

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION**

**JOHN B., CARRIE G., JOSHUA M., MEAGAN A.,)
and ERICA A. by their next friend, L.A.; DUSTIN P.)
by his next friend, Linda C.; BAYLI S. by her next)
friend, C.W.; JAMES D. by his next friend,)
Susan H.; ELSIE H. by her next friend,)
Stacy Miller; JULIAN C. by his next friend,)
Shawn C.; TROY D. by his next friend, T.W.;)
RAY M. by his next friend, P.D.; ROSCOE W. by)
his next friend, B.W.; WILLIAM B. by his next)
friend, K.B.; JACOB R. by his next friend, Kim R.;)
JUSTIN S. by his next friend, Diane P.; ESTEL W.)
by his next friend, E.D.; individually and on behalf)
of all others similarly situated,)**

Plaintiffs,

v.

**NANCY MENKE, Commissioner, Tennessee)
Department of Health; THERESA CLARKE,)
Assistant Commissioner, Bureau of TennCare;)
GEORGE HATTAWAY, Commissioner, Tennessee)
Department of Children’s Services,)**

Defendants.

**No. 3:98-0168
Judge Haynes**

MONITORS’ REPORT ON OUTREACH

**I.
INTRODUCTION**

Pursuant to the Consent Decree in this cause, the Defendants have a responsibility to achieve and maintain outreach efforts designed to reach all members of the Plaintiffs class with information and materials in conformance with federal law. *See John B. v. Menke*, 176 F.Supp.2d 786 (M.D. Tenn. 2001). Consistent with the order appointing the

monitors principal areas of responsibilities, a review of outreach examined the "Defendants' compliance with the Consent Decree, and identifying issues and the reasons therefore, to direct the parties and the court's inquiry." (Docket Entry No. 602-1, Order at 2).

The issues identified from the Consent Decree and, what has been generally identified by the parties based upon discovery and various and numerous documents generated by the parties, are discussed below. In addressing these issues, as stated, numerous documents were reviewed, including, but not limited to, the documents listed in the footnotes. In addition to discussions with counsel for the parties and others, the following persons were interviewed or engaged in general and/or specific conversations pertinent to this report:

1. Richard A. Carter (special master)
2. Paul Newacheck (court expert)
3. Larry Platt (court expert)
4. Burton Edelstein (court expert)
5. Sara Rosenbaum (court expert)
6. Judy Womack (Assistant Director for Quality Oversight)
7. Kasi Tiller (Outreach Coordinator for TennCare)
8. Dr. Wendy Long (Director, TennCare)
9. Dr. Jim Gillcrist (TennCare Dental Director)
10. Jena Napier (Oversees EPSDT in TennCare Bureau; Oversees DOH Outreach)

In the Court's 2001 findings of facts in this cause, the following facts as to outreach were found by the court and deemed to substantiate non-compliance with the consent decree:

(a) The Defendants mostly delegated the responsibility to conduct outreach to MCO's (Managed Care Organizations) and BHO's (Behavioral Health Organizations) who had not successfully implemented the outreach requirements contained in the Consent Decree;

(b) TennCare officials were unable to implement a proactive approach to outreach which included oversight of providers to assure that proper outreach is being conducted. TennCare, through its Quality Oversight Department, did review the outreach strategies employed by the MCOs. TennCare also formulated a survey to ascertain what methods of outreach each MCO was utilizing. However, the record does not clearly indicate that TennCare actually used the surveys and reports to correct the MCO's deficient outreach efforts. TennCare failed to assure proper outreach activities by the various agencies that are involved in the TennCare program;

(c) The state's strategy of mailing fliers and brochures to inform TennCare recipients of their EPSDT (Early and Periodic Screening, Diagnosis and Treatment) rights was inadequate. The state was aware that its outreach strategies were insufficient and one TennCare employee recognized that a statewide broadcast and media campaign was necessary in order to inform children and their parents of EPSDT. Therefore, although TennCare MCOs did engage in outreach, and even conducted outreach in Spanish and other languages, the outreach conducted was ultimately ineffective;

(d) TennCare did not specifically require a certain method of outreach. TennCare did not require a base level for EPSDT oversight on the part of its contractors; and,

(e) At least some TennCare members and their parents were unaware of what EPSDT represents or even that it conferred certain benefits upon them. TennCare did not succeed in informing these individuals of EPSDT. *See John B.*, 176 F.Supp.2d at 792-95.

Thus, with these issues in mind, the following report on the status of outreach is presented.

II. OUTREACH ISSUES

1. Has the State aggressively and effectively informed TennCare enrollees of the existence of the availability of specific anticipatory guidance, immunizations, and case management? (Paragraph 39(a))
2. Does the State effectively inform individuals generally within 60 days of the TennCare MCOs receipt of notification of the child's enrollment in its plan and, if no one is eligible in the family has utilized EPSDT services? (Paragraph 39(b))
3. Does the State use oral outreach in combination with written information so that the program is clearly and easily understood? (Paragraph 39(c))
4. Does the State use effective methods to inform people who are illiterate, blind, deaf, or cannot understand English about the availability of ESPDT services? (Paragraph 39(e))
5. Does the State inform eligible individuals and their biological or foster parents about what services are available under EPSDT, the benefits of preventive healthcare, where the services are available, and how to obtain them and that necessary transportation and

scheduling assistance is available for children in institutions; this should include the administration of the institution? (Paragraph 39(f))

6. Has the State created a system so that families can readily access an accurate list of contract providers who are currently accepting TennCare? (Paragraph 39(h))

7. Does the State provide recipients assistance in scheduling appointments and obtaining transportation prior to the date of such periodic examination as requested and necessary? (Paragraph 40(i))

8. Does the State document services declined by a parent, guardian, mature competent child specifying the particular service declined so that outreach and education for other EPSDT services continues. (Paragraph 39(g))

9. Does the State maintain records of the efforts taken to reach out to children who have missed screening appointments when scheduled or who have failed to schedule regular check-ups? (Paragraph 39(1))

10. Has the Defendants established the criteria for determining what enrollees should be targeted for specific informing, activities to particular at risk groups, e.g., mothers with babies to be added to assistance units, etc.? (Paragraph 39(m))

11. Has the Defendants provided information to adolescent prenatal patients and offered them assistance in making a timely first prenatal care appointment?

III. APPLICABLE PRINCIPLES

The above issues, as are substantially all of the outreach issues, are governed by Paragraph 39 of the Consent Decree and the State was found not to be in compliance with the decree in the Court's 2001 Order. The applicable governing law is as follows:

Outreach and Informing Requirements

39. Within 180 days of entry of this decree, the state shall adopt any policies and procedures necessary to ensure that TennCare rules and guidelines clearly describe and allocate responsibility for, and require compliance with, each specific outreach and informing requirement under federal law, including, but not limited to, the following:

- (a) "aggressively and effectively" informing enrollees of the existence of the EPSDT program, including the availability of specific EPSDT screening and treatment services (e.g., lead blood assessment, anticipatory guidance, immunizations, case management);
- (b) "effectively informing; individuals [and others, set forth in (e) below], in a timely manner, generally within 60 days" of the TennCare MCO's receipt of notification of the child's enrollment in its plan and "if no one eligible in the family has utilized EPSDT services, annually thereafter..." State Medicaid Manual § 5121 (C);
- (c) use of clear and non-technical terms to provide a combination of written and oral information so that the program is clearly and easily understandable, *see id.*;
- (d) use of effective methods (developed through collaboration with agencies who have established procedures for working with such individuals) to inform individuals who are illiterate, blind, deaf, or cannot understand English, about the availability of EPSDT services; *see* 42 C.F.R. § 44L56(a)(3);
- (e) designing and conducting outreach to inform all eligible individuals and their biological or foster parents about what services are available under EPSDT, the benefits of preventative health care, where the services are available, and how to obtain them; and that necessary transportation and scheduling assistance is available; for children in institutions, this should include the administrator of the institution; *see* State Medicaid Manual § 5121(B), (C);
- (f) creation of a system so that families can readily access an accurate list of names and phone numbers of contract providers who are currently accepting TennCare; *see* 42 C.F.R. § 441.61;
- (g) offering both transportation and scheduling assistance prior to the due date of a child's periodic examination: *see* 42 C.F.R. § 441.56(a) (iv) and State Medicaid Manual § 5121(b);
- (h) providing recipients assistance in scheduling appointments and obtaining transportation prior to the date of each periodic examination as requested and necessary: *id.*;
- (i) documenting services declined by a parent or guardian or mature competent child, specifying the particular service declined so that outreach and education for other EPSDT services continues;
- (j) maintaining records of the efforts taken to reach out to children who have missed screening appointments when scheduled or who have failed to schedule regular check-ups, which shall be available to defendants and plaintiffs' counsel;
- (k) informing families of the costs, if any, of these services;

