



National Association of State Medicaid Directors

an affiliate of the American Public Human Services Association

June 18, 2010

The Honorable Marilyn Tavenner
Acting Administrator
Centers for Medicare & Medicaid Services
Department of Health and Human Services
200 Independence Avenue S.W.
Washington, D.C. 20201

Re: Petition for Certiorari in *David Maxwell-Jolly, Director of the California Department of Health Services v. Independent Living Center of Southern California, Inc. et al.*

Dear Ms. Tavenner:

On May 24, 2010, the United States Supreme Court issued an order inviting the Solicitor General to file a brief expressing the views of the United States in the above-referenced matter. This concerns California's petition for certiorari concerning Ninth Circuit decisions, which hold that state Medicaid programs may be sued under the Supremacy clause of the Constitution for allegedly establishing reimbursement rates in violation of 42 U.S. Code section 1396a(a)(30)(A), notwithstanding that the statute does not confer judicially enforceable "rights" on providers or recipients. The Ninth Circuit has further interpreted section 1396a(a)(30)(A) as imposing rate setting requirements on states that are not contained in the statute or supported by the legislative history. Moreover, the Ninth Circuit's interpretation of section 1396a(a)(30)(A) conflicts with the interpretation of the statute by the United States Department of Health and Human Services (DHHS).

The state Medicaid agencies respectfully request that you urge the Solicitor General to ask that certiorari be granted in this case because the Supreme Court must resolve whether alleged violations of the Medicaid Act, such as section 1396a(a)(30)(A), that do not confer "rights" enforceable under 42 U.S. Code section 1983, can be enforced by private litigants pursuant to the Supremacy clause. If these decisions stand, it could open the floodgates of litigation against the states on virtually any number of hundreds of Medicaid provisions for which Congress did not intend to confer judicially enforceable rights.

Certiorari should also be granted to address the Ninth Circuit's holding that the "efficiency, economy, and quality of care" (EEQ) provision of section 1396a(a)(30)(A), requires that before states can change their Medicaid rates, they must conduct a cost study and assure that the new rates "bear a reasonable relationship" to the costs of efficient and economical providers in providing quality care. DHHS has never adopted any regulations interpreting the EEQ provision

in this manner. The only federal regulations that DHHS has ever adopted to implement the EEQ provision with respect to Medicaid rates are upper payment limits (e.g., 42 C.F.R. §447.321). Moreover, the Solicitor General submitted an amicus brief on behalf of DHHS in 1997 specifically rejecting that interpretation of section 1396a(a)(30) by the Ninth Circuit in Orthopaedic Hospital, et al. v. Belshe (9th Cir. 1997) 103 F.3d 1491. In Independent Living, which is the subject of the pending petition, the Ninth Circuit held that its interpretation of section 1396a(a)(30)(A) in Orthopaedic is still good law.

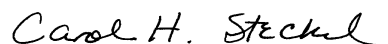
Among other things, the Solicitor General noted in 1997 that “[i]n accord with the text and structure of the Medicaid Act, the Secretary has not construed section 1396a(a)(30)(A) to require the states to base reimbursement rates for outpatient or other services on the costs incurred by providers.” (Amicus brief at page 8.) The Solicitor General further noted that the Orthopaedic decision was “inconsistent with the history of section 1396a(a)(30)(A)” and “conflicts with Congress’s clear intent to encourage cost-efficient provision of covered Medicaid services.” (Id., at page 9, footnote 4, and page 12.) The Solicitor General noted that “neither the Act nor any regulation promulgated by the Secretary gives any guidance . . . as to what portion of costs must be reimbursed by states for how many providers, or gives more specific content to the statutory criteria of ‘efficiency, economy, and quality of care, so that those general criteria could be enforced by a court.’” (Id. at p. 15.) Finally, the Solicitor General noted that by “[b]y ordering a system of cost-based reimbursement for outpatient services,” the Orthopaedic decision “frustrates the intent of Congress to accord states flexibility in encouraging efficient and economical care.” (Id. at p. 16.)

The issues raised in the petition for certiorari are very important for all fifty states, and particularly for those states that have revised or plan to revise their Medicaid reimbursement rates. States must be able to smoothly administer their Medicaid programs, and we need clarity. What the Solicitor General said in 1997 is still true today that the Ninth Circuit’s interpretation of section 1396a(a)(30)(A) could “increase substantially the expense of the Medicaid program to the States and the federal government, without any corresponding finding that, under the current system, needy individuals lack access to quality care.” (Id. p. 16.)

The states urge you to request that the Solicitor General complete and submit an amicus brief expressing views of the United States on these issues by sometime this summer. Time is of the essence, and we need the Supreme Court to settle this area of law as soon as possible. We would like to have the matter heard by the Supreme Court for the October 2010 term.

Thank you for your consideration of this important issue.

Sincerely;



Carol H. Steckel, MPH
Chairperson

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cc: Cindy Mann, Deputy Administrator and Director, CMCS
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