

# Investigating a Medicaid EPSDT Case

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## Records

### Examples of relevant information to look for in a child's records:

- Diagnoses (especially DSM-IV Axis I diagnoses)
- Evidence of behavioral issues
- Evidence of other mental health or therapeutic needs, such as self-esteem issues, anxiety, suicidal ideations or attempts, grief/bereavement
- Evidence of prior trauma (abuse, neglect, witnessing of violence, loss of a close relative or friend)
- Psychiatric hospitalizations
- Prior residential treatment
- Truancy, suspensions, expulsions, other behavioral issues at school
- Arrests/delinquency system involvement
- Recommendations for specific mental health services or types of treatment

### Obtaining Records

Collecting and reviewing documents is an essential part of gathering evidence for the attorney's case. An attorney should request documents as soon as he or she opens a case, if the attorney has not already done so. Depending on the length of a case and the particular activities in that case, the attorney may need to request documents more than once. This strategy is important because the attorney can see whether the child is progressing, whether any therapeutic or behavioral concerns persist, cease, or develop, and whether the provider has convened any meetings or taken any steps in response to changing circumstances. The attorney should consult local laws and procedures in advance of requesting documents to ensure the request is being made in the proper manner and to the proper entity.

### Ways to Obtain Records:

- Written request
- In-Person request
- Freedom of Information Act (FOIA) request
- Subpoena (if there is any court involvement)

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## 1. Medical Records, including Mental Health Records

Attorneys should request medical records from the child's pediatrician and any other relevant medical providers. Medical records can help an attorney figure out whether there are violations of Medicaid law related to the child's mental health needs. For example, if a pediatrician's well child check report includes a statement from the pediatrician that the child requires functional behavioral therapy because it is medically necessary, but the attorney's investigation shows that the child's mental health provider has not initiated this service, then there might be a Medicaid EPSDT violation.

Moreover, medical records can provide other useful information in helping the attorney determine what the child's needs are or what services he or she may require to address those needs. The medical records could provide information about the significance or intensity of the child's mental health needs, such as the ways in which those needs are manifesting, and therefore provide justification for certain services or for a sense of urgency in the need to secure those services. Depending on the doctor-patient relationship, doctors can obtain a variety of information about their patients, which might show up in medical records. Doctors may identify certain developmental, academic, or mental health concerns, and then make recommendations for evaluations or services. Moreover, parents, case workers, social workers and other professionals in the child's life may speak to the child's doctor about concerns about the child's mental health, which might be documented in the medical records. The doctor may have ordered an evaluation or referred the parent or child to a specialist. Or the doctor may simply make a note in the medical file that a concern exists or indicate that the child should receive mental health services or a specific mental health service. Any of these indications in a medical document by a doctor may be useful evidence for a Medicaid administrative hearing or relevant information to provide to a mental health provider as part of an intake, in the course of treatment, or at a treatment team meeting. In addition, medical documents may also contain evaluations that could be useful to the Medicaid EPSDT case. Medical records can also be useful in helping the attorney to develop the health/mental health history of the child, including a history of the child's early developmental milestones, if relevant. The child may also have prior emergency room visits, hospitalizations, or contacts with psychologists, psychiatrists, social workers or other mental health professionals of which the attorney is not aware, but which the medical records could reveal. An attorney should make medical record requests to a child's primary care doctor and to any specialists the child may have seen, including mental health providers.

***Examples of Medical Records:***

- Well-child visit reports
- Developmental evaluations
- Records of referrals to other providers for services or for evaluations
- Sick visit reports
- Emergency room records
- Medication history
- Specialist reports and evaluations

Mental health records, a type of medical record, are of course critical to an attorney attempting to secure appropriate mental health services for a child under Medicaid EPSDT. Children with behavioral or social-emotional issues may already have a mental health provider in the community who the attorney can contact to obtain records. Some examples of mental health providers are a counselor, psychiatrist, therapist, social worker, and psychologist. Information obtained in mental health records could be used to inform the attorney about the child's mental health history, the services the child has received in the past, or the services the child currently requires. The attorney should try to get information for any current or previous mental health providers or evaluating psychologists or psychiatrists and try to obtain any and all records related to the child from those providers. If the child was previously hospitalized related to a mental health emergency or in residential treatment, the attorney should seek records requests from the hospital and/or residential treatment facility. D.C. Department of Mental Health (DBH) providers are required to keep reports of any major unusual incidents and to file such reports with DBH. If applicable, these reports should be requested as well.