- (l) establishing criteria for determining when an MCO may be required to target specific informing activities to particular 'at risk' groups, for example: mothers with babies to be added to assistance units, families with infants, or adolescents, first time eligibles, and those not using the program for over two years, who might benefit most from oral methods of informing: *see* State Medicaid Manual, § 5121(a);
- (m) providing information on covered services to adolescent prenatal patients who enter TennCare through presumptive eligibility; and offering them, on the day eligibility is determined, assistance in making a timely first prenatal care appointment; for a woman past her first trimester; this appointment should occur within 15 days;
- (n) treating a TennCare eligible woman's request for EPSDT services during pregnancy as a request for EPSDT services for the child at birth; *see* State Medicaid Manual § 5121(B);
- (o) for institutions or homes with a number of eligible children, informing them annually, or more often when the need arises, including when a change of administrators, social workers or foster parents occurs. *See* State Medicaid Manual § 5121(B); and
- (p) for families of uninsured children who are enrolled in TennCare through county health departments, informing them regarding benefits covered under TennCare and the importance of accessing preventive services.

Outreach Performance Standard

40. The Defendants or their contractors shall achieve within 240 days and shall maintain thereafter, EPSDT outreach efforts designed to reach all members of the plaintiff class with information and materials which conform with Section V (B) (l) (a).

IV. REVIEW OF ASSERTED OUTREACH EFFORTS

The following is a review of the parties' current contentions and activities regarding the outreach issues as determined by the Monitors from the pleadings and documents provided by the parties.

The defendants contend that they are in full compliance with Paragraph 39 as it specifically delineates the outreach requirements as adopting "any policies and procedures necessary to ensure that TennCare rules and guidelines clearly describe and

allocate responsibility for, and require compliance with, each specific outreach and informing requirement under federal law...” As such, Defendants contend that they have adopted such policies and procedures, and compliance with this paragraph has been fulfilled. ¹

In support of its position, Defendants cite the change of the name of the EPSDT program to “TENnderCare”; age specific outreach activities such as the distribution of TENnderCare information to children in public school; the MCOs’ adolescent newsletters; the formation of the teen sub-committee as part of the outreach workgroup; adolescents have been targeted by the DOH Call Center due to the lower rate of screenings in this age group; the enrollee Outreach Workgroup adding a member from the Department of Human Services to work with it; that TennCare and its External Quality Review Organization (EQRO), monitors the outreach and tracking activities of the MCOs and requires appropriate follow-up; standards related to outreach content and the number of required attempts are in the policy and contract of MCOs; MCOs are required to provide and report regarding proactive and reactive outreach activities and to use the TENnderCare name in their outreach efforts. ²

Additionally, Defendants identified outreach materials created and used for the EPSDT populations described as Limited English Proficiency (LEP), illiterate, deaf and blind and the various MCOs outreach materials and activities. Defendants cite to Section 2-5 of the Contractor Risk Agreement (CRA) which requires the MCOs to provide information to their members on how to obtain information in alternative formats and/or how to access translation services. Further, Defendants state that the EQRO evaluates

¹ See Defendants’ Response to Plaintiffs’ Third Set of Interrogatories at 18-29.

² *Id.*

and confirms that written information is made available to Limited English Proficiency groups.³

As to the Paragraph 39(1) requirement that TennCare or its subcontractors be able to identify those members not using the program for over two years who might benefit most from oral methods of informing, Defendants contend that it has implemented a requirement that MCOs have a process in place for determining if someone is eligible for EPSDT has used no services within a year by requiring MCOs to make two reasonable attempts to re-notify members about the availability of EPSDT in addition to other required outreach contacts.⁴

Other activities referenced by Defendants in support of their position: an Outreach Workgroup was developing subcommittees to tailor outreach to children enrolled in special education programs, the LEP population and teenager population; and, the Defendants have engaged in Public Service Announcements about TENNderCare and EPSDT targeted to English and Spanish outlets.⁵ Moreover, Defendants cite surveys administered by the Center for Business and Economic Research, College of Business Administration at the University of Tennessee in support of their effort to publicize the availability of EPSDT.⁶

Defendants further support their position by citing that the MCOs are engaged in outreach such as, requiring mental health centers to hang posters and provide brochures to enrollees, member handbooks, four quarterly newsletters, one reminder before screening is due, teen quarterly newsletters, calls to those not up to date, EPSDT tracking

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ Results Second Survey TennCare Public Awareness Campaign, August 7, 2006, Center for Business and Economic Research, University of Tennessee (TCJB0406-L-00037).

system where all calls are documented, monthly report of members who are not up-to-date with screens is sent to health department and members Primary Care Provider (PCP), targeted activities to pregnant women, families with newborns, adolescents, first time eligible members, illiterate, blind, deaf and LEP members in the household will be contacted by phone, some methods used are audio, cassettes, TTDY, Braille and telephonic translators.⁷

Other outreach efforts cited by the Defendants were the Tennessee Pharmacists Association Annual Convention where brochures on EPSDT were distributed, TNAAP EPSDT physician coding office visits and training, development and distribution of educational materials, Department of Health Central Call Center and community outreach in thirteen regions.⁸

Organizations named as engaging in outreach with Defendants were the National Health Care for the Homeless Council, Governor's Office of Children Care Coordination, Developmental Disabilities, Department of Mental Retardation, Department of Children's Services, Department of Human Services, Department of Education, Children's Special Services, Tennessee Department of Mental Health, Head Start, Family Voices, Statewide Genetics Committee, and Tennessee Voices for Children.⁹

In sum, the Defendants contend that the above outreach activities and others not listed herein, but contained in the numerous documentation referenced in support of their position, demonstrates that the State is aggressively and effectively informing TennCare

⁷ Organization of EPSDT Outreach Activities, dated September 9, 2006 provided to the Monitors by Defendants.

⁸ *Id.*

⁹ Defendants' Response to Plaintiffs' Third Set of Interrogatories.

enrollees of the existence of the EPSDT program including the availability of specific EPSDT screening and treatment services.

The record suggests that from Plaintiffs' perspective, a June 2004 report of Dr. Henry T. Ireys, an expert with Mathematica Policy Research, Inc., hired by the Defendants to assist Tennessee by providing a framework for analyzing the percentage of children who receive screening services and presenting projections for the growth in the percent of children receiving health and dental screenings, outlined what was needed to implement an EPSDT Outreach program pursuant to the Consent Decree.¹⁰

Dr. Ireys' document refers to a list of 105 problems developed in the fall of 2003 with the Defendants and the Special Master.¹¹ The 105 problems are listed in a document styled the Initial Work Plan. Problems 52 and 66 referenced the absence of a comprehensive grassroots campaign, and Problems 59, 60 and 63 pointed out the absence of effective methods for coordinating outreach activities with other state agencies.¹²

Problems 53, 54, 58, 61, 62, 64, and 65 cited the lack of methods for identifying special subgroups for outreach (e.g. parents, caregivers, teens or children with LEP, disabilities or poor reading ability; children in custody or at risk of custody; and foster parents) and appropriately adapting outreach materials to these populations. Additionally, the report notes the absence of methods for evaluating the effectiveness of the outreach campaign in Problems 55, 56, 66, 67.¹³

¹⁰ Henry T. Ireys & Tara Krissik, Mathematic Policy Research, Inc., *The EPSDT Program in Tennessee: Strategies for Enhancing Screening Percentages* (Apr. 29, 2004).

¹¹ Exhibit No. 1 to Manny Martin's Deposition. It should be noted that the Defendants assert that they have followed the majority of Dr. Ireys' recommendations. Moreover, their may be an issue by the Defendants as to the relevancy of this document in the sequence of various presentations, court suspension of enforcement and other outlines or plans to accomplish the outreach goals.

¹² *Id.*

¹³ *Id.*

The record demonstrates that TennCare requires MCO's to have a process in place for identifying EPSDT eligible members or their parents or guardians who should be the subject of outreach efforts. The Contractor Risk Agreement (CRA), provided to the MCOs, requires six outreach attempts, a member handbook, four quarterly newsletters, one reminder before screening is due, Teen quarterly newsletters, calls made to those not up to date on screenings and scheduling assistance to be was offered during calls, an EPSDT tracking system where all calls are documented, a declined services process is required for declined services by parents, guardian, or mature competent child specifying the service declined. Additionally, the CRA requires re-notification twice if no services are used, to maintain a process for determining if someone eligible for EPSDT has used no services within a year the MCO must follow up with two reasonable attempts to re-notify that enrollee; the attempt should include one attempt which can be a referral to a health department. These attempts are in addition to the required quarterly attempts outlined in the CRA.

