NHeLP
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To: Health Advocates[1]
From: Jamie D. Brooks and Sarah Somers

Re: July Q & A: The Eighth Circuit's decision in *Lankford v. Sherman*

Question: What is the significance of the recent Eighth Circuit decision in *Lankford v. Sherman?*

Answer: The Court of Appeals reversed a denial of a preliminary injunction in a challenge to a Missouri Medicaid regulation. The rule strictly limited coverage of medical equipment, supplies and appliances for some Medicaid beneficiaries. While the Court held that beneficiaries did not have a private right of action to enforce Medicaid's reasonable standards requirement through Section 1983, it also held that this federal requirement preempted conflicting state law.

Discussion

Background

The plaintiffs in *Lankford* filed suit to challenge a Missouri regulation governing the coverage of durable medical equipment, supplies and appliance (DME). The regulation, which became effective September 1, 2005, eliminated coverage of many items of DME for Medicaid recipients who are aged or disabled, but not blind. Under the new regulation, Medicaid recipients who are blind or pregnant are still entitled to the full scope of coverage. In contrast, adult Medicaid recipients who are not blind or pregnant can no longer receive coverage for many important items of DME including artificial larynxes, CPAPs, BiPAP, and IPPB machines; nebulizers; suction pumps; apnea monitors; or wheelchair accessories or scooters – regardless of whether their health care providers determined that these devices were medically necessary. Accordingly, thousands of Medicaid beneficiaries were at risk of increased illness and suffering.

The situation of lead plaintiff Susan Lankford is typical. Ms. Lankford suffers from a variety of medical conditions, including chronic obstructive pulmonary disease, bronchitis, asthma, emphysema, sleep apnea, irritable bowel syndrome, colonitis, diverticulitis and acid reflux. Ms. Lankford needs a number of items of DME for which coverage was eliminated, including a CPAP

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machine. Her health care provider had told her that going without the CPAP would increase her risk of premature death. Ms. Lankford has no way of paying for the machine without Medicaid coverage. Similarly, plaintiff Joey Everett, 21, was in a car accident that left him paralyzed with traumatic brain injuries. He was left with no purposeful movement, no ability to swallow and no speech. Further, he had very limited mental comprehension and required constant care. The new regulation eliminated coverage for many items that he needed, including catheters and equipment for a suctioning machine. His doctor had filed for an exception to the DME restrictions, which was denied.

Plaintiffs based their suit on violations of two Medicaid requirements. Plaintiffs argued that Missouri's regulation violates Medicaid's requirement that (1) benefits be comparable among categories of recipients because the state covers a greater scope DME benefits for blind recipients than it does for other adult Medicaid recipients and (2) that state Medicaid plans to include reasonable standards for determining eligibility for, and the extent of, medical assistance. Plaintiffs argued that these statutory provisions could be enforced through an individual private right of action under 42 U.S.C. § 1983 and also that, under the Supremacy Clause, these statutory provisions conflicted with and therefore preempted Missouri's regulation.

The District Court Decisions

In response to the motion for preliminary injunction, the defendant stated that Missouri had applied to the Centers for Medicare and Medicaid Services (CMS) for permission to waive the federal comparability requirement and argued that the court should therefore find that the plaintiffs were not likely to prevail on their claims. Additionally, the defendant claimed that the plaintiffs could still obtain necessary DME if they qualified for "home health" benefits under Missouri law or, sought an exception for non-covered DME items through the exceptions process. Accordingly, because these options are in place, the DME regulation did not cause irreparable harm to plaintiffs

The court did not consider the reasonable standards claim but focused solely on the comparability claim. The district court accepted the defendant's claims that a waiver would be granted by CMS. Further, the court held that because there was an exceptions process, the plaintiffs would not be harmed by the new regulation. *Lankford v. Sherman,* No. 05-4285-CV-C-DW (Order, Sept. 13, 2005). Accordingly, the court denied the injunction and the plaintiffs appealed.

Missouri then filed a motion to dismiss the complaint due to a lack of jurisdiction and failure to state a claim. Among other things, Missouri argued that the comparability and reasonable standards were not enforceable by Medicaid beneficiaries. The district court rejected these arguments and denied the motion to dismiss. *Lankford,* (Order, Nov. 22, 2005).

While the plaintiff's appeal was pending, CMS denied Missouri's request for a comparability waiver. Missouri then informed CMS that it would not seek federal financial participation for DME for the blind but would instead use state funds. Thus, Missouri argued, the federal Medicaid requirements would not apply. Missouri then filed a motion to supplement the record claiming the plaintiff's argument was now moot.