***Examples of Mental Health Records:***

- Evaluations
- Treatment plans
- Treatment notes
- Diagnostic and assessment information
- Medication history
- Risk assessment
- Any treatment records related to psychiatric hospitalizations, including intake documentation, evaluations/assessments, and discharge plan
- Any records related to residential treatment
- Any major unusual incident reports

***Authorization for Release of Information and Records***

An attorney will need an appropriate authorization for release of information and records that is HIPAA compliant signed by the parent or other appropriate caregiver (or the child, where applicable)

to obtain records or in some cases, an appointment order from the court showing the attorney's representation of the child might suffice.

Note that some medical or mental health providers and the D.C. Department of Behavioral Health may have their own authorization forms that they insist be signed in order to release records or information to the attorney. If the provider or DBH insists on the need for their own authorization forms to be signed and there are barriers to making that happen or the situation is urgent, the attorney should research whether the provider's own authorization forms are indeed required under law or whether the provider or DMH should accept the authorization forms or record showing court appointment of counsel.

## **2. Educational Records**

Educational records can also help an attorney ascertain whether a child has any unmet mental health needs or whether there are services that the child requires in school or in the community to address those needs. Where the child is in special education, particularly if the child is classified under special education law as having a Serious Emotional Disturbance, educational records may be helpful to an attorney advocating for mental health services under Medicaid EPSDT. Evidence of suspensions, expulsions, truancy, arrests, or other behavioral problems at school could point to unmet mental health needs. Parents (or other caregivers with educational decision-making rights) have an explicit right to gain access to their child's educational records. Specifically, under special education law, parents have a right to inspect and review their child's records any time a request is made. 34 C.F.R. § 300.613. The school must provide access to the records without unnecessary delay, but not more than 45 days after the parent makes the request. *Id.* Also, the school must provide the requested records to the parent prior to any upcoming Individualized Education Program meeting, dispute resolution session, or due process hearing. *Id.* A parent has a right not only to inspect records but actually to receive copies of those records if failure to provide the copies would effectively prevent the parent from gaining access to and inspecting the records. *Id.* This right extends to any representative of the parent, including the parent's lawyer. *Id.* If an attorney represents the child, and not the parent, he or she may still want to get a signed authorization form from the parent or caregiver in order to request school records or be prepared to show the school documentation of the court's appointment of the attorney to represent the child.

### ***Examples of Educational Records to Obtain from School:***

- Report cards
- Progress notes from teachers and related service providers (*i.e.*, counselors, speech/language pathologist)
- Teacher's notes or comments
- Individualized Education Programs (IEPs), including if appropriate:
  - Transition Plans
  - Behavior Intervention Plans (BIPs)
- IEP meeting notes
- Prior Written Notices
- Evaluations, including if appropriate:
  - Functional Behavior Assessments (FBAs)
  - Screenings for evaluations
- Standardized test scores
- Encounter Tracking Forms from related service providers
- Disciplinary records
- Attendance records
- Samples of student's schoolwork

When requesting educational records, the attorney should put the request in writing and provide a copy of the authorization of release of information and records signed by the parent to the school, as described above. The time period it takes school districts to comply with records requests varies by jurisdiction, but an attorney could expedite the process by going to the school in person to review the records or by offering to copy the records or pick up the records in person from the school.