Other requirements of the CRA are monthly reports of members who are not up-to-date with screens are sent to health departments and members Primary Care Providers and an inactive contact letter is mailed twice a year if no services are used within a year.

If undeliverable mail is received, the MCOs must complete two more attempts to find a family when mail is returned or undelivered. One of those attempts is oral.

Each MCO must provide a list of providers with names and phone numbers who are currently accepting TennCare.

The CRA requires targeted activities to pregnant women, families with newborns, adolescents, first time eligible members, those not using the program for over two years,

illiterate, blind, deaf, and LEP members in the household be contacted by phone. Some methods the MCOs use are audio cassettes, TTDY, Braille and telephonic translators.

The CRA provides that:

The CONTRACTOR shall be responsible for various activities and for informing enrollees assigned to its plan who are under the age of 21, or their parent or guardian, of the availability of early and periodic screening, diagnostic, treatment services. All Enrollee material shall be submitted to TENNCARE for approval prior to distribution and shall be made available in accordance with the requirements specified in Section 2-5. In order to comply with this requirement, the CONTRACTOR shall, at a minimum, adhere to the following:

Paragraph 2-3.u.7 of the CRA reads as follows:

(a) The CONTRACTOR must have a process in place to distribute to each member a minimum of six (6) "outreach contacts" a year from the MCO with information about EPSDT. The "outreach contacts" include: 1 member handbook, 4 newsletters, 1 reminder before a screening is due.

Information included in the member handbook regarding EPSDT services must be sent within thirty (30) days of receipt of notification of enrollment as specified in Section 2-5.b.1 and 2-6.b.1. Annually thereafter, upon the Enrollee's anniversary date of enrollment, the CONTRACTOR shall send an updated handbook, a supplemental update to the handbook, or a reminder of EPSDT services. All handbooks must be in compliance with the TennCare Marketing Guidelines and Section 2-5 of this Agreement.¹⁴

A review of the 2006 First and Second Quarterly Reports of the Managed Care Companies, reveals the required CRA information, some in more detail than others, but nonetheless, the information and efforts of outreach by the MCCs are documented therein.¹⁵ The 2005 Third and Fourth Quarterly EPSDT Reports reflect similar information.

A review of the Standardized Membership Handbook for 2006, which was provided by the Defendants as a result of an interview with TennCare officials, is marked as "Handbook Draft, 02/07/06." It contains on the inside front cover free phone numbers

¹⁴ Contractor's Risk Agreement at 84.

¹⁵ The Third Quarter EPSDT Report covers the time period of July 1 through September 30, 2006; the First Quarter is January 1 through March 31 and the Second Quarter April 1 through June 30, 2006.

to call for help, on page 3 a TennCare Foreign Language Lines which list the Languages—Arabic, Bosnian, Kurdish-Badinani, Kurdish-Sorani, Somali, Spanish and Vietnamese—and 1-800 numbers for each. Page 9 of the Handbook indicates that if English is not the member’s first language, he/she may ask for a translator when they go to their health care visits. The Draft Handbook provides a place for a number to call to be inserted by each MCO when their various membership handbooks are prepared.¹⁶

The handbook advises that there are two ways that a member may pay for health care: premiums and co-pays. It then provides that “Not everyone on TennCare pays premiums and co-pays.”

The handbook explains that a Behavioral Health Organization (BHO) plan takes care of mental health care and provides an area for each BHO to insert an appropriate phone number. Additionally, it provides enrollees with a 1-800 phone number for mental health emergencies.

The handbook advises that Doral Dental is the dental plan for children under the age of 21 and provides a 1-800 phone number and instructs enrollees to call the number to find a dentist and that it is free.

The Defendants’ special needs flyers are in English and Spanish which references that children with special health needs may see many doctors and provides what the TENNderCare check-up exam would cover.

The Bureau of TennCare by their representatives and, in some instances, a review of documents, and its web site states that the following are activities and efforts of the TennCare Bureau in outreach:

¹⁶ Because this is a draft dated February 7, 2006, I am going to assume that it is the State’s most complete and legal requirement driven document and that other previous member handbooks were either deficient or out dated in some regards in comparison to this most recent version.

1. Enrollee Outreach Workgroup. The Planning and implementation of EPSDT outreach efforts in Tennessee are coordinated by the EPSDT Enrollee outreach Workgroup, which is an entity set up and monitored by the Governor's Office of Children's Care Coordination. Members of the workgroup include representatives of the child-serving departments, as well as the Council on Developmental Disabilities (an agency which provides services to children with special health care needs and their families) and the TennCare Dental Benefits Manager, which provides dental services to TennCare children. The workgroup provides an opportunity for all of the departments and agencies to make sure that outreach materials developed reflect attention to the unique needs of the children they serve.

2. Departmental Outreach Coordinators. Both TennCare and the Department of Health have full-time staff persons whose primary job responsibility is EPSDT outreach. The other child-serving departments have staff persons who serve as a focus for EPSDT outreach within their respective departments.

3. MCC EPSDT Coordinators. All of TennCare Managed Care Contractors have staff persons who are named as EPSDT Coordinators. The Managed Care Contractors include Managed Care Organizations, Behavioral Health Organizations, a Dental Benefits Manager, and the Department of Children's Services.

4. Regional and Local DOH EPSDT Coordinators. There are regional directors/managers located in each of the 13 DOH regions. These are full-time staff persons whose primary job responsibility is to supervise the full-time TENNderCare Community Outreach Coordinators and the part-time lay workers who directly provide EPSDT outreach.

Further, Defendants have stated that TennCare has engaged in the following activities in support of their aggressive outreach:

The state has established a TENNderCare website and TEEN Care site with health information for the enrollee, information for providers, training opportunities, publications, etc. The address is www.tennessee.gov/tenncare/tenndercare.

As best as can be determined, records supplied supports that two paid commercials, one for parents and one for teens, have been produced and aired across the state. These commercials ran from November 2004 to December 2004. Other records state that 128 billboards have been produced and that these billboards were displayed in Chattanooga, Jackson, Knoxville, Memphis, and Nashville during the time period of November 2004 to December 2004.

Also two radio spots in English and Spanish were produced and aired. The subjects of these spots were "Heartbeat" (focusing on parents, to encourage them to take their children for screenings) and "I Get It" (focusing on teens).

Brochures in English and Spanish have been produced and are available for ordering by state agencies and by non-state agencies such as providers' offices, mental health centers, and schools.

Posters in English and Spanish have been produced and distributed to public schools, DHS offices, providers' offices, mental health clinics, DOH regional outreach workers, ambulatory care centers, and groups such as the Nashville Latino Organization.

The Defendants cite to a campaign to "get the word out" to children in public schools that has been in process for three years. In this program, school principals have

been required to return attestation forms indicating that the material provided has gone out to the students in their schools.

Examples of brochures were provided to the Monitors which represented those which were sent to every school in the state for distribution to children, who were asked to take them home. In school year 2005-2006, flyers and outreach kits were sent to each school. The outreach kits included brochures, band aids, and posters to be hung in the halls of the school and for school year 2006-2007, four health-specific posters and TENNderCards were sent to the public schools. The Monitors were advised that these posters were aimed at teens and focused on the following topics: yearly screens, dental, avoidance of drugs and alcohol, and depression and suicide. Additionally, TENNderCards were distributed which are small cards containing important numbers.

Health departments conduct dental screenings for public school children in schools where a large percentage of the population is on free or reduced-price lunch.

TENNderCare band aids have been produced and widely distributed at a variety of public events. Many of the band aids have been given to Department of Health Community Outreach Workers to use in their counties. TENNderCare stickers have been produced and widely distributed at a variety of public events.

Promotional packages to include newsletter articles in English and Spanish, fact sheets, helpful numbers, and posters in English and Spanish have been prepared and are available on the website for downloading.

TENNderCare trainings and health fairs are held from time to time at various places around the state and conducted by TennCare's EPSDT Coordinator.

The Provider Services unit at TennCare conducts workshops across the state for the Tennessee Medical Association and other providers. These workshops include materials about TENNderCare. They provide appointment cards with EPSDT information for providers to use have been produced and given to DOH Community Outreach workers for use in their communities.

In 2005 TennCare mailed 5,000 packets to EPSDT providers enrolled with TennCare. These packets informed providers of the required screening components, as well as information about interperiodic screenings and billing codes.

