; sometimes the pain is so bad that Russell cannot sleep at night. Russell's leg problem prevents

him from running normally. But, Russell has never seen an orthopedic or other specialist for evaluation or treatment of his leg problem.

21. Dominique, the baby, is behind on her immunizations. She has only received one set of immunizations, instead of the six (6) sets that she should have received by now. She has not received any hepatitis B immunizations, as required by EPSDT rules.

22. Jeneva Frazar and her children have virtually no knowledge about EPSDT. Defendants have not effectively informed them about program benefits. Further, Defendants have not assisted the Frazar children to get timely screens or follow up care.

Linda Frew and her Daughter

23. Linda Frew is a single mother. She is now undergoing chemotherapy for lung cancer. She has been hospitalized for mental health problems. Two of her three sons died at a young age. One died at age 21 of a rare kidney disorder. The second died at age 17 of a rare form of abdominal cancer.

24. Linda and her daughter, Carla (born June 28, 1980), live together in public housing in Cooper, Delta County, Texas. They do not have a car or a telephone.

25. Delta County is a small, rural county. The County has few health care resources.

26. Carla has been a Medicaid recipient continuously since birth. During that time, she should have received 17 health screens. Carla has not received the full number of health screens indicated by the EPSDT periodicity schedule for that time period.

27. Carla has been in and out of special services classes during most of her years of schooling.

28. Until September 1, 1993, the Texas Department of Human Services was the agency that had responsibility for the EPSDT program.

29. From February 23, 1987 to November 05, 1990, Carla was in the temporary custody of the Texas Department of Human Services. From February 23, 1987 to February 27, 1989, she was in foster care in Hopkins and Lamar County, Texas. Carla remained in the Department of Human Services' custody for 21 months after she returned to live with her mother, Linda. Linda now has custody of Carla.

30. While the Department of Human Services had custody of Carla, the Department supervised Carla's health care. For example, Defendant's staff took Carla to Dallas several times to see a specialist because her triglycerides were so high. They also took her for several psychological and neurological evaluations. Of course, mental health problems are common among children who live in foster care. Carla's mental health diagnoses ranged from dysthymia (a mood disorder) to severe right brain hemisphere dysfunction and possible childhood schizophrenia. Various treatment plans were recommended. Further, while she was in the Department's custody, Carla was grossly obese.

31. After Carla returned to live with her mother and the Department of Human Services ceased to have conservatorship over her, DHS no longer assisted with Carla's health care. Carla has not



had any medical screens and has only been to the dentist once since being returned to her mother's custody on November 05, 1990. She is still grossly obese (5'4", 232 1/2 lbs. on March 9, 1993), but she has not received nutritional counseling or treatment beyond advice to cut back on her caloric intake. There has been no follow up on this issue. Further, Carla has had pain in her abdomen on and off for the past year. Her triglycerides and cholesterol have not been assessed. Carla's mental health problems, if any, are unevaluated and continue to go untreated. Carla's lack of current mental health services is particularly egregious because of her past diagnoses of mental health problems and the many stresses that Carla faces. Those stresses include the premature deaths of her two brothers (one because of cancer) and her mother's current cancer.

32. Further, Defendants have not assisted Carla Frew to receive the EPSDT benefits to which she is entitled.

33. Carla's ongoing health problems that have not been properly evaluated or treated recently.

34. Linda and Carla Frew have virtually no knowledge about EPSDT. Defendants have not effectively informed them about program benefits. Further, Defendants have not assisted Carla to get timely screens or follow up care. This failure is particularly problematic because the Department of Human Services (Defendant Department of Health's predecessor in the administration of EPSDT) has first hand knowledge of Carla's health care needs.

### The Medicaid Program

35. Congress enacted Title XIX of the Social Security Act in 1965. 42 U.S.C. § 1396 et. seq. Title XIX is also known as the Medicaid program. Medicaid is administered cooperatively by the federal and state governments. Its purpose is to provide necessary medical services to eligible indigents.

36. The State of Texas participates in the Medicaid program.

37. The federal government provides approximately 64 cents of every dollar that the Texas Medicaid program spends on health care services for the poor. Texas must comply with minimum federal Medicaid requirements to receive this federal financial participation.

38. Further, the Health Care Financing Administration (HCFA), the federal agency that administers EPSDT, has published program guidelines in the State Medicaid Manual. Sections of the Manual are mandatory and binding upon the states.

#### The Early, Periodic, Screening, Diagnosis and Treatment Program

39. Congress has long been concerned about poverty among children in the United States. Congress is particularly concerned about the health of indigent children in this country, because their living circumstances frequently contribute to or exacerbate health problems. Further, undiagnosed or untreated health problems may prevent indigent children from developing normally and inhibit their ability to contribute to society.

40. EPSDT is one of Congress' most significant responses to the health care needs of our country's indigent children. EPSDT is

a mandatory Medicaid service; states must comply with minimum federal EPSDT requirements in order to participate in the Medicaid program and receive federal financial participation.

