Implications of the U.S. Supreme Court’s Ruling in Armstrong v. Exceptional Child Center

A Real World Analysis

April 30, 2015

Kathy Gifford and Catherine Rudd, Health Management Associates
Leah S. Mannweiler and Meghan Linvill McNab, Krieg DeVault
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DECISION OVERVIEW
It all started in Idaho . . .

• **Trial court issue:** HCBS residential habilitation *rate adequacy*

• **Background:** State law said rate methodology must consider “actual cost” of providing “quality services”
  
  – Rate increase proposed by state officials, but not funded by Legislature
  
  – Five Res Hab providers sued relying on the Medicaid “*equal access*” provision:

  ... provide such methods and procedures relating to the utilization of, and the payment for, care and services available under the plan * * * as may be necessary to safeguard against unnecessary utilization of such care and services and to assure that payments are consistent with efficiency, economy, and quality of care and are **sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area . . .”

42 U. S. C. §1396a(a)(30)(A)
First, a brief history lesson

- **Key legal question:**
  - *Do providers and beneficiaries have the right to bring lawsuits challenging inadequate Medicaid rates or is enforcement left exclusively to CMS?*

- For years the answer was “yes” (regarding right to sue), but not any more!
  - “Boren Amendment” repealed in 1997
  - *Gonzaga Univ. v. Doe:* (2002 Supreme Court decision)
    - Narrowed ability to use the Civil Rights Act to bring a private right of action under the federal Medicaid Act

- Following *Gonzaga*, providers looked for another way to get into court to challenge rates
  - **New legal theory:** Constitutional Supremacy Clause provides an implied right of action enabling providers to sue states and seek a court order to require a state to comply with the equal access requirement
Armstrong providers won the early battles but lost the war

- District Court of Idaho ruled for providers
  - Found rates not consistent with equal access requirement

- 9th Circuit U.S. Court of Appeals affirmed lower court ruling and bought the new legal theory
  - Providers entitled to seek injunctive relief against the state under the “Supremacy Clause”

- U.S. Supreme Court (5-4 decision) overruled 9th Circuit:
  - Did not reach the rate adequacy question
  - Rejected the “Supremacy Clause” argument and also held there is no “implied” private right of action to seek equitable relief under the equal access section: that is,
  - **Bottom line:** Providers cannot challenge Medicaid rates as violating the equal access requirement; up to CMS to enforce
Where you stand on the decision depends on where you sit

“The decision prevents a “tsunami of litigation” that could “have had the effect of grinding the gears of the effective and efficient administration of the Medicaid program to a halt.”

— National Association of Medicaid Directors

“The decision essentially destroys democracy . . . “

— Lynn S. Carman, Medicaid Defense Fund

“If providers and beneficiaries cannot go to court to hold the states feet to the fire to pay adequate rates, there may be a race to the bottom as state budgetary concerns drive Medicaid funding decisions.”

— HOOPER, LUNDY & BOOKMAN, P.C.