Tragically, Joey Everett, died while the appeal was pending. His doctor could not say whether the lack of necessary DME contributed to his death.

The Court of Appeals Decision

The Court first rejected the mootness claim reasoning that, "even if a defendant volunteers to cease a challenged practice, a federal court has the power to determine the legality of the practice." *Lankford v. Sherman,* 451 F.3d 496, *10 (8th Cir. 2006). The Court held that Missouri did not meet the heavy burden to show mootness because they could at any time reinstate a Medicaid plan using federal funding for DME coverage for the blind. *Id.* The Court further stated that CMS had as of yet, not approved or rejected the amended plan submitted by Missouri, and Missouri could still seek further amendment at any time. Accordingly, the Court had jurisdiction to address the merits of the comparability claim. *Id.*

Comparability. The Court held that there was no violation of the comparability requirement because Missouri was using state funds to provide additional benefits to blind Medicaid recipients and therefore the Medicaid requirements did not apply. *Id* at *19. The Court stated that "states are in no way prohibited from using only state funds to fund an independent plan, providing it does not violate the constitution." This holding is puzzling and seems at odds with the determination that the claim is not moot because defendant could resume his illegal conduct. The Court did however affirm two important requirements related to comparability:

- Medicaid's comparability requirement requires states to provide equal "amount, duration and scope' of medical assistance to all categorically needy," *citing* 42 U.S.C. § 1396a (a)(10)(B)(i); 42 C.F.R. §§ 440.240(a), (b)(1).

- The comparability mandate prevents discrimination against or among the categorically needy and it applies equally to mandatory and option medical services, *citing Smith v. Rasmussen,* 249 F.3d 755, 757-59 (8th Cir. 2001).

Private Right of Action. The Court considered whether the reasonable standards claim was enforceable by plaintiffs through Section 1983, despite the fact that defendants had not appealed the denial of the motion to dismiss. Missouri argued, however, that it was appropriate to address the issue because it decreased the likelihood that Plaintiffs would succeed on the merits. The Court accepted this rationale.

The Court relied on the three-part test used to determine whether the Spending Clause legislation creates a right of action under 42 U.S.C. § 1983: (1) whether Congress intend the statutory provision to benefit the plaintiff; (2) the asserted right not so "vague and amorphous" that its enforcement would strain judicial competence; and (3) whether the provision clearly impost a mandatory obligation upon the states. *See Blessing v. Freestone,* 520 U.S. 329, 344-45 (1997). If legislation meets each of the three part test, then there is a presumption it is enforceable under Section 1983. *Id*. at 341.

The Court held that the statutory language of the reasonable-standards requirement requiring state Medicaid plans to "include reasonable standards…for determining eligibility for

and the extent of the medical assistance was insufficient to evince a congressional intent to create individually-enforceable federal rights. *Lankford,* at 27. The Court relied on the recent decision in *Watson v. Weeks*, 436 F.3d 1152, 1162 (9th Cir. 2006) that found the reasonable standards requirement unenforceable. The Court held that because the statute lacks a reference to "individuals" or "persons" and instead focuses on the aggregate practices of the states in establishing reasonable Medicaid services, there is no evidence that Congress intended that beneficiaries be able to enforce it. *Lankford,* at 29. The Court stated that even if the statute had referenced the individuals benefited, the right it would create is too vague and amorphous for judicial enforcement. *Id.* at 30. The Court noted that the only guidance Congress provides on reasonable standards provisions is that the state establish standards consistent with Medicaid objectives. The Court concluded that because the provision only sets forth general goals, giving the states broad discretion to implement and therefore the Plaintiffs do not have a private right of action to enforce Medicaid's reasonable-standards provision under section 1983. *Id.* at *30.

Preemption. The Court then addressed the reasonable standards claim under the Plaintiff's preemption theory. Plaintiffs cited conflicts between the Missouri regulation and the federal reasonable standards requirements, contending that the state regulation is preempted under the Supremacy Clause because it does not provide a sufficient amount of DME services to meet Medicaid's basic objectives and fails to establish an appropriate procedure for recipients to obtain non-covered DME items.

Plaintiffs argued that Missouri's regulation is unreasonable in light of the purposes of Medicaid because, for example, it covers wheelchairs, but excludes funding for batteries, filters, accessories, repairs and other types of replacement parts necessary to keep the wheelchair running.