41. EPSDT involves a comprehensive program of screens, or check ups, to assess children's health and follow up care to address problems that are diagnosed during screens. EPSDT programs cannot limit the services that they provide to children, as Medicaid programs can limit services to adults. Instead, when medically necessary, EPSDT programs must provide all services allowed by the federal Medicaid Act, whether or not they are included in the state's Medicaid Plan. 42 U.S.C. § 1396d(r).

42. The Omnibus Budget Reconciliation Act of 1989 (OBRA'89) strengthened Medicaid programs' obligations to EPSDT recipients. Congress' intent was to incorporate the EPSDT regulations that existed in 1984 into OBRA'89 and also to expand Medicaid programs' EPSDT obligations beyond those incorporated in the regulations. The regulations have not been revised since OBRA'89 became effective. But, after OBRA'89 became effective, HCFA revised the EPSDT guidelines that are incorporated in the State Medicaid Manual.

#### Screens

43. EPSDT programs must provide preventive health care to indigent Medicaid recipients under the age of 21. A significant and mandatory component of the EPSDT program is regular screens, or "check ups," to assess recipients' health. One purpose of screens is to identify indigent recipients' health problems before they

worsen, so that problems can be corrected in a manner that is humane, cost effective and that prevents or lessens future problems when possible.

44. EPSDT programs must provide screens to assess recipients' physical, mental, vision, hearing and dental health and to provide immunizations. Screens and immunizations must be provided in accordance with periodicity schedules that meet professional standards. 42 U.S.C. §§ 1396d(r)(1)(A)(i); (2)(A)(i); (3)(A)(i); (4)(A)(i); State Medicaid Manual § 5140.

45. In spite of the federal requirements concerning screens, the Texas EPSDT program does not assure that EPSDT recipients receive screens when due. Plaintiffs' children have received few timely health screens. Further, none has received regular dental screens. This situation is common. See, below, Paragraph 44.

46. Congress requires EPSDT programs to meet annual participation goals established by the Secretary of Health and Human Services, to assure that an increasing number of EPSDT recipients actually receive screens. 42 U.S.C. § 1396d. The Secretary established participation goals for health screens; EPSDT programs must achieve 80% participation by 1995. Expected annual increases are based upon each state's participation rates in 1989, the baseline year. State Medicaid Manual § 5360.

47. The Texas EPSDT program fails to meet the Secretary's participation goals. The goals and Texas participation rates are as follows:

FISCAL YEAR	GOAL	RATE
1989	24%	
1991	34%	33.2%
1992	46%	36.69%
1993	58%	
1994	69%	
1995	80%	

Further, the Texas EPSDT program is falling farther behind its targeted participation goal each year. Although it was less than 1% behind its goal in fiscal year 1991, it was almost 10% behind its goal in fiscal year 1992.

48. In addition, most Texas EPSDT recipients do not receive dental, vision or hearing screens as required by the Texas periodicity schedules. According to the periodicity schedule, EPSDT recipients should receive dental screens every 6 months beginning at age 1. 40 T.A.C. § 33.306(c). They should also receive vision and hearing screens. According to official Texas EPSDT reports, few actually receive dental, vision or hearing screens:

<u>FY</u>	<u># ELIGIBLE</u>	<u>Dental</u>	<u>Vision</u>	<u>Hearing</u>
1991	1,029,776	172,014	152,793	70,667
1992	1,197,648	199,218	182,566	79,805

49. The Texas EPSDT program does not employ policies or procedures to assure that EPSDT recipients receive timely health, dental, vision, or hearing screens. State Medicaid Manual § 5310. The Texas EPSDT program further does not employ policies or procedures to assure that recipients who "are overdue for services" receive them. State Medicaid Manual § 5330.

Identifying and Informing Recipients and  
their Families about EPSDT

50. To ameliorate problems with low EPSDT participation, Congress requires EPSDT programs to aggressively identify and inform families whose children are eligible for EPSDT services about the benefits of EPSDT. 42 U.S.C. 1396a(a)(43)(A). Federal regulations further require EPSDT programs to inform eligible individuals about EPSDT services and how to obtain them. 42 C.F.R. §§ 441.56(c)(2); 441.62(b)(1984)(1984).

51. Also, the State Medicaid Manual requires EPSDT programs to inform eligible persons about EPSDT effectively and in a timely manner, generally within 60 days of eligibility. § 5121A. Further, the Manual instructs that "[a] combination of face-to-face, oral and written informing activities is most productive. ... it is effective and efficient to target specific informing activities to particular 'at risk' groups." Id. The State Medicaid Manual further requires EPSDT programs to offer transportation and scheduling assistance prior to each due date of a child's periodic examination." § 5150 (emphasis added).

52. In spite of the requirement that EPSDT programs effectively inform recipients and their families about EPSDT benefits, Plaintiffs and their children are unaware of EPSDT. This situation is common, particularly because the Texas EPSDT program does not employ effective means to inform recipients about program benefits. Further, the Texas EPSDT program does not comply with the requirements imposed by the State Medicaid Manual.

