# Health Advocate

E-Newsletter of the National Health Law Program

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## Litigation Round up

**Prepared by: Jane Perkins**

**Key Resources**

Deford, Perkins, Smith & Tawatao, *The Supreme Court's 2014 Term: High- and Low-Profile Decisions with Lurking Access Issues*, 49 CLEARINGHOUSE REV. J. OF POV. L. & POL. (Dec. 2015)

Perkins, Fact Sheet: Selected Supreme Court Access to Court Opinions from the 2014 Term (July 30, 2015)

NHeLP, *Armstrong v. Exceptional Child Care Center: Health Care Providers' Access to Court is Blocked* (Apr. 29, 2015)

Perkins, *Update on Private Enforcement of the Medicaid Act: The Supremacy Clause and 42 U.S.C. § 1983* (Sept. 29, 2015)

**Coming in January's *Health Advocate*: Our New Year's Resolutions**

This issue of *Health Advocate* provides NHeLP's annual summary of some of the year's notable court cases. The Supreme Court decided yet another case involving the Affordable Care Act, and it issued a ruling that has sharply curtailed health care providers' ability to obtain court orders requiring state Medicaid agencies to set adequate payment rates. As discussed below, federal appellate courts also announced notable decisions affecting Medicaid and public health.

### The Affordable Care Act

During 2015, the Supreme Court reviewed its third case challenging the Affordable Care Act (ACA). *King v. Burwell*, 135 S. Ct. 2480 (2015), looked at what Congress meant in the ACA when it used the phrase "Exchange *established by the State*" in a provision addressing the availability of insurance premium assistance for limited-income individuals. 26 U.S.C. § 36B(b)(2)(A) (emphasis added). The ACA requires an Exchange to operate in each state to provide enrollment and premium assistance, and provides that the Exchange will be operated by the federal government if the state does not operate its own Exchange. Most states have left operation to the federal government, so read literally in isolation from the rest of the Act, the pivotal phrase would have barred limited-income citizens who live in federal exchange states from getting access to affordable health insurance … a situation that would potentially bring down ObamaCare.

By a relatively comfortable 6-3 margin, however, the Court upheld the ability of low- and middle-income individuals to obtain premium assistance through all types of Exchanges. The Court decided the case by applying traditional rules of statutory construction. Thus, rather than assessing the phrase in isolation, the Court construed the phrase in context and with a view toward its place in the overall statutory scheme. As explained by the Court, the entire purpose of the ACA is to make health insurance available to Americans by making it more affordable and to stabilize the health insurance market through guaranteed issue requirements (*e.g.*, no exclusions based on pre-existing conditions). Premium tax credits are an essential component of this scheme. The *King* Court, thus, made the rather common-sense conclusion that Congress would not have buried such a critical feature as a state-operation requirement in a "sub-sub-sub section of the Tax Code" mid-way into a 900+ page law that repeatedly states that its purpose is to insure all Americans.

The Supreme Court is not finished with the ACA, however. After deciding *King*, the Court agreed to hear a challenge by non-profit religious entities that object to the ACA's requirement for employers to provide their employees with health insurance that includes contraceptive services. The government has accommodated the religious entities by allowing them to certify their religious objection to the coverage and thereby shift the obligation onto insurers to provide contraceptive coverage. The non-profits want nothing at all to do with the process for enforcing the coverage mandate, and in *Zubik v. Burwell* (which is actually seven similar cases consolidated), the Court will decide whether the federal accommodation violates the Religious Freedom Restoration Act.

Appellate courts also reviewed other ACA challenges. Two courts rejected the argument tax provisions in the ACA are unconstitutional because they did not arise in the House of Representatives as required by the Constitution's Origination Clause. One of the cases was decided by the Fifth Circuit (*Hotze v. Burwell*, 784 F.3d 984), and the other by the D.C. Circuit (*Sissel v. U.S. Department of Health and Human Services*, 799 F.3d 1035).

