HHS to Define the Equal Access Clause

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On December 3, 2010, the acting United States Solicitor General filed the long-awaited amicus curiae brief of the United States in the case of *Maxwell-Jolly v. Independent Living Centers of California*.[1] *Independent Living Centers* is a preemption case brought by Medicaid providers to challenge cuts in the California Medicaid reimbursement rates. The brief comes on the heels of the Department of Health and Human Services' (HHS) denial on November 18, 2010 of California State Health Plan amendments that would have implemented the rate cuts. The brief and the recent actions of HHS make this case, which once seemed destined to be heard by the Supreme Court, to now appear to be a doubtful petition for certiorari.

For Medicaid providers across the nation, on the whole the Solicitor General's brief is favorable in that it weighs heavily against a grant of certiorari in the case, which, as it stands now, is very advantageous to providers. Medicaid providers certainly have a lot lose at the Supreme Court. But the Solicitor General's brief is most definitely not a complete victory for providers because the brief makes clear that although the Solicitor General and HHS would prefer to see the Ninth Circuit's decision stand for now, they believe that the Ninth Circuit went too far in its interpretation of the equal access clause.

The Solicitor General mostly affirmed the Medicaid providers' standing to bring preemption cases under the Supremacy Clause and rejected the petitioner's contentions to the contrary. The brief approves of "the important role private parties can and often do play in vindicating federal law" through the Supremacy Clause.[2] Thus, the Solicitor General's position adds credibility to the Medicaid providers' argument that they should be able to challenge Medicaid rate cuts in the federal courts through preemption actions.

But the brief is less favorable to providers regarding the equal access clause. The equal access clause, found at 42 U.S.C. § 1396a(a)(30)(A), provides that Medicaid rates should be "consistent with efficiency, economy, and quality of care" and "sufficient to enlist enough providers so that such care and services are available . . . at least to the extent that such care and services are available to the general population in the geographic area." Circuit courts have interpreted the equal access clause in different ways, but the Ninth Circuit alone has required states to engage in pre-cut studies to determine if the reimbursement rate "bear[s] a reasonable relationship to efficient and economical hospitals' costs of providing quality services."[3] Thus, the Ninth Circuit, much more than any other circuit, focuses on whether the rates fairly cover a providers' actual costs of providing care. The Solicitor General rejected that approach in his brief by asserting: "[t]here is no general mandate under Medicaid to reimburse providers for all or substantially all of their costs, and Section 1396a(a)(30)(A) does not set forth any requirement that a State consider cost studies in setting payment rates….there is no requirement that Medicaid assume all or substantially all of the costs incurred by providers in order to ensure reasonable access to quality care."[4] Essentially, the position of the United States at this time is that states have an

obligation to ensure that Medicaid beneficiaries have access to care but no obligation to pay providers the full cost of providing that care.

One of the surprises of the brief was the announcement that HHS plans to promulgate regulations to authoritatively interpret the equal access clause. HHS will issue a proposed rule in April 2011 and a final rule by December of the same year. The rule should explain the nature and extent of the obligations that the equal access clause imposes on states. The Solicitor General argues that courts must afford *Chevron* deference to HHS's interpretation and that this should resolve the conflict between the circuits over the meaning of the equal access clause. Thus, in the Solicitor General's opinion, there is no need for the Supreme Court to resolve the conflict at this time.

Given the Solicitor General's criticism of the Ninth Circuit's approach, providers can expect that HHS's regulation interpreting the equal access clause will be similar to the interpretation of either the Seventh Circuit or Eighth Circuit. States will have to ensure that Medicaid beneficiaries have reasonable access to care, but the rates they pay will not have to approximate the actual cost of care. States will likely not be able to cut rates based solely on budgetary concerns, but they will almost certainly not have to do pre-cut studies as required by the Ninth Circuit. This access-only interpretation of the equal access clause is particularly frustrating to providers because many providers are practically or legally unable to turn away Medicaid beneficiaries. The result is that states can still ensure adequate access to medical care for Medicaid beneficiaries without paying providers anywhere near the actual cost of care—leaving providers scrambling to fill the gap.

Whether the circuits that have already interpreted the equal access clause will defer to HHS's forthcoming interpretation is less than certain. HHS is a little late to the game given that Congress added the equal access clause to the Medicaid Act in 1989 and providers have litigated its meaning in multiple circuits. Ultimately, it may yet take a Supreme Court case to resolve the split between the circuits over the meaning of and obligations imposed by the equal access clause, but that case is unlikely to be the *Independent Living Centers* case.

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[1] 572 F.3d 644 (9th Cir. 2009). For detailed analysis of the *Independent Living Center* case, see "Potential Supreme Court Decision Could Close Avenue for Medicaid Providers' Legal Challenges to State Rate Cuts" in the November 2010 issue of *AHLA Connections*.

[2] Amicus curiae brief of the United States at 19.

[3] Orthopaedic Hospital v. Belshe, 103 F.3d 1491, 1496 (9th Cir. 1997).

[4] Amicus curiae brief of the United States at 9.