#### Follow Up Treatment

53. EPSDT programs must provide "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)(5). EPSDT programs must refer recipients for "diagnosis without delay and follow-up to make sure that the recipient receives a complete diagnostic evaluation.... (They must also) [d]evelop quality assurance procedures to assure comprehensive care for the individual." State Medicaid Manual § 5124A. Further, EPSDT programs must "[e]mploy processes to ... insure timely initiation of treatment" and assure that recipients who "are overdue for services" receive them. Id. § 5330. But, according to official EPSDT reports, only 139,072 of the almost 1,200,000 Texas EPSDT recipients received referrals for corrective treatment in fiscal year 1992.

54. The Texas EPSDT program does not have effective policies or procedures to insure that EPSDT recipients receive needed health care, diagnosis, treatment or other measures needed to correct or ameliorate defects and physical and mental illnesses and conditions discovered during screens.

#### Case Management

55. The Texas EPSDT program does not make case management available to all recipients. Case management is a service that assists families to assure that their children receive needed health care in a manner that is coordinated, appropriate and cost

effective. It could appreciably improve EPSDT recipients' coordinated and timely access to screens and other EPSDT services. Further, case management is a service that federal law permits Medicaid programs to cover. 42 U.S.C. §§ 1396d(a)(19); 1396n(g). So, EPSDT programs must provide it for children. 42 U.S.C. § 1396d(r).

Services are not Uniformly Available Statewide

56. Finally, the Texas EPSDT program does not assure that EPSDT services exist, operate and function uniformly in all political subdivisions of the state. 42 U.S.C. § 1396a(a)(1); 42 C.F.R. § 431.50.

FIRST CAUSE OF ACTION

57. Defendants and the Texas EPSDT program do not employ policies or procedures to assure that recipients receive health, dental, vision and/or hearing screens in accordance with the Texas EPSDT periodicity schedules. 42 U.S.C. §§ 1396d(r)(1)(A)(i); (2)(A)(i); (3)(A)(i); (4)(A)(i); State Medicaid Manual §§ 5310;5330.

SECOND CAUSE OF ACTION

58. Defendants and the Texas EPSDT program do not meet the annual participation goals that the Secretary of Health and Human Services established for the Texas EPSDT program. 42 U.S.C. § 1396d(r); State Medicaid Manual § 5360.

THIRD CAUSE OF ACTION

59. Defendants and the Texas EPSDT program do not effectively inform all persons in the State who are under age 21 and who are



eligible for Medicaid of the availability of EPSDT services. 42 U.S.C. § 1396a(a)(43)(A); 42 C.F.R. § 441.56(a); State Medicaid Manual § 5121.

FOURTH CAUSE OF ACTION

60. Defendants and the Texas EPSDT program do not employ policies or procedures to assure that recipients receive "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)(5); State Medicaid Manual §§ 5124A; 5330.

FIFTH CAUSE OF ACTION

61. Defendants and the Texas EPSDT program do not assure that case management services are available to all EPSDT recipients as needed. 42 U.S.C. § 1396d(r).

SIXTH CAUSE OF ACTION

62. Defendants and the Texas EPSDT Program do not assure that EPSDT services exist, operate and function uniformly in all political subdivisions of the state. 42 U.S.C. § 1396a(a)(1); 42 C.F.R. § 431.50.

THEREFORE, Plaintiffs request that the Court:

Certify the existence of a class of all present and future Texas Medicaid recipients who qualify for EPSDT because they have not reached the age of 21;

Declare that Defendants violate the federal Medicaid Act, regulations and mandatory portions of the State Medicaid Manual by failing to comply with minimum EPSDT standards;

Preliminarily and permanently enjoin Defendants from violating federal EPSDT standards;

Order Defendants to pay to Plaintiffs' attorneys reasonable fees and costs;

Order any other relief that is appropriate.

ATTORNEYS FOR PLAINTIFFS

Respectfully submitted,

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VERIFICATION

THE STATE OF TEXAS §

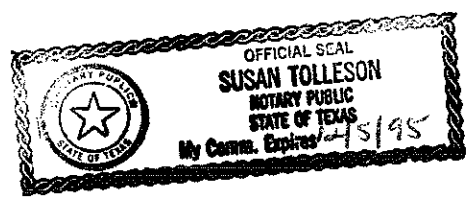
COUNTY OF DELTA §

LINDA FREW, being first duly sworn, deposes and says that she has read the foregoing Complaint, and that the facts stated therein which relate to her and her child are true to her own knowledge.

Linda Frew  
LINDA FREW

SUBSCRIBED AND SWORN TO BEFORE ME on this the 31<sup>st</sup> day of August, 1993.

Susan Tolleson  
NOTARY PUBLIC, STATE OF TEXAS



VERIFICATION

THE STATE OF TEXAS §

COUNTY OF LAMAR §

JENEVA FRAZAR, being first duly sworn, deposes and says that she has read the foregoing Complaint, and that the facts stated therein which relate to her and her children are true to her own knowledge.

Jeneva Frazar  
JENEVA FRAZAR

SUBSCRIBED AND SWORN TO BEFORE ME on this the 31<sup>st</sup> day of August, 1993.

Susan Tolleson  
NOTARY PUBLIC, STATE OF TEXAS

