

## Remedies for Reform

### Improving Medicaid services for Illinois children

Imagine you are the loving parent of two wonderful children. One of them gets sick. You call the pediatrician to make an appointment. During your office visit, the doctor reminds you of preventive measures to assure the best health for your offspring: immunizations, eye exams, hearing tests, and regular well-child checkups, among others. You schedule your child's next checkup before you leave the office. You are comfortable knowing that, should there be a crisis—even in the middle of the night—you can call your pediatrician's office for help.

It is a different story when your second child becomes ill. You call eight local pediatricians. Not one will see your child. You're resourceful so you check with referral agencies, hotlines, and any other source you can think of. You call



David Chizewer and Fred Cohen

twenty more doctors, some as far as thirty miles away. None will see your child. You end up holding your sick child in your arms for hours at a clinic or emergency room, hoping you won't be told that the staff doctors are too busy and you'll have to return tomorrow. You have no assurance that this same nightmare won't occur the next time your child needs medical attention. Worse, you know there's no physician you can call in an emergency.

Same parent, two stories. The difference is that the first child is your natural child, covered by your family's private medical insurance. The second child is a foster or an adopted child whose medical treatment is provided through Medicaid.

For years, many pediatricians in private practice in Cook County refused to see children covered by Medicaid. Some would, but their appointments were severely rationed. Obtaining an appointment with a pediatric specialist was nearly impossible. Most of the nearly 600,000 Medicaid-eligible children in Cook County—entitled by federal law to equal access to all forms of medical care, including preventive care under Medicaid's Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) program—received very little of that care. (see sidebar)

#### COHEN AND CHIZEWER

In 2000, Fred Cohen, '90, a principal at Goldberg Kohn in Chicago, set out to change the situation. He was spurred by a request for pro bono services received relating to a suit filed in 1992 by public-interest groups challenging the way Medicaid services were provided to children in Cook County. "This was not just a matter of equitable enforcement of a law," Cohen said. "The pediatricians had a pretty good reason for providing so few services to children on Medicaid [since] reimbursement rates were so low—less than half of what private insurance pays. Pediatricians actually lost money every time they saw a child on Medicaid. To make things worse, Medicaid paid very slowly and created plenty of other administrative hassles for doctors. At the same time, there were mountains of evidence describing the long-term harm to children of not receiving adequate care for even the most basic things like their teeth, their eyesight, and their hearing. Not only can the denial of such care create larger and more complicated medical problems later (which the Medicaid system is even less able to handle)

there's also a terrible cycle in which preventable health conditions can injure these kids—school performance, their social relationships, and their lives at home, and that can spiral into all sorts of later problems for the kids and, ultimately, for society."

David Chizewer, '91, who is also a principal at Goldberg Kohn, joined the litigation team for this case in 2003. "I knew Fred at the Law School and we had become friends here at the firm, but we hadn't had a chance to really work together before this," Chizewer said. Chizewer's interest in this case sprung from his concern for disadvantaged children. He is a founding board member and vice president of the Chicago Charter School Foundation, which runs the largest charter school in Illinois, serving over 5600 students at nine

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Chicago campuses. Roughly eighty percent of these students are Medicaid-eligible. Chizewer is also a founding member of the Illinois Network of Charter Schools, has served on the board of directors and the executive committee of a scholarship fund supporting economically disadvantaged children attending private high schools, and he was one of the original directors of College Bound, which helps economically disadvantaged students attend private and public colleges and universities.

When Chizewer signed on to Cohen's project, neither of them imagined how much they would be working together in the years to come. Combined, the two of them have committed nearly three thousand billable hours to this case. Goldberg Kohn's total investment stands at over 9500 hours.

#### THE SUIT

The state of Illinois administers and sets policy for Medicaid through the Illinois Department of Public Aid, or IDPA. The 1992 suit resulted in a stay to permit IDPA to improve children's access to services, but by 1999 it was apparent that satisfactory progress would not be made and the stay was lifted. Cohen and the other attorneys working on the case would have to persuade a federal judge that Illinois had

not provided true equal access to Medicaid services, as required by law, to "assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area." Four years of discovery, motion practice, and trial preparation followed. "We were asking a federal judge to order the Illinois legislature to spend more money in Cook County," Chizewer recalled. "We didn't want any holes in our case."