The state's Pharmacy Benefits Manager, First Health, has communicated with the Tennessee Pharmacists Association at their annual convention about EPSDT and provided brochures and band aids.

The defendants reference a statewide EPSDT collaborative effort that targets 15-20 year olds due to lower EPSDT participant and screening rations for this age group, each MCO develops a newsletter targeted to this age group to provide information regarding EPSDT and health topics relevant to adolescents. The results were shared among the MCOs in September 2006 so that the results could be used to modify existing interventions and activities in the future.¹⁷

As to Behavior Health Organizations (BHO) outreach, the Defendants state that its contract requires the BHO to inform enrollees about EPSDT when they first enroll and must conduct an outreach activity annually thereafter to update this information. That the outreach activities to be conducted must be approved by the Tennessee Department of Mental Health and Mental Retardation (TDMHDD) and BHOs are also required to produce Enrollee Education Plans which are to be developed in concert with the

¹⁷ Defendants' Response to Plaintiffs' Third Set of Interrogatories at 41-42.

Consumer Advisory Board, a subcommittee of TDMHDD's Statewide Planning Council. The BHOs' network providers who render mental health case management services are audited by TDMHDD in accordance with a Performance Monitoring Plan. The BHO audit their network providers to ensure compliance with the Supervised System of Care Manual. The BHO provides the results of the audit to TDMHDD for review.¹⁸

Defendants state that the Department of Children Services (DCS) engages in outreach activities and submits reports to TennCare on outreach on a quarterly basis which list various activities on outreach designed to educate providers, family members, foster parents and others regarding EPSDT services and benefits.¹⁹

The Defendants state that TennCare has not allocated resources to do a formal validation of DCS outreach reports.²⁰

Defendants assert that the MCOs are monitored to assure that all contractual requirements have been met by the Quality Oversight Division of TennCare which receives quarterly EPSDT reports submitted by the MCOs that outline all of their outreach activity for the quarter. Additionally, the External Quality Review Organization (EQRO) performs an annual review of MCO EPSDT activities.²¹ The EQRO validates that the MCO has policies and procedures in place to conduct outreach pursuant to CRA.

The Defendants submit that there exists dental EPSDT outreach. The outreach is performed by the Dental Benefit Manager (DBM) which is Doral Dental of Tennessee,

¹⁸ *Id.* at 47.

¹⁹ *Id.* at 48.

²⁰ *Id.* at 49.

²¹ *Id.*

L.L.C. The contract between TennCare and the DBM establishes minimum benefit and service requirements/limitations to be provided to enrollees by the DBM.²²

A review of the EQRO and discussions with TennCare officials reveal the outreach activities of newsletters, member handbook, provider directory, notice to all members under 21 years of age to make dental appointments, post card and outbound call campaigns, member education, activities to at risk population (non-English speaking, visually impaired, low literacy level, special health care needs, and Department of children Services) among others. According to the EQRO, Doral had 62 collaborations with health departments, professional organization, community groups and community health events that entailed presentations to groups, booth displays at health events, sponsorships, committee memberships and provision of oral health supplies.²³ Doral mailed 14,300 post cards to TennCare enrollees age 13 to 19 in 2004.²⁴ It also developed oral health literature that was distributed through community health events, professional conferences and through collaboration with community based organizations. In addition, Doral has provided to TennCare MCOs oral health educational articles to be included in their quarterly newsletters. The written literature has also been translated into Spanish.²⁵ Doral also cites outreach to at risk populations, such as, all materials are transferred to an audio format for the visual impaired, and low-literacy level enrollees.²⁶

²² Health Services Advisory Group, Inc. (HSAG), 2005 Provider Network Adequacy and Benefit Delivery Review Report, June, 2005 (JB003069).

²³ *Id.* at 4 (JB008601).

²⁴ *Id.* at 5 (JB008602).

²⁵ *Id.* at 6 (JB008603).

²⁶ *Id.* at 7 (JB008604).

Additionally, Doral provided oral health literature and toothbrushes to women participating in pre-natal programs throughout the State and developed a presentation for teens and youth groups.²⁷

Further dental outreach cited by the Defendants is the Tennessee Department of Health conducting oral disease prevention services for children in grades K-8 attending public schools where 50% or more of the student population participates in the school lunch program. The State asserts that many of the children enrolled in these schools are TennCare eligible.

Lastly, the Defendants references that the Tennessee Dental Association and the Pan-Tennessee Dental Association (the minority dental association) have formed a public/private partnership where dentist volunteer and provide free dental screenings for children under 21 years of age at community based events.

The Defendants assert that it engages in local community outreach with each of the thirteen (13) regions in the Department of Health. The regions have developed and implemented community specific outreach activities to address the needs and interests of their respective areas. Activities have included health fairs, minority health fairs, PTO/PTA meetings, kindergarten registrations, community festivals, home visits, faith based activities and other community events. A review of the Community Outreach Monthly Reports detail the region and the counties and the outreach activities conducted.²⁸

²⁷ *Id.* at 8, 9,10 (JB008605, JB008606, JB008607).

²⁸ The Community Outreach Monthly reports reviewed were February 2006 through June 2006 ; the thirteen regions are Sullivan County, Northeast Region, East Tennessee region, Knox county, Southeast region, Hamilton County, upper Cumberland, Mid-Cumberland, Davidson County, South central region, Madison County, west Tennessee and Shelby County. The Community Outreach program was established in 2005.

As to the issue of targeting specific populations, TennCare has a proposal which is being finalized to print flyers for special needs individuals. The intent is to print 150,000 flyers and have the liaisons from the EPSDT Enrollee Outreach workgroup distribute these to the different departments and agencies. Once finalized, the flyer will also be available on the TennCare website for downloading.²⁹

As to other targeted groups, Defendants state they have utilized the Department of Health to hold coalition meetings and county-based training sessions on EPSDT for local and state agencies that serve EPSDT children; targeted activities for blind, deaf and LEP members, to include phone contacts, conducted by TennCare MCOs, using in some instances audio cassettes, TTY, Braille and telephonic translators; information about EPSDT is provided to children with mental health/substance abuse issues and to institutions providing care for these children by the TDMHDD; information is provided to children in preschool programs and Head Start by the DOH; information and assistance in scheduling appointments are provided to families of children who are homeless by the National Health Care for the Homeless by providing brochures and flyers with information where parents can go to get well-child check-ups and access free transportation; the DOH provides assistance to pregnant adolescents presenting for determination of presumptive eligibility with includes help in scheduling prenatal appointments; and the Department of Human Services provides information to Families First recipients, a program in which many participants qualify for TennCare assistance, which includes brochures, training and posters.³⁰

²⁹ TennCare Summary of Outreach Activities; *see also* Work Group Monitoring Tool dated January 2006 (JB000057-JB000071).

³⁰ *Id.*

Moreover, the documentation reveals that Defendants' Outreach Workgroup has formed sub-committees to tailor outreach to specific populations-children enrolled in special education programs (the Special Needs Sub-Committee), the LEP population and teenager population. The Special Needs Sub-Committee includes a focus on children and parents of children with special needs.³¹

The Defendants have cited in support of their outreach effort the Department of Health developed in 2005 a Call Center designed to "aggressively and effectively inform families of all new TennCare eligible children and those recipients who are newly re-certified of the need for preventive check-ups for their children and to assist them with scheduling appointments and transportation."³²

A review of the TENNderCare Outreach Call Center Operators Protocol with a revision date of March 24, 2005 outlines the policy and procedure of the Outreach Call Center operators. It provides a detailed script and procedures in contacting TennCare enrollees including procedures for LEP enrollees. The monthly and quarterly reports from DOH reviewed by the ESPT Coordinator regarding the Call Center, lists the number of contacts attempted, the number of contacts made, appointments scheduled, the number of follow-up calls placed, the number of welcome to TennCare sessions for new enrollees and the counties where the sessions occurred.³³

The Department of Health provides an Outreach Report to TennCare detailing its compliance with contract requirements. The Call Center staffing is part of the report which indicates for January-March 2005 that the manager and four operators were currently in place; that April-June 2005 a manager and twelve (12) operators were in

³¹ Defendants' Response to Plaintiffs' Third Set of Interrogatories at 21.

³² Appendix 2 to Decl. of Thomas Catron, Ph.D. (Jan. 31, 2006), *John B. Chronology* (Doc. No. 581) at 38.

