1993 WL 497232
United States District Court,
N.D. Texas, Dallas Division.

THOMPSON, et al.
v.
RAIFORD, et al.

No. 3:92–CV–1539–R.
|
Sept. 24, 1993.

Opinion

BUCHMEYER, District Judge:

***1** The Court finds and orders that:

1. The requirements of Fed.R.Civ.P. 23(a) and (b)(2) are met. A nationwide class is certified as follows: All Medicaid-eligible children under age 72 months who are eligible to receive Early and Periodic Screening, Diagnosis, and Treatment ("EPSDT") program services. The term "Medicaid-eligible" means an individual who has been determined under the authority of a state Medicaid agency as eligible to receive medical assistance under the Title XIX of the Social Security Act, 42 U.S.C. § 1396, and who remains so eligible.

2. The terms of the settlement agreement are fair to the members of the class.

3. The class has been adequately represented in the negotiation which resulted in the settlement agreement.

4. Class notice has been adequately provided through the publication and distribution of notice of this Settlement Agreement to the following organizations that represent low-income children on Medicaid and other health-related issues:

(1) National Clearinghouse for Legal Services

(2) National Health Law Program

(3) National Housing Law Project

(4) National Center for Youth Law

(5) Children's Defense Fund

(6) Alliance to End Childhood Lead Poisoning

(7) ABA Center on Children and Law

(8) Trial Lawyers for Public Justice

(9) Lawyers Committee for Civil Rights Under Law

(10) Puerto Rican Legal Defense and Education Fund

(11) Mexican American Legal Defense and Education Fund

(12) Environmental Defense Fund

(13) Sierra Club Legal Defense Fund

(14) Natural Resources Defense Council

5. This action against defendant United States of America and Secretary of the Department of Health and Human Services, Donna Shalala, is an action seeking solely injunctive and declaratory relief.

6. Upon an independent review of all the pleadings and the agreement of the parties, the Settlement Agreement is found to be fair, adequate and reasonable, and pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, the same is approved.

7. Except as provided in paragraph 7 of the Settlement Agreement, the case against the federal defendants is dismissed with prejudice.

It is so ordered.

This Settlement Agreement is made by and on behalf of Lois Thompson, on behalf of and as next friend to Taylor Keondra Dixon, Zachery X. Williams, Calvin A. Thompson and Prentiss Lavell Mullins; People United for a Better Oakland; Denver Action for a Better Community; New York City Coalition to End Lead Poisoning; Robin Gourley on behalf of and as next friend to Bryan Alan Gourley, Wesley Kyle Gourley, Bridget Michelle Gourley, Linda Danielle Gourley, and Betsey Irene Gourley; Tearrah Roberson on behalf of and as next friend to Juan Wilkins; and Mary Marie Roberson on behalf of and as next friend to Ashard Moore, Jason Rollins, Ashea Roberson, and Nasheika Roberson, Plaintiffs herein; and defendant, Donna Shalala, Secretary, United States Department of Health and Human Services, in the above-entitled action by and through the parties' undersigned attorneys.

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***2** WHEREAS, the parties agree that childhood lead poisoning is a serious health problem facing children in America today. The parties further agree that the continuation of a cohesive program to address the problem of childhood lead poisoning is desirable.

WHEREAS, the parties agree that HHS, through the Health Care Financing Administration ("HCFA"), defines appropriate blood lead level assessment by reference to various current sources of medical expertise, including, most importantly, the periodic statements of the Public Health Service's Centers for Disease Control and Prevention ("CDC") on "Preventing Lead Poisoning in Young Children."

WHEREAS, the parties believe that the majority of Medicaid-eligible children are at high risk for lead poisoning.

It is hereby agreed, by and between the parties, appearing through their undersigned attorneys, that this action is settled on the following terms:

1. In accordance with Federal Rules of Civil Procedure 23(a) and (b)(2), the parties agree that this action shall proceed as a nationwide class action effective as of the date of notice to the class, defined as "all Medicaid-eligible children under age 72 months who are eligible to receive Early and Periodic Screening, Diagnosis, and Treatment ("EPSDT") program services." The term "Medicaid-eligible" means an individual who has been determined under the authority of a state Medicaid agency as eligible to receive medical assistance under Title XIX of the Social Security Act, 42 U.S.C. § 1396, and who remains so eligible.