There are a wide variety of educational records an attorney might want to obtain and review for his or her case, depending on the circumstances. These records can generally be grouped into one of three categories: cumulative (or general) records, disciplinary records, and special education records. Some schools maintain all of these records together, and other schools may keep them separately or even have different custodians for different types of records. An attorney should inquire about how the record keeping system is organized and to who records requests should be directed at a particular school so that she can obtain a complete copy of the student's educational records. Also, it may be important for an attorney to obtain educational records not only for the current school year, but for the student's entire educational career. To ensure that the attorney receives the requested documents, she should carefully choose the language to include in the records request letter. The attorney may elect to make a general request for all educational records, but the school may respond by providing only a portion of what the attorney is seeking. For example, the school may provide only the student's cumulative file and fail to provide any special education records. In the alternative, the

attorney may choose to make a more specific request and list all of the documents he or she wants from a certain time period. This approach may ensure that the attorney receives more of the documents that he or she is seeking. This more specific approach, however, may preclude the attorney from receiving additional documents that may exist in the student's file that the attorney did not know were there. The best approach may be a combination of the general and specific approach, where the attorney makes a general request for the educational records and then indicates that the request "includes, but is not limited to" specifically listed documents. This approach will help to guarantee that the school provides the attorney with as many records as possible, including those specific documents of which the attorney is already aware. Below are two sample records requests to a school, which reflect different levels of detail and different approaches. An authorization for release of records and information, signed by the parent or caregiver, should be attached to any records request letter, as reflected in the language in the sample letters below, and sent to the school or the custodian of educational records.

*Sample School Records Request #1:*

*August 10, 2010*

*Stevie Wonder  
Special Education Coordinator  
Jones Elementary School  
22 Smith Road  
Walkerville, Any State 22222*

*Re: Request for School Records for Frank Sinatra (DOB 1/22/02)*

*Dear Mr. Wonder:*

*I am writing to request a complete copy of any and all school records that you have for Frank Sinatra (DOB 1/22/02). This request includes, but is not limited to, the following documents:*

- *attendance records*
- *report cards and/or progress reports*
- *results of standardized testing*
- *disciplinary reports or records*
- *IEPs and multidisciplinary team (MDT) meeting notes*
- *progress notes*
- *prior notices and other relevant special education notifications*
- *any evaluations that may have been conducted on the child.*

*I have enclosed an authorization for release of records signed by Frank's mother, Ms. Sinatra. Please let me know when the records are available for pick up or please mail them to me at the address on my letterhead. Thank you for your timely response. If you have any questions, please do not hesitate to contact me at 222-333-4444.*

*Sincerely, Sammy Davis, Jr., Attorney*

*Sample School Records Request #2:*

*October 2, 2010*

*Loretta James, Special Education Coordinator  
ABC Elementary School  
123 4th Street  
Plainville, State 11111*

*Re: Records Request for John Doe (Date of Birth 5/15/00)*

*Dear Ms. James,*

*I am writing on behalf of my client, Jane Doe, to request the full school records file for her son, John Doe (DOB: 5/15/00). Please include copies of his main file including report cards and progress reports, his special education file including IEPs, evaluations and progress reports, his disciplinary files, and any medical records that you have.*

*I have attached an Authorization for Release of Information and Records, signed by Ms. Doe.*

*Please fax the information to me as soon as possible at 123-555-1234, sent to my attention. Otherwise, I can come to the school to pick them up.*

*Thank you in advance for your time and attention. If you have any questions, please do not hesitate to contact me at 123-555-4321, x123 or via e-mail at [greatattorney@helpingmyclient.org](mailto:greatattorney@helpingmyclient.org).*

*Regards,*

*Alan Attorney  
Counsel for Jane Doe*

### **3. Records from Other Services Providers and Other Sources**

If the student participates in activities or receives services outside of school, the attorney should consider requesting these records too. Other service providers could include mental health providers (as discussed above in medical records), tutors, mentors, non-clinical social workers, camp counselors, and athletic coaches. The documentation obtained from any of these providers could

provide extra support for the attorney's case. For example, an independent tutor may keep progress notes for each tutoring session, including notes on a child's behavior. The attorney could use this information to corroborate other information obtained on the student and to advocate for services.