³³ Outreach Contract Monthly Report, April, 2005-July, 2005 (JB006153-JB006162).

place; and, January-September 2005 a manager and ten (10) operators made up the staff.³⁴

The DOH reports also reference progress on development of a mechanism for communicating with families with LEP. The January-March 2005 reports those meetings have been held and arrangements in place with Open Communications, a company or system that provides translations services over the phone. That most of the regions are attempting to hire community health workers who are bilingual.³⁵ The April-June 2005 report on this area states that meetings have been held and arrangements are in place with Open Communications to provide translation services over the phone with similar notations as the earlier report.³⁶ The July-September 2005 report states that translation services continue to be provided through Open Communication and it is primarily used by the call center; that translators located in local health departments are used by community staff and a few of the community staff are bilingual.³⁷

The DOH Reports also require an assessment of the progress on surveys conducted by the outreach call center to measure the effectiveness of community outreach approaches. The January-March 2005 report reads “Because the current call center staff are still in orientation and others are yet to be hired, surveys have not yet been done. They will begin after the staff is hired...”³⁸

³⁴ See JB006105, JB006126, and JB006112.

³⁵ JB006105.

³⁶ JB0061126.

³⁷ JB006126.

³⁸ JB006106.

The April-June 2005 report regarding progress to measure the effectiveness, states “while the mechanism is in place to do surveys for the regional staff, the actual surveys done are left to the discretion of field staff. To date, none have been requested.”³⁹

The July-September 2005 report regarding surveys of the outreach call center’s effectiveness of community outreach approaches concludes with the same language as the April-June 2005 report.⁴⁰

The External Quality Review Organizations (EQRO) is the Defendants mechanism for assuring that the Managed Care Organization (MCO) and Behavioral Health Organizations (BHO), (collectively the MCCs) participating in the TennCare program are in compliance with the EPSDT consent Decree.

MCOs are monitored by the Quality Oversight Division of TennCare, which receives quarterly EPSDT reports submitted by the MCOs that outline all of their outreach activity for the quarter. The EQRO performs an annual review of MCOs’ EPSDT activities. The EQRO validates that the MCO has policies and procedures in place to conduct outreach pursuant to the CRA.⁴¹

The Annual Quality Survey is a tool used to collect information from the MCCs and is customized to assess compliance with all elements of the EPSDT Consent Decree, the ruling of Judge Nixon and the applicable health plan contract.⁴²

The Bureau of TennCare contracted with an organization named Qsource as the External Quality Review Organization. This organization collected and validated

³⁹ JB006113.

⁴⁰ JB006127.

⁴¹ 2006 Early and Periodic Screening, Diagnosis and Treatment (EPSDT) Report, August 2006 Final Report, p. 4.

⁴² Defendants’ Response to Plaintiffs’ Third Set of Interrogatories at 4.

information for the 2006 EPSDT Report in conjunction with the 2006 Annual Quality Survey. The surveys began April 4, 2006 and continued to June 1, 2006.

The EQRO for 2006 reveals its findings from the calendar year 2005. It also includes the findings for calendar years 2003 and 2004. The 2006 calendar year will not be evaluated by the EQRO until its 2007 report.⁴³

The EQRO evaluates the several outreach efforts of the MCCs as they relate to the Consent Decree, the CRA and Medicaid Manual. The areas reviewed are:

1. Outreach efforts are individualized to meet the needs of enrollees;
2. The following items have been distributed to each enrollee or family a minimum of annually: 1 member handbook, 4 newsletters, and 1 reminder before a screening is due. (Handbook is sent within 30 days of enrollment, annually thereafter, the member is sent a reminder of EPSDT services;
3. The MCO customizes methods to inform individuals who are illiterate, blind, deaf, or cannot understand English, about the availability of EPSDT services;
4. A process has been maintained for determining if and EPSDT eligible enrollee has used no services within a year and follow-up with 2 reasonable attempts (in addition to the quality attempts) to re-notify that enrollee about EPSDT;
5. List of names and phone numbers of contracted providers who are currently accepting TennCare have been made available to families;
6. A process for assuring provides document specific services declined by parent or guardian has been maintained;

⁴³ 2006 Early and Periodic Screening, Diagnosis and Treatment (EPSDT) Report, August 2006, Final Report at 4.

7. Two reasonable attempts to find a family when mail is returned as undeliverable have been documented and one of the attempts was oral;
8. A process is maintained for follow-up including documenting all outreach attempts and a method to track efforts to reach enrollees missing screening. This includes a different method of outreach effort at least quality;
9. Specific informing activities have been targeted to women and families with newborns;
10. Pregnant women are informed about the availability of EPSDT for their children prior to the delivery date and are offered those services for the child when it is born;
11. Assisting was offered in making timely prenatal appointments for eligible pregnant enrollees;
12. Outreach efforts are individualized and meet the needs of enrollees; and
13. Communication is available in the languages of the major population groups served.⁴⁴

The MCC organizations reviewed by the EQRO are Blue Care, John Deere Health Plan, Preferred Health Partnership in Tennessee, TLC Family Care Health Plan, Unison Health Plan of Tennessee, Inc., VHP Community Care, Doral Dental of Tennessee, L.L.C. and TennCare Select.⁴⁵

⁴⁴ *Id.*

⁴⁵ *Id.* at 16. The Final Report states that QSource collected and validated information for the 2006 EPSDT Report in conjunction with the 2006 Annual Quality Survey. The surveys began April 4, 2006 and continued to June 1, 2006. Site visits were performed at eight MCOs, two BHO networks, and one DBM. QSource gathered information through interviews, document review, and direct observation. *Id.* at 5.

A review of the EQRO states that for BlueCare in years 2003 and 2004 there was no review of methods to inform the illiterate, blind deaf or LEP. This evaluation however, was satisfied in 2005.⁴⁶

The John Deer Health Plan also was not reviewed for the special needs group in 2003 and 2004. The evaluation was satisfactory for 2005. However, outreach efforts were partially satisfactory in 2003 because they were not individualized to meet the needs of enrollees but were satisfactory in 2004 and 2005. John Deere's evaluation was not satisfactory for two reasonable attempts to find a family when mail is returned including an oral attempt in 2003 and 2004 and was partially satisfactory for 2005.⁴⁷

The Preferred Health Partnership in Tennessee (PHP) in 2004 was partially satisfactory for outreach efforts being individualized to meet needs of enrollees but satisfactory for 2004 and 2005. PHP was partially satisfactory in 2003 and 2005 in sending a member a handbook or other EPSDT information, mailing to all EPSDT eligible members annually a reminder of EPSDT services which should include offers of transportation and scheduling assistance.⁴⁸

PHP also was not reviewed in 2003 and 2004 for failure to customize its information to inform illiterate, blind, deaf or the LEP about the availability of EPSDT services. PHP was also evaluated unsatisfactory in 2005.⁴⁹

PHP was found unsatisfactory for not developing a process requiring providers to document specific EPSDT services declined by a parent, guardian, or mature competent child.⁵⁰

⁴⁶ *Id.* at 28.

⁴⁷ *Id.* at 33-35.

⁴⁸ *Id.* at 39-40.

⁴⁹ *Id.* at 41.

PHP was found partially satisfactory in 2005 and cited for failure to include at least one oral attempt to contact the member in addition to any other attempts when mail is returned undeliverable.⁵¹ PHP was evaluated as not satisfying the requirement to develop a process that captures outreach efforts to members who have missed schedule screenings or failed to schedule regular screens and this should include a different method of outreach at least quarterly.⁵²

In the 2006 Report, PHP was found unsatisfactory for failure to establish criteria for determining when to target specific informing activities to pregnant women and families with newborns.⁵³ PHP was rated unsatisfactory for failure to offer appointment assistance for all eligible pregnant enrollees in 2003. In 2005 PHP was unsatisfactory for failure to establish a method for providing assistance in making prenatal appointments for adolescent prenatal patients who enter TennCare through presumptive eligibility and assist in making appointments for women past the first trimester.⁵⁴

The EQRO demonstrates that TennCare Select was not reviewed in 2003 and 2004 for customizing methods to inform the special needs group of illiterate, deaf, blind and the LEP, but was found satisfactory in 2005.⁵⁵

The MCO TLC Family Care Health Plan was not reviewed for methods to inform the illiterate, blind deaf and LEP for the years 2003 and 2004, but was satisfactory in 2005.⁵⁶

⁵⁰ *Id.* at 42.

⁵¹ *Id.* at 43.

⁵² *Id.*

⁵³ *Id.* at 44.

⁵⁴ *Id.* at 45.

⁵⁵ *Id.* at 50.

⁵⁶ *Id.* at 56.