In contrast to cases where the challengers hope to curb or enjoin enforcement of the ACA, the Eight Circuit Court of Appeals upheld a preliminary injunction that prohibits the Missouri Department of Insurance from implementing provisions of the Missouri Health Insurance Marketplace Innovation Act that restrict the activities that consumer assisters can undertake to help individuals enroll in Missouri's federal Exchange. *St. Louis Effort for AIDS v. Huff*, 782 F.3d 1016 (8th Cir. 2015), held the restrictions contained in the state law prevented certified consumer assisters from performing the duties required of them by the ACA and were, thus, preempted by the ACA. The case is important because at least 15 other states have passed laws similar to Missouri's. The plaintiffs are represented by Mehri & Skalett and the National Health Law Program.

**Enforcement of the Medicaid Act in Court**

In *Armstrong v. Exceptional Child Care Center*, 135 S. Ct. 1378 (2015), the Supreme Court held that health care providers cannot enforce the Supremacy Clause of the U.S. Constitution to make the state Medicaid agency comply with the Medicaid Act's requirement to ensure that adequate payment rates are paid to participating providers. The case was decided by a narrow 5-4 margin. The line-up of the justices did not reflect the usual ideological split, however. Justice Breyer voted with the majority; Justice Kennedy, with the dissent.

The Court found that the Supremacy Clause merely creates a "rule of decision" that instructs courts what to do when state and federal law clash. It does not, however, include a cause of action that empowers a plaintiff to file a case in the first place. In other words, the Supremacy Cause does not address who may enforce federal laws in court and in what circumstances they may do so. Writing for the majority, Justice Scalia said that individuals can ask the court to exercise its equitable powers to enjoin unconstitutional actions by government officials. That power, however, is subject to any express or implied limitations intended by Congress.

Turning, then, to the Medicaid payment provision, 42 U.S.C. § 1396a(a)(30)(A), the Court concluded that Congress "implicitly" precluded the health care providers' enforcement action, finding two indications of congressional intent. First, the remedy Congress provides for a Medicaid Act violation is for the Secretary of Health and Human Services (HHS) to terminate federal funding to all or parts of the state Medicaid program until the state stops violating the federal law. The *Armstrong* majority's second major point is that, while the termination of funding provision might not, by itself, preclude the provider's lawsuit, the Medicaid payment provision does because it is so broad and non-specific as to be "judicially unadministrable." 135 S. Ct. at 1385. This ignores the reality that, prior to this opinion, courts had enforced the Medicaid payment provision dozens of times.

While the reach of *Armstrong* is yet to be decided, it is clear that the enforcement scheme described by the Court will not work. As noted, the Court places the remedy with the Secretary to terminate all or part of the state's federal

Medicaid funding. In other words, health care providers, who are not being paid enough by the state Medicaid agency, would be asking the federal government to deny the state the federal funding that the state needs to operate its Medicaid program. This is hardly a realistic solution.

**Medicaid Due Process**

Federal courts of appeals decided cases during 2015 that address due process—the notion that Medicaid applicants and recipients have the right to a written notice and the opportunity to be heard by an impartial decision maker before their claims for Medicaid assistance are denied, reduced or terminated. These due process rights are found in both the U.S Constitution and the Medicaid Act, 42 U.S.C. § 1396a(a)(3).

In other due process developments, two circuit courts recognized that constitutional due process and Medicaid Act standards are not the same. In *Fishman v Paolucci*, _ F. App'x _, 2015 WL 5999318, the Second Circuit found that the due process rights contained in the Medicaid statute are broader than the constitutional due process right with respect to dismissal of appeals and termination of benefits when an individual fails to appear at a hearing. By contrast, in *N.B. v. District of Columbia, Peacock*, 794 F.3d 31, the District of Columbia Court of Appeals found that the constitutional right is broader than the statutory right with respect to notices when an applicant's request for Medicaid services is denied. Both cases were remanded to the district courts to decide what process is due.