#### **4. Court and Agency Records**

If the student is involved in a neglect or delinquency matter, the attorney should obtain documents from the court file. The court files can often contain relevant information in regards to advocacy for mental health services under Medicaid. The attorney should consult her local laws and court rules and procedures to determine if she is permitted to gain access to the court files and, if she is, how to go about doing so. Court-ordered evaluations, such as forensic evaluations, reports by agency social workers and other evaluations, reports or records in the court file might contain invaluable information in regards to evidence of a child's unmet mental health needs, what those particular needs are (including relevant diagnoses), and evidence in support of a particular mental health service. Moreover, if the relevant agency (CFSA, DYRS etc.) has records for the child that are not found in the court file, any records that can be shared with the attorney should be requested as well.

### **Interviewing Relevant Individuals**

An attorney advocating for medical services for a child should interview individuals who might be able to provide the attorney with information about the child's needs. If that person has information or recommendations that support the attorney's advocacy, the attorney might try to secure that person's participation at a treatment team meeting or as a witness at an administrative hearing. Alternatively or additionally, the attorney could try to secure from that person a written recommendation, evaluation or affidavit for use in a treatment team meeting, administrative hearing, or other proceeding.

#### **Examples of Relevant Information to Ask About in Interviews:**

- Diagnoses (especially DSM-IV Axis I diagnoses)
- Evidence of behavioral issues
- Evidence of other mental health or therapeutic needs, such as self-esteem issues, anxiety, suicidal ideations or attempts, grief/bereavement
- Evidence of prior trauma (abuse, neglect, witnessing of violence, loss of a close relative or friend)
- Psychiatric hospitalizations



- Prior residential treatment
- Truancy, suspensions, expulsions, other behavioral issues at school
- Arrests/delinquency system involvement
- Recommendations for specific mental health services or types of treatment
- Denials of services, temporary cessations of services, or permanent terminations of services
- Previous services or treatment methodologies that were effective
- What services or supports are needed to keep this child stable?
- Are there other individuals I should speak with regarding this child's mental health needs?

**Examples of Individuals to Interview (if applicable):**

- Child
- Parent or other caregivers
- Counselor/therapist/social worker
- Agency social worker or case worker (CFSA, DYRS, etc.)
- Teacher (including special education teacher if child is in special education)
- School counselor
- Psychiatrist
- Evaluating psychologist
- Primary care pediatrician
- Developmental pediatrician

# Administrative Advocacy

## MCO Grievances, MCO Appeals, and Fair Hearings

If a Medicaid beneficiary is denied coverage for a service, experiences a reduction in coverage, or is otherwise unhappy with the services offered, and he and he or she is enrolled in a Managed Care Organization (MCO), he or she can either file a grievance or an appeal with the MCO. Medicaid beneficiaries also have the right to request a “fair hearing” before an Administrative Law Judge. This section explains these processes.

### Internal Grievance and Appeal Information for Managed Care

Under federal law, each MCO must establish its own internal grievance and appeal procedure.<sup>1</sup> 42 C.F.R. § 438.402 (a). An appeal is a review of an “adverse benefit determination,” which includes, among other determinations, “the denial or limited authorization of a requested service, including determinations based on the type or level of service, requirements for medical necessity, appropriateness, setting, or effectiveness of a covered benefit,” “the reduction, suspension, or termination of a previously authorized service,” “the denial, in whole or in part, of payment for a service,” and/or “the failure to provide services in a timely manner.” 42 C.F.R § 438.400. The MCO must provide an enrollee with “timely and adequate notice” of an adverse benefit determination. 42 C.F.R § 438.404. Importantly, the law requires that the MCO continue the benefit at its current level pending the resolution of an appeal. 42 C.F.R. § 438.420.

Any other expression of dissatisfaction about a MCO’s service is considered a “grievance.” Grievances “may include, but are not limited to, the quality of care or services provided, and aspects of interpersonal relationships such as rudeness of a provider or employee, or failure to respect the enrollee’s rights regardless of whether remedial action is requested.” A grievance is filed by an enrollee requesting review of decision, either orally or in writing. Specific requirements for both grievances and appeals are contained in 42 C.F.R. § 438.400 *et seq.*

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<sup>1</sup> This section reflects recent updates to the federal Managed Care regulations. The final rule was issued on May 6, 2016; the majority of the rule takes effect on July 5, 2016. See 81 Fed. Reg. 27, 498 (May 6, 2016).