Missouri contended that all Medicaid recipients have two options for receiving non-covered DME items under the state Medicaid plan. Missouri asserted that recipients can qualify for home health care services which would require necessary DME items to be provided or can seek reimbursement for non-covered items through the established exceptions process. The plaintiffs responded that qualifying for home health necessitated that an individual be confined to his home, which none of the plaintiffs are, and that such a requirement is forbidden by CMS. Further, plaintiffs also pointed out that under the Missouri regulation, in order to qualify for an exception, the Medicaid provider must demonstrate that; (1) the item is needed to sustain life; (2) the item will substantially improve the quality of life for a terminally-ill patient (3) the item is necessary as a replacement due to an act of nature; or (4) the item is necessary to prevent a higher level of care. Mo. Code Regs. Ann. tit. 13, § 70-2-100(2)(J). Thus, it was not possible for plaintiffs – or most other Medicaid recipients – to qualify for an exception. Further, such an exceptions process did not comply with requirements articulated by CMS.

The Court held that because the DME regulation restricts available DME, and this exceptions process did not provide the Plaintiffs with an adequate mechanism to obtain non-covered DME items, the regulation appears unreasonable under directives from both CMS and the court. *Lankford* at 44.

The Court was not prevented from reaching this conclusion by the its finding that the provision was not enforceable through Section 1983. Because preemption claims are analyzed under a different test than section 1983 claims, the Court reasoned, plaintiffs have an alternative theory for relief when state law is in conflict with a federal statute or regulation. The Court noted

that the Supremacy Clause is not the direct source of any federal right, but secures federal rights by according them priority whenever they come in conflict with state law. *Id.* at 31. The Court makes three important points about preemption:

- Where Congress has not expressly preempted or entirely displaced state regulation in a specific field, as with the Medicaid Act, "state law is preempted to the extent that it actually conflicts with federal law."

- Actual conflict arises between state and federal law when it is a "physical impossibility" to be in compliance with both laws, or where the state law "stands in the way of the execution of the full purposes and objectives of Congress."

- Once a state voluntarily accepts the conditions imposed by Congress, the Supremacy Clause obliges it to comply with federal requirements.

The Court noted that CMS specifically instructed that a homebound requirement is an improper restriction for the provision of any home health care service – including DME. In addition, the Court stated that Missouri was informed that this very DME policy was inconsistent with CMS's directive that any "homebound" requirement is specifically prohibited. The Court stated that this position was further supported by the fact that no plaintiff appears to qualify for home health care under Missouri law, and Missouri's exceptions process does not afford a meaningful opportunity to obtain non-covered DME items.

Accordingly, the Court held that the plaintiffs established a likelihood of success on the merits of their claim that the reasonable standards provision, implementing regulations and CMS policy preempts Missouri's regulation. Thus, the Court held that plaintiffs had satisfied one of the four factors establishing whether a preliminary injunction should issue. Because circumstances had significantly changed since the original hearing, the Court held that the case should be remanded back to district court for further proceedings and to determine whether the remaining three factors were satisfied.

Conclusion

This case is significant for several reasons. First, this is the first Medicaid decision in which a court clearly holds that the absence of a privately enforceable right has no bearing on whether a federal statute or regulation may preempt conflicting state laws. This decision will be influential and advocates should consider how the preemption possibility may breathe new life into Medicaid requirements that seemed unenforceable. In addition, it demonstrates the extent to which courts will defer to sub-regulatory interpretation by CMS. The court based much of its reasoning on statements by CMS as to the appropriate scope of DME coverage, and its disapproval of overly narrow requirements. In this case this proved helpful to the plaintiffs, however, in other cases in which CMS has approved a state plan that is being challenged, this may be problematic for Medicaid beneficiaries. With regard to DME specifically, the Court stated in dicta that DME is an optional Medicaid service. Plaintiffs had argued that DME is mandatory because it is a required component of the mandatory home health services. This dicta is incorrect and advocates should be aware of how it can be distinguished. This issue was thoroughly briefed by counsel and in an amicus brief and the briefing is available from NHeLP upon request.

Many law firms participated as counsel for the plaintiffs, including NHeLP, Legal Services of Eastern Missouri, Missouri Protection and Advocacy Services, Law Offices of Thomas E. Kennedy, St. Louis University School of Law Legal Clinic, Gateway Legal Services, AARP Foundation Litigation, National Senior Citizens Law Center, National Center for Law and Economic Justice, and the Assistive Technology Law Center. An amicus brief was filed on behalf of the National Council on Independent Living, the ARC of the United States, the U.S. Society for Augmentative and Alternative Communication, the American Speech-Language-Hearing Association, and NDRN. The amicus brief was authored by Neighborhood Legal Services and New Haven Legal Assistance Assoc.