The Ninth Circuit decided a Medicaid due process case involving enrollees in Idaho's home and community based waiver program for individuals with disabilities. The Medicaid agency appealed a lower court ruling requiring it to give full written notice when application of its enrollee needs assessment tool caused the enrollee's budget to change. Citing 42 C.F.R. § 431.201, the Department appealed the case to the Ninth Circuit, arguing that the calculation of a new budget was not an "action" under the Medicaid law because the budget itself did not result in the "termination, suspension, or reduction" of any Medicaid services. The Ninth Circuit rejected the argument, reasoning that the notice requirements are triggered because services must be reduced or eliminated to bring the cost of the service plan within the budget so, "as a practical matter, calculating a lower budget decreases a participant's Medicaid services…." *K.W. v. Armstrong*, 789 F.3d 962 (9th Cir. June 5, 2015).

**Public Health**

In *Wollschlaeger v. Governor of Florida*, 797 F.3d 859 (11th Cir. 2015), the Eleventh Circuit faced a challenge by physicians to the constitutionality of the Florida Firearm Owners' Privacy Act, which restricts inquiry and record-keeping by physicians regarding firearm ownership by their patients and subjects them to disciplinary action for violations. The Court upheld the law as a permissible restriction on physician speech. As explained by the Court, the Florida legislature passed the Act in response to complaints from constituents that medical personnel were asking unwelcome questions regarding firearm ownership, and that constituents faced harassment or discrimination on account of gun ownership. According to the Court, the law codifies the commonsense conclusion that good medical care does not require inquiry or record-keeping regarding firearms when unnecessary to a patient's care. The Court reversed the District Court's grant of summary judgment in favor of the physicians and vacated the injunction against enforcement of the Act.

The Second Circuit Court of Appeals rejected a challenge by parents of unvaccinated children to the constitutionality of New York laws requiring children to be vaccinated in order to attend public school and allowing unvaccinated children to be excluded from public schools during an outbreak of a vaccine-preventable disease. The requirement is subject to medical and religious exemptions. *Phillips v. City of New York*, 775 F.3d 538 (2d Cir. 2015), a per curiam opinion, concluded that the state laws are a constitutionally permissible exercise of the State's police power and do not infringe on the free exercise of religion. The Court found the parent's argument against

New York's mandatory vaccination requirement to be foreclosed by a long-standing U.S. Supreme Court case, *Jacobson v Commonwealth of Massachusetts*, 197 U.S. 11 (1905), which held that mandatory vaccination was within the State's police power and rejected the claim that the individual liberty guaranteed by the Constitution overcame the State's judgment that mandatory vaccines were in the interest of the population as a whole.

**Conclusion**

Federal and state policy making—both legislative and administrative—receive everyday attention. Activity in the judicial branch of government is often not as high profile. During 2015, however, Supreme Court decisions were responsible for keeping the ACA in place, nationwide, and for closing court house doors on health care providers who are being inadequately reimbursed by state Medicaid programs. The Court has already agreed to decide its fourth ACA case during 2016. Without doubt, decisions from the judicial branch of government will help continue to shape health policy in the years to come.

## About Us

The National Health Law Program protects and advances the health rights of low income and underserved individuals. NHeLP advocates, educates and litigates at the federal and state level.

## Author

This month's *Health Advocate* was prepared by:

Jane Perkins
Legal Director,
North Carolina Office

## Offices

**Washington, DC**
1444 I Street NW, Suite 1105
Washington, DC 20005
(202) 289-7661
nhelpdc@healthlaw.org

**Los Angeles**
3701 Wilshire Blvd, Suite 750
Los Angeles, CA 90010
(310) 204-6010
nhelp@healthlaw.org

**North Carolina**
101 East Weaver Street, Suite G-7
Carrboro, NC 27510
(919) 968-6308
nhelpnc@healthlaw.org

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