The regulations also require MCOs to:

- Give enrollees reasonable assistance in completing the forms and taking other procedural steps;
- Ensure that the person making the decision was not involved in the previous level of review or decision-making;
- Provide the enrollee a reasonable opportunity, in person and in writing, to present evidence and testimony and make legal and factual arguments; and
- Complete disposition of grievances within 90 days, and for an appeal within 30 days.

For specific phone numbers and contact information regarding the filing of grievances and appeals, refer to the MCO enrollee handbook.

The National Health Law Program has a [helpful resource](#) explaining the 2016 changes to the managed care regulations that are relevant here.

## Fair Hearing Information

A fair hearing is an administrative proceeding where your client has the opportunity to challenge a Medicaid action in front of an impartial Administrative Law Judge (ALJ). Under new federal regulations, an MCO enrollee must first appeal an adverse benefit determination using the MCO appeal process. If the adverse benefit determination is upheld, the enrollee may then request a fair hearing. See 42 C.F.R. § 438.402 (c).

An individual only has a right to a fair hearing when there has been state action. As explained above, action is defined as under federal law as “a termination, suspension, or reduction of Medicaid eligibility or covered services.” 42 C.F.R. § 431.201. However, under D.C. law, you can request a fair hearing in many more circumstances: “The Mayor, upon receipt of an application made pursuant to § 4-210.05, shall grant a fair hearing to any applicant for or a recipient of public assistance whose claim for assistance has been denied or has not been acted upon within a reasonable time not to exceed 45 days; or who is aggrieved by any other action or inaction of the Mayor which affects the receipt, termination, amount, kind, or conditions of his assistance.” D.C. Code § 4-210.02.

A fair hearing is an evidentiary hearing, so be careful about building a record—get as much documentation, declarations, etc., as you can. If you have to appeal, you may not get a chance to supplement the record. If you need discovery, ask for it as early as possible. The need for discovery at this stage is rare, because MCO enrollees generally have a right to access their full case file under 42

C.F.R. § 438.406 (b)(5), whereas OAH Rule 2823 is much narrower. If you want discovery, you should be able to tell the ALJ either that you tried to get the record from opposing counsel and they refused to provide it, or be able to justify why you need information that is contained outside the file.

File any subpoenas 11 days before the hearing date, at the latest. Ten days before the hearing, disclose any documents you want to use at the hearing to opposing side and to the Administrative court:

Office of Administrative Hearing, Clerk's Office Information for Medicaid Fair Hearings

Telephone: 202-442-9094  
Fax: 202-442-4789  
Address: Office of Administrative Hearings  
One Judiciary Square  
441 4th Street, NW  
Washington, DC 20001

Relevant Procedural Rules and Law:

Administrative Procedure Act, D.C. Code § 2-501 et seq.  
General procedures for use during administrative hearings

Office of Administrative Hearings Establishment Act, D.C. Code § 2-1831 et seq.  
Establishes OAH's Jurisdiction

Office of Administrative Hearing procedural rules, D.C. Mun. Code tit. 1, § 2800 et seq.

Public benefits (generally), D.C. Code § 4-205 et seq.

Public benefits hearing procedures, D.C. Code § 4-210 et seq.

Federal Rules regarding hearing procedures, 42 C.F.R. § 431.200 et seq.

*Updated by Beth Kurtz, Children's Law Center, July 2016  
Modified from a prior version by Jennifer Lav, University Legal Services*

# Litigating a Medicaid Case: Applicable Law

[42 C.F.R. Pt. 431, Subpt. E](#) (Fair Hearings for Applicants and Beneficiaries)

[42 C.F.R. Pt. 431, Subpt. F](#) (Safeguarding Information on Applicants and Beneficiaries)

[1 D.C.M.R. § 2800 et seq.](#) (Office of Administrative Hearings: Rules of Practice and Procedure)

[D.C. Code § 4-210 et seq.](#) (Hearing Procedures)