Over the course of four weeks in the courtroom of Judge Joan H. Lefkowitz in May 2004, Cohen, Chizewer, and the other attorneys presented testimony from seven pediatricians, six Medicaid recipients, several medical administrators, and experts in statistical analysis. In August Lefkowitz ruled in their favor in a 102-page decision, concluding: "[T]he plaintiffs have met their burden of establishing that the defendants

Evidence presented at trial by Fred Cohen and David Chizewer demonstrated large gaps between children's Medicaid rights and the actual services those children received in Cook County. Among them are the following:

All of the children should have received a screening test to evaluate the level of lead in their blood between the ages of 11 months and 23 months; 77.9 percent did not.

Medicaid-enrolled children are more likely than young children not on Medicaid to have elevated blood lead levels.

All of the children should have received a hearing exam between 47 months and 59 months of age; 93.6 percent did not.

67% received fewer than the three required diphtheria/tetanus vaccinations. 57% received no MMR (measles mumps rubella) immunization.

Although Medicaid allows for six doctor visits for health screenings in the first eleven months of life, 43% had no screenings at all and 61% had two or fewer such visits. Just 8% received all six examinations.

have violated their rights by failing to provide them with equal access to medical services. Plaintiffs simply do not have access to medical services which is equal to that of privately insured children.” Lefkow also held that Illinois had failed to establish programs and practices to assure that all EPSDT services were available to all Medicaid-enrolled children on a timely basis.

The decision made for a banner headline in the Chicago Tribune. Similar suits have been brought in several states, and other states have revised their Medicaid policies relating to pediatric care to bring them more into line with Lefkow’s ruling.

#### REMEDIES

Courtroom victory had to be turned into practical action by hammering out an agreement regarding remedies. Although the state had relied on counsel from its Attorney General’s office to argue its court case, it retained Skadden Arps to handle the subsequent negotiation, which lasted

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nearly a year. A consent decree that took effect on the first day of 2006 included the following provisions:

- An increase of nearly 100% in Medicaid reimbursement rates for pediatric medical and dental care
- Increased funding of qualified inner-city clinics
- Bonuses for pediatricians who act as a medical “home” for Medicaid children and insure that those children receive regular, consistent well-child care
- Better communication with recipients about their entitlements and an improved referral system for those seeking care

Illinois is also required by the consent decree to prepare regular reports on its progress in implementing the agreed-upon changes and on the actual impacts those changes have had on service to the Medicaid-eligible children. Cohen and Chizewer monitor the state’s actions and they are also preparing further action. Cohen said, “The case established that, across the board, IDPA wasn’t doing enough to get care to these children. But the consent decree focused

primarily on preventive care, which is just one step along a path. We’re committed to working with the state to make sure that it complies with the full consent decree and that we reach the end of that path.” Better access to care from specialists is the next step.

As a direct result of their work on this case, they have taken on a new project: a whistleblower action against one of the State’s largest Medicaid HMOs, alleging illegal discrimination against Medicaid recipients on the basis of their health status. Initially, both the Illinois Attorney General and the U.S. Attorney declined to take up that case, but Cohen and Chizewer’s expertise encouraged them to take a second look, and now they’re joining with Goldberg Kohn in bringing the suit.

There’s a bit of additional good news for Goldberg Kohn in the fact that federal law permits reimbursement of the expenses the firm incurred in securing the rights of children under Medicaid. “The firm has been great [throughout] the entire case,” Chizewer said. “There never was a question about the amount of resources we could devote—and our ability to recover our fees never entered the analysis at any time. We thought these children were not receiving the care that was promised to them by the Medicaid Act and our goal was to rectify that situation. Luckily, it wasn’t until after the case was decided that we learned that practically the entire medical community of Illinois thought we didn’t have that proverbial snowball’s chance of prevailing.”

Cohen added, “It turns out to be a great win-win for everyone, including Illinois taxpayers, because six hundred thousand healthier children—more than a million children, really, since these reforms will go into effect statewide—is a huge plus for the state in the long run.”