Unison Health Plan of Tennessee, Inc. (Unison) was found unsatisfactory for not ensuring that providers maintained a process for documenting EPSDT services that were declined for 2005.⁵⁷

The MCO VHP Community Care (VHP) was found partially satisfactory in 2005 for not developing a process for tracking the mailing of new handbooks within 30 days of enrollment. VHP was not reviewed for methods to inform illiterate, blind, deaf and LEP in 2003 and 2004, but was satisfactory in 2005.⁵⁸

VHP was unsatisfactory in 2005 for failure to establish criteria for determining when to target specific informing activities for pregnant women and families with newborns. Additionally, VHP failed to provide a list of names and phone numbers of contracted providers who are currently accepting TennCare enrollees.⁵⁹

Doral Dental of Tennessee, LLC (Doral), the DMB, was found partially satisfactory in 2005 for failure to send a reminder of EPSDT services annually to all TennCare EPSDT eligible enrollees.⁶⁰

Lastly, the EQRO states that “during the course of conducting the Annual Quality Survey, it became apparent that there were circumstances which made it difficult to score three components of the BHO EPSDT tracking tool: Transportation/Appointment Assistance Offered, Coordination of Care with other agencies, and PCP Notification, as these components are required to be captured at the provider level instead of the “BHO

⁵⁷ *Id.* at 68.

⁵⁸ *Id.* at 73-74.

⁵⁹ *Id.* at 74-75.

⁶⁰ *Id.* at 86.

level....”⁶¹ It would appear that a verification of these elements can not be confirmed by the EQRO.

V.
CONCLUSIONS AND DESIGNATION OF THE ISSUES

The above review demonstrates a great deal of outreach efforts by Defendants, as well as, several areas of failure on the part of the MCCs to conform to the requirements of the Consent Decree.

The following conclusions are based upon the above review of the stated documents, the acceptance of the statements of parties, their representatives and others. Notwithstanding, and with this caveat, the following are the Monitors’ conclusions in the area of outreach.

A. The Defendants have been and are engaged in outreach.

The record of documents provided by the Defendants voluntarily, through pleadings, on the website and interviews with various parties clearly reflect this.

The document production and other reviewed materials and interviews demonstrate that outreach is being conducted. In Judge Nixon’s order of 2001, the Court stated “although, TennCare MCOs did engage in outreach, and even conducted outreach in Spanish and other languages, the outreach conducted was ultimately ineffective.” *John B. v. Menke*, 176 F. Supp. 2d at 793. Thus, whether the Defendants are engaged in outreach should not be an issue before the Court.

The following is a review of each issue designated earlier, with the issue regarding effectiveness reserved for last.

⁶¹ *Id.* at 236.

Does the State use oral outreach in combination with written information so that the program is clearly and easily understood?

The Defendants' written outreach efforts of the MCCs have been explored earlier. Additionally, the July 31, 2006 Semi-Annual Report (SAR) states that between January 1, 2006 to July 31, 2006 the Community Outreach staff completed 4,937 outreach activities in a total of 107,562 face to face contacts with TennCare recipients or other individuals working with recipients.⁶² The Community Outreach staff conducted fifty-two (52) direct mailings reminding recipients that their children need to receive TENNderCare exams and the staff made 6007 home visits resulting in 6610 face to face contacts.⁶³ Thus, oral outreach and written information is being used.

Is this outreach information such that the program is clearly and easily understood?

The Defendants' Work Group, John B. Activities Monitoring Tool, dated January 2006, notes that problem 54 of the September 2, 2003, 105 problems IWP, which concerned how to tract parents, caregivers, or teens with special needs because of disability or poor reading ability, agreed that "an approach to reaching individuals with poor reading ability is ensuring that all print materials related to TENNderCare are written at a 6th grade reading level."⁶⁴ This suggests that as late as January 2006 the issue of the written material's ability to communicate the information to poor readers was not resolved.

The January 2006 Work Group also discussed problem 58 of the IWP which concerned how to implement oral outreach for all children, especially for those whose

⁶² July 2006 Semi-Annual Progress Report (Doc. No. 675).

⁶³ *Id.*

⁶⁴ January 2006, Work Group Activities and Monitoring Tool at 23 (JB000059).

parents are poor readers and whose parents do not have phones.⁶⁵ The comments in the work group monitoring tool in response to this problem, states that the Department of Health outreach staff is “receiving a list of new and re-certified enrollees each week and providing oral outreach to them, that in some regions lay health workers may make home visits to those without phones, in some areas of the state efforts are publicized through radio talk shows, cable channels, posters, and use of business and training professional staff of other agencies such as DCS, mental health and DHS.”⁶⁶

The Call Center is an integral part of the resolution of this issue.⁶⁷ The Defendants’ Response to Plaintiffs’ Third Set of Interrogatories states that DOH will be expanding the scope of the Center in an attempt to reach all newly enrolled or re-certified children in all age groups and regions starting in June 2006. Staffing will be increased by adding fifteen additional managed care operators, two managed care specialists, two registered nurses, one nurse clinician and one administrative assistant.⁶⁸ Initially, the Call Center was only contacting 10-18 year old youth. Therefore, prior to June, 2006 a significant number of the class or enrollees were not receiving the oral outreach contemplated by the creation of the Call Center. As to the implementation of the staff of the outreach, the Monitors are unable at this time to verify that these additions and expanded services have occurred.

A May 23, 2005 draft of the John B. Consent Decree Reporting Responsibilities (TennCare) lists the areas in which TennCare will report to the GOCCC when Semi-Annual Reports and other documents are prepared. It indicates in the area of the use of

⁶⁵ *Id.* at 4 (JB000060).

⁶⁶ *Id.* at 4-5 (JB000060-JB000061).

⁶⁷ One of the recommendations of the Ireys’ report was the tracking of the EPSDT outreach campaign of the Call Center.

⁶⁸ Defendants’ Response to Plaintiffs Third Set of Interrogatories at 48.

clear language, the responsibility is Winnie Toler (marketing). The comments in the document states that Harriet Hickson reviews all marketing materials submitted by TennCare contractors, however, the area is blank as to who monitors compliance with the use of clear language at TennCare.⁶⁹

As previously pointed out, the EQRO for 2006 regarding the PHP MCO customizing methods to inform individuals who are illiterate, etc., was cited for failure to do so.⁷⁰ For the years 2003 and 2004, this area was not reviewed for compliance with any of the MCOs.

Since at least one MCO was not in compliance with this requirement of the Consent Decree and for the prior years the EQRO was not evaluating any of the MCOs' compliance, it is impossible to conclude that the Defendants are in compliance with this issue and this matter remains to be resolved.

This next issue is similar to the previous inquiry: Does the Defendants have an effective method to inform people who are illiterate, blind, deaf or cannot understand English about the availability of EPSDT services?

The Defendants efforts in this regard are outlined in the above discussions.

The Defendants set up a sub-committee of the outreach workgroup to identify ways of reaching the LEP population. The start date of this group was April, 2005, it was to continue meeting and make recommendations, and no date was set for the completion of this task.⁷¹

The Defendants also have in place an enrollee outreach workgroup, which

⁶⁹ John B. Consent Decree Reporting Responsibilities (TennCare), dated May 23, 2005 (JB000001).

⁷⁰ 2006 Early and Periodic Screening, Diagnosis and Treatment (EPSDT) Report, August 2006, Final Report.

⁷¹ Work Group, John B. Activities Monitoring Tool, January 2006 at 3 (JB000059).

produced a document styled “Enrollee Outreach Workgroup Recommendations for Next Six Months”.⁷² The document is dated February 8, 2006. It provides for the continued focus on teens and children with special needs and, among other things, “establish a sub-committee on children with special needs, develop a letter to Special Education Directors and 504 Supervisors that describes the need to send something home to their families and develop a flyer that is specific to children with special needs.”⁷³ It is clear that as late as February 2006, the Defendants were still developing what they believed to be an effective method to inform people who are illiterate, blind, deaf or who have difficulty understanding English regarding EPSDT services.

Other considerations regarding the Defendants’ effectiveness of the methods to inform this group regarding EPSDT service availability are:

1. The January 2006 Work Group, John B. Activities Monitoring Tool in response to question 53, how to track parents, etc. states in the comments that “Although language data from DHS will not be available until a new system is implemented in 2007, the Workgroup feels that much has been done to reach this population: DOE distributed brochures written in Spanish to all Spanish speaking students; Schools track all LEP students; and TDH uses translations services through Open Communications and these are tracked.”⁷⁴
2. The PHP MCO was found to be unsatisfactory in 2005 in the 2006 EQRO report for failure to customize its information to inform illiterate, blind, deaf or LEP enrollees about the availability of EPSDT services. None of the MCOs were reviewed for methods to inform the illiterate, blind, deaf or LEP

⁷² *Id.* (JB000071).