2. HHS agrees to revise the instructional and interpretive guidance concerning lead toxicity screening of Medicaid-eligible children contained in the "State Medicaid Manual" in accordance with the terms of this Settlement Agreement. Any subsequent letters or guidance to the states shall be in accordance with the revised State Medicaid Manual.

3. HHS, through HCFA's "State Medicaid Manual," will inform the states that the erythrocyte protoporphyrin ("EP") test is not to be considered an acceptable test for screening Medicaid-eligible children for lead poisoning, regardless of the child's risk level. Under the revised policy, HCFA will now require the use of the blood lead test as the only acceptable laboratory screening test for performing blood lead level assessments. In requiring use of only the blood lead test for lead screening, HCFA's revised policy will place the responsibility on the individual states to reach adequate laboratory capacity to perform blood lead testing for all Medicaid-eligible children.

4. HHS, through HCFA's "State Medicaid Manual," will inform the states that:

Lead Toxicity Screening.—All children ages 6 months to 72 months are considered at risk and must be screened for lead poisoning. Each State establishes its own periodicity schedule after consultation with medical organizations involved in child health. These periodicity schedules and any other associated office visits must be used as an opportunity for anticipatory guidance and risk assessment for lead poisoning.

***3** a. Risk Assessment. All children from 6 to 72 months of age are considered at risk and must be screened. Beginning at six months of age and at each visit thereafter, the provider must discuss with the child's parent or guardian childhood lead poisoning interventions and assess the child's risk for exposure. Ask the following types of questions at a minimum.

- Does your child live in or regularly visit an old house built before 1960? Was your child's day care center/preschool/babysitter's home built before 1960? Does the house have peeling or chipping paint?

- Does your child live in a house built before 1960 with recent, ongoing or planned renovation?

- Have any of your children or their playmates had lead poisoning?

- Does your child frequently come in contact with an adult who works with lead? Examples are construction, welding, pottery, or other trades practiced in your community?

- Does your child live near a lead smelter, battery recycling plant, or other industry likely to release lead such as (give examples in your community)?

- Do you give your child any home or folk remedies which may contain lead?

- Does your child live near a heavily travelled major highway where soil and dust may be contaminated with lead?

- Does your home's plumbing have lead pipes or copper with lead solder joints?

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Ask any additional questions that may be specific to situations which exist in a particular community.

b. Determining Risk. Risk is determined from the response to the questions which your State requires for verbal risk assessment.

- If the answers to all questions are negative, a child is considered low risk for high doses of lead exposure, but must receive blood lead screening by blood lead tests at 12 months and 24 months of age.

- If the answer to any question is positive, a child is considered high risk for high doses of lead exposure. A blood lead test must be obtained at the time a child is determined to be high risk.

Subsequent verbal risk assessments may change a child's risk category. If as a result of a verbal risk assessment or other information conveyed during a screening visit a previously low risk child is recategorized as high risk, that child must be given a blood lead test.

c. Screening Blood Lead Tests.—The term screening blood lead tests refers to blood lead tests for children who have not previously been tested for lead with the blood lead test or who have been previously tested and found not to have an elevated blood lead level. If a child is determined by the verbal risk assessment to be at:

(1) Low Risk.—A screening blood lead test is required at 12 months of age and a second blood lead test at 24 months of age.

(2) High Risk.—A blood lead test is required when a child is identified as being high risk, beginning at six months of age. If the initial blood lead test results are less than (<) 10 micrograms per deciliter (ug/dL), a screening blood lead test is required at every visit prescribed in the States' EPSDT periodicity schedule through 72 months of age, unless the child has received a blood lead test within the last six months of the periodic visit.

***4** A blood lead test result equal to or greater than (≥) 10 ug/dL obtained by capillary specimen (fingerstick) must be confirmed using a venous blood sample.

If a child between the ages of 24 months and 72 months has not received a screening blood lead test, then that child must receive it immediately, regardless of being determined at low or high risk.

d. Diagnosis, Treatment and Follow-up.—If a child is found to have blood lead levels equal to or greater than (≥) 10 ug/dL, providers are to use their professional judgment, with reference to CDC guidelines covering patient management and treatment, including follow up blood lead tests and initiating investigations to the source of lead, where indicated. Determining the source of lead may be reimbursable by Medicaid.

e. Coordination with Other Agencies. Coordination with WIC, Head Start, and other private and public resources enables elimination of duplicate testing and ensures comprehensive diagnosis and treatment. Also, public health agencies' Childhood Lead Poisoning Prevention Programs may be available. These agencies may have the authority and ability to investigate a lead-poisoned child's environment and to require remediation.