⁷³ *Id.*

⁷⁴ *Id.* at 1 (JB000057).

enrollees in 2003 and 2004.⁷⁵

3. The January 2006 Work Group, John B. Activities Monitoring Tool in response to question 53, how to track parents, etc. states “BCBST is providing a list of children who are delinquent on screens to the health department outreach staff. This list includes primary language spoken if known. An attempt to being made to obtain this information from the other MCOs/BHOs as well.”⁷⁶
4. The January 2006, John B. Activities Monitoring Tool, in response to question 54, how to track parents, caregivers, or teens with special needs because of disability, or poor reading ability, the comments state “Although there is no means of tracking these children across departments, both the DOE and THD track the children with disabilities that they serve.”⁷⁷

The above would suggest that the resolution of these fairly recent notations of deficiencies in the outreach area reflects an ongoing effort to comply with this issue. Further, based upon the MCO’s failure to be in compliance in the current EQRO report, the Defendants do not appear, at present, to have reached the level of utilizing effective methods to inform people who are illiterate, blind, deaf or cannot understand English about the availability of EPSDT services.

The next inquiry concerns the following issues:

B. Has the State created a system so that families can readily access an accurate list of names and phone numbers of contract providers who are currently

⁷⁵ 2006, Early and Periodic Screening, Diagnosis and Treatment (EPSDT) Report, August 2006, Final Report.

⁷⁶ Work Group, John B. Activities Monitoring Tool, January 2006 at 1 (JB000057).

⁷⁷ *Id.*

accepting TennCare; and,

Does the State provide recipients assistance in scheduling appointments and obtaining transportation prior to the date of such periodic examination as requested and necessary?

The MCOs' efforts to address the above issues have been detailed earlier. The Defendants' Call Center has also been discussed in its efforts to address the above issues. In addition, TennCare provides the Department of Health an electronic file which includes all newly enrolled and recertified TennCare enrolled children. This file includes the telephone numbers for the enrollees as provided to TennCare. This is the method the Call Center uses to reach families for purposes of EPSDT outreach.⁷⁸

A review of the 2006 EQRO is one method to evaluate these issues, absent some other available information. The State has created a system so that families can readily access an accurate list of names and phone numbers of contract provides who are currently accepting TennCare. The CRA and the Provider Risk Contract (PRC) for BHOs, require the MCCs to provide this information to enrollees. However, the EQRO cites the VHP MCO for failure to develop a process to make available to members accurate, up-to-date lists of names and phone numbers of contracted providers currently accepting TennCare patients.⁷⁹ The failure of an MCO is the failure of the Defendants.⁸⁰ Therefore, although a system is in place, the failure to accomplish the requirements of the Consent Decree as to this matter still exists.

⁷⁸ Defendants' Response to Plaintiffs' Third Set of Interrogatories at 38.

⁷⁹ 2006 Early and Periodic Screening, Diagnosis and Treatment (EPSDT) Report, August 2006, Final Report at 74.

⁸⁰ As stated in Judge Nixon's 2001 Court Order, the failure of an MCO does not relieve the State from the responsibility of outreach under the decree. *See John B. v. Menke*, 176 F. Supp. 2d 786 (M.D. Tenn. 2001).

The 2006 EQRO also answers the second question. The PHP MCO was cited for its failure to establish a method for providing assistance in making prenatal appointments for adolescent prenatal patients and failing to assist in making appointments for women pass the first trimester.⁸¹ Since the method established by the Defendants to evaluate and assure the compliance with the Consent Decree discloses the failure of a MCO to do so, this issue appears to remain one for resolution.

Significantly, the EQRO states that it was difficult to score three components of the BHO EPSDT tracking tool: transportation and appointment assistance offered, coordination of care with other agencies and PCP notification.⁸² Therefore, although the other MCOs appear to be in compliance with this issue, complete compliance has not been accomplished in light of the MCO PHP failure and it can not be verified by the EQRO as to BHOs.

The next issue is:

C. Does the State inform eligible individuals and their biological or foster parents about what services are available under EPSDT, the benefits of preventive healthcare, where the services are available, and how to obtain them and that necessary transportation and scheduling assistance is available for children in institutions, this should include the administration of the institution?

The Defendants cite DCS Policy 20A-7 Initial and Annual EPSDT, DCS Provider Policy Manual: Internet link to the DCS Provider Policy Manual; DCS Foster Parent handbook, the internet link to EPSDT training for foster parents “Foster Parents: Basic Questions and Answers for TennCare Services for Foster Children” in support of the

⁸¹ *Id.* at 45.

⁸² 2006 Early and Periodic Screening Diagnosis and Treatment (EPSDT) Report, August 2006, Final Report at 236.

compliance with the above issue.⁸³

The Work Group, John B. Activities Monitoring Tool, dated January 2006, responds to question number 61 regarding how to provide additional outreach to children in custody and at risk of custody with the comments that information will be included in the child and family team meeting that is held for children coming into custody and that information will be given to families in the Family Support Service program which are children who are not in custody. The packet includes frequently asked questions provides the web sites regarding access to health information, phone numbers for the MCO and BHO and DCS Health Advocacy contact information. DCS also provided targeted case management for at risk children⁸⁴

The Work Group, John B. Activities Monitoring Tool also responds to question 62, how to provide better outreach to foster parents. The comments state that DCS coordinates with the foster parent association to provide a foster parent advocacy program which allows foster parents to serve as advocates to other foster parents. The TENNderCare information was distributed to the Foster Parent Advocates.⁸⁵

The Work Group Tool responds to question 63, how to improve outreach to DCS case workers, by stating that case managers are educated regarding effective advocacy in accessing TennCare services. Also TennCare Tips, an education source for managers accessing health care services, are published via e-mail to all DCS employees. DCS provides information to DCS employees in a weekly newsletter distributed electronically.⁸⁶

⁸³ *John B. v. Goetz* Consent Decree Paragraph Correlation Index, Paragraph 39(e) (JB000063).

⁸⁴ Work Group, John B. Activities Monitoring Tool, January 2006 at 7-8 (JB000064).

⁸⁵ *Id.* at 9 (JB000065).

⁸⁶ *Id.* at 11 (JB000067).

The Work Group Monitoring Tool responds to question 64, how to provide outreach to children leaving either legal or physical custody of the State with the comments that DCS has a policy for coordinating benefits when children leave custody and the independent living program educates youth who are leaving care regarding the application process for TennCare.⁸⁷

The Work Group Tool responds to question 65, how to provide outreach to children on the cusp of custody who could avoid DCS placement with an appropriate mental health assessment and resources with no comments but simply a blank space.⁸⁸

The Defendants have provided information to satisfy the above issue with the exception of question 65 of the monitoring tool. This clearly suggests that in the Defendants' own assessment tool this area does not appear to be in compliance and is an outstanding issue. It should be noted that unlike the MCCs, there does not appear to be a mechanism, such as the EQRO, to validate the outreach efforts of the DCS.

The following two issues will be addressed in this discussion:

D. Does the State document the services declined by a parent, guardian, mature competent child specifying the particular services declined so that outreach and education for other EPSDT services continued; and,

Does the State maintain records of the efforts taken to reach out to children who have missed screening appointments when scheduled or who have failed to schedule regular check-ups?

Again, a reference to the EQRO provides a method to answer the above questions. The discussions outlined in the earlier review highlighted the Defendants' activities

⁸⁷ *Id.* at 8 (JB000064).

⁸⁸ *Id.* at 11 (JB000067).

regarding these issues. THE EQRO shows that the PHP MCO was found unsatisfactory for not developing a process requiring providers to document specific EPSDT services declined by a parent, guardian, or mature competent child in 2005. PHP was also evaluated as not satisfying the requirement to develop a process that captures outreach efforts to members who have missed scheduled screenings or failed to schedule regular screens. Additionally, the Unison MCO was found unsatisfactory in 2005 for not ensuring that providers maintain a process for documenting EPSDT services declined and specifying the services declined.⁸⁹

Therefore, at present, the Defendants have not completely complied with the Consent Decree regarding documenting the services declined and maintaining records of attempts to reach children who have declined services, simply because some MCOs have failed in this regards.

The next issue inquiry is:

E. Have the Defendants established the criteria for determining what enrollees should be targeted for special informing activities to particular at risk groups, e.g., mothers with babies to be added to assistance units, etc.; and,

Has Defendants provided information to adolescent prenatal patients and offered them assistance in making a timely first prenatal care appointment?

In addition to the discussions above, the EQRO provides an answer to these issues as well. The PHP MCO was found unsatisfactory for failure to establish criteria for determining when to target specific informing activities to pregnant women and families with newborns. PHP was also unsatisfactory in 2005 for failure to establish a method for

⁸⁹ 2006 Early and Periodic Screening Diagnosis and Treatment (EPSDT) Report, August 2006, Final Report.

providing assistance in making prenatal appointments for adolescent prenatal patients who enter TennCare through presumptive eligibility and for failure to assist in making appointments for women past the first trimester.⁹⁰

The VHP MCO was found unsatisfactory in 2005 for failure to establish criteria for determining when to target specific information activities for pregnant women and families with newborns.⁹¹

Therefore, Defendants have not yet demonstrated compliance with the areas raised by these issues.

The next issue is:

F. Has the State aggressively and effectively informed TennCare Enrollees of the existence of the EPSDT program including the availability of specific EPSDT screening and treatment service, e.g. lead blood assessment, anticipatory guidance, immunizations, case management?

The above discussions of Defendants' outreach activities, the Plaintiffs' apparent position regarding its effectiveness and the general overview of the outreach efforts, provides the starting point for the answer to this issue.

The federal code requires that a state plan for medical assistance must provide for informing all persons in the State who are under the age of 21 and who have been determined to be eligible for medical assistance...of the availability of early and periodic screening, diagnostic, and treatment services. . . .⁹²

Implementing regulations further provide that the State must:

(1) Provide for a combination of written and oral methods designed to inform

⁹⁰ *Id.* at 44-45.

⁹¹ *Id.* at 75.

⁹² 42 U.S.C. § 1396a(a)43(A).

effectively all EPSDT eligible individuals (or their families) about the EPSDT program.

(2) Using clear and nontechnical language, provide information about the following – (i) The benefits of preventive health care; (ii) The services available under the EPSDT program and where and how to obtain those services; (iii) That the services provided under the EPSDT program are without cost...; and (iv) That necessary transportation and scheduling assistance...is available to the EPSDT eligible individual upon request.

The EQRO demonstrates that the MCCs are performing outreach; the Defendants, along with other agencies, are performing outreach. The EQRO also reflects that the MCCs are not completely fulfilling the requirements of the Consent Decree.

The Defendants have initiated a survey to evaluate the effectiveness of their outreach efforts as to whether there is familiarity with TENNderCare and other aspects of the program.

The first survey was conducted from October 1 to October 31, 2004 by the University of Tennessee Social Science Research Institute. The second survey was conducted from April 13 to May 21, 2006 by the University.⁹³

They survey reveals that the percentage of those surveyed who had heard of the TENNderCare program increased from 6.5 percent to 43.7 percent; that those who heard of EPSDT remained about the same, from 31.0 to 31.3.⁹⁴

The survey demonstrated that the percentage of urban and rural respondents who had heard of TENNderCare differed in that rural respondents were more likely than urban respondents to have heard of TENNderCare. In the original survey 6.9% of urban respondents had heard of the program and increased in the 2006 survey to 41.1%. The rural survey initial percentage was 4.4% and increased to 48.4% in 2006.

The Ireys Report stated that the Defendants' outreach efforts would be effective

⁹³ *Measuring Success of TennCare's Public Awareness Campaign: Results of the Second Survey of Primary Care Providers with Comparisons to the Baseline Survey*, August 15, 2006 (TCJB0406-L-00047).

⁹⁴ *Id.* at 5-6.

when:

At least 80 percent of families with children who have been enrolled in TennCare for at least 12 months will report that they have received information about TENNderCare in the last year.

At least 80 percent of families who have been enrolled for at least 12 months will indicate that it is important or very important for infants, toddlers, children, and adolescents to have appropriate health screenings.

The survey explored many aspects of the TennCare public awareness; however, it did not appear that the above specific questions were surveyed or answered.⁹⁵

The Special Master contended that the effectiveness of outreach is measured on the basis of the increase in the screening percentage.⁹⁶ This would seem to be consistent with the findings of the lower court in *Frew v. Gilbert*,⁹⁷ which discussed the methods to assess the effectiveness of an outreach program. The court stated that among the methods to determine effectiveness is to measure the number of class members who opt to receive services after having been contacted; the low participation rates among class members, demonstrates ineffective outreach; and the large number of class members overdue for checkups is evidence of an ineffective outreach program.⁹⁸

Significantly, Judge Nixon's decision in 2001 addressed several flaws of the Defendants in monitoring the MCOs adequate outreach. The court pointed out that the Defendants failed to require any specific baseline standards for EPSDT from the MCOs; it did not specifically require a certain method of outreach and, it did require a base level

⁹⁵ Significantly, the survey noted that notwithstanding the awareness levels of the specific benefits offered to children was high, awareness of transportation benefits continued to be low. *Id.* at 15.

⁹⁶ Interview with Special Master Dr. Richard Carter and his assessment of method to measure the effectiveness of outreach.

⁹⁷ 109 F. Supp. 2d 579 (E.D. Tex. 2000); 376 F.3d 444 (5th Cir. 2004); 504 U.S. 434 (2004).

⁹⁸ *Id.* at 592–594.

for EPSDT oversight on the part of its contractors.⁹⁹ The Defendants have essentially rectified these deficiencies based on the review of the contractual requirements with the MCCs.

The Court also cited the failure of the Defendants to implement a proactive approach, which included oversight of providers to assure that proper outreach was being conducted and that although the Quality Overnight Department did review the outreach strategies employed by the MCOs and formulated a survey to ascertain what methods of outreach each MCO was utilizing, the Defendants did not actually use the surveys and reports to correct the MCOs' deficient outreach efforts.¹⁰⁰

The defendants have clearly corrected these shortcomings and have extensive requirements of the MCCs. Moreover the EQRO monitors and cites the need and type of correction that the MCCs must undertake. To the extent the court highlighted these problems as outstanding issues in the Consent Decree, they appear to be resolved at this time.

The Defendants have the EQRO to indicate if the outreach is being conducted along with other mechanisms and processes. However, the Defendants do not have any means to measure the effectiveness of their outreach efforts. Therefore, an issue before the Court is whether the Defendants' outreach is effective and how it should be measured.

In summary, the following are issues still to be resolved from the Monitors' review:

⁹⁹ *John B. v. Menke*, F. Supp.2d at p.793-794.

¹⁰⁰ *Id.* at 793.

1. What significance, if any, does the failure of some MCCs to comply with outreach requirements, as determined by the External Quality Review Organization, have in determining whether the defendants are in compliance with the Consent Decree?
2. Do the relatively recent efforts of the outreach call center provide a basis to determine whether it is engaged in oral outreach consistent with the Consent Decree and, if so, is the outreach effective?
3. Assuming as valid, the scope, volume and variety of outreach efforts of the Defendants, are the Defendants engaged in effective outreach and what is the appropriate method to measure its effectiveness?¹⁰¹

With the resolution of these issues, it will then be possible to determine whether all children who have not received complete screenings, consistent with the Consent Decree, have been the subject of outreach efforts reasonably calculated to ensure their participation.

101. The Monitors have been apprised that there has now been an expansion of the operations of the Call Center, that a party has been designated as having the responsibility for monitoring of the use of clear language at TennCare and that the EQRO findings of deficiencies of the cited MCOs have resulted in a plan of correction and that in some instances an onsite review of the plans of corrections were scheduled.

It has also been suggested that the reference to the EQRO and the Outreach Work Group Tool to assess compliance/non-compliance issues are inappropriate, in that they were not designed for those purposes. The Monitors have reviewed the above documents, other documents, pleadings, as well as, the semiannual reports for the outreach activities and have cited in their report numerous outreach activities listed in the semiannual reports and the other documents. The semiannual reports were one source used in drawing the conclusions on outreach. As to the suggestion that outreach is too sprawling and multifaceted a process to be captured in a single compliance tool, the Monitors would suggest that the absence of such a tool creates the difficulty in monitoring the compliance with outreach efforts. The Defendants have numerous policies and programs for outreach, however, it is impossible to determine if all the services and activities noted are actually being performed rather than just policies that are in place. The Monitors have noted above the numerous and wide ranging scope of the outreach programs, but what is absent is any objective method, measurement or analysis of outcome indicators. Simply put, how do the Defendants monitor and know the effectiveness of these various and disparate programs and policies to ensure that they are reasonably calculated to ensure the participation of all children who have not received complete screening consistent with the consent decree?