5. Nothing in this Settlement Agreement alters HCFA's policy concerning the extent to which investigations to determine the source of lead are reimbursable by Medicaid.

6. HHS, through HCFA, agrees to publish the revision as a State Medicaid Manual transmittal not more than thirty (30) days from the date this Settlement Agreement is approved by the Court with an effective date not more than ninety (90) days from the date this Settlement Agreement is approved by the Court.

7. HHS retains the right to alter the terms of its guidance to the states to respond to changes in pertinent legislation or implementing regulations, or to significant new scientific information and/or developments regarding childhood lead poisoning screening and treatment. In the event HHS makes any such alterations within one year of this Court's approval of the settlement agreement, plaintiffs and plaintiff-intervenors retain the right to re-institute this civil action challenging the legality of HHS's actions by filing a supplemental complaint. Defendant Donna Shalala, Secretary of HHS, retains the right to present any and all defenses to such an action.

In the event any such alterations are made after that date, plaintiffs and plaintiff-intervenors retain the right to institute a new civil action challenging the legality of HHS's actions, and defendant retains the right to present any and all defenses to such an action.

8. The parties agree that United States Centers for Disease Control and Prevention ("CDC") is an appropriate body to look to for guidance in the development of a childhood lead poisoning prevention program, and that the CDC's October 1991 statement entitled Preventing Lead Poisoning in Young Children ("CDC Statement") with respect to the proper protocol for pediatric lead testing is an important source of available medical knowledge regarding pediatric lead screening, testing, and treatment.

***5** 9. Defendant shall make available to plaintiffs and/or plaintiff-intervenors any non-privileged information in her possession on the efforts of state Medicaid programs to implement blood lead level testing under the EPSDT program. This information shall be made available to plaintiffs and plaintiff-intervenors within a reasonable time after a written request for such information is received by defendant.

10. The parties agree that notice to the class of this Settlement Agreement, as defined in paragraph 1 above, will be provided through the publication and distribution of notice of this Settlement Agreement to the following organizations that represent low-income children on Medicaid and other health-related issues, not to exceed fourteen (14) such organizations:

(1) National Clearinghouse for Legal Services

(2) National Health Law Program

(3) National Housing Law Project

(4) National Center for Youth Law

(5) Children's Defense Fund

(6) Alliance to End Childhood Lead Poisoning

(7) ABA Center on Children and Law

(8) Trial Lawyers for Public Justice

(9) Lawyers Committee for Civil Rights Under Law

(10) Puerto Rican Legal Defense and Education Fund

(11) Mexican American Legal Defense and Education Fund

(12) Environmental Defense Fund

(13) Sierra Club Legal Defense Fund

(14) Natural Resources Defense Council

The cost of this notice is to be borne by defendant Department of Health and Human Services.

11. Neither this Settlement Agreement nor any negotiations or proceedings in connection herewith shall be construed, offered, received as, or deemed to be evidence of an admission on the part of defendant Donna Shalala, HHS, HCFA or any of their employees, of any breach, liability or wrongdoing whatever, whether as alleged in the litigation or otherwise.

12. The obligations of this Settlement Agreement are subject to approval by the Court. Upon execution of the Settlement Agreement by the parties, the parties will file a joint motion for approval of the Settlement Agreement and approval of notice to the class with the Court and dismissal of the case on the terms of the agreed order attached to this Settlement Agreement.

13. Attorney's fees

Defendant shall pay the following listed amounts to the entities representing plaintiffs and plaintiffs-intervenors for attorney's fees, litigation expenses, and costs:

A. NAACP Legal Defense and Educational Fund, Inc. = $26,316,

B. National Health Law Project, Inc. = $8,553,

C. Bronx Legal Services = $10,526,

D. Edward B. Cloutman, III = $3,947,

E. Michael M. Daniel, P.C. = $40,658.

The payments shall be full satisfaction of all claims for attorney's fees, litigation expenses, and costs incurred through the Court approval of the settlement agreement.

The payments shall be made within 30 days of the Court's approval of the settlement agreement.

14. The parties agree that this Settlement Agreement shall be effective once it has been signed on behalf of all the parties and approved by the Court.

All Citations

Not Reported in F.Supp., 1993 WL 497232, Med & Med GD (CCH) P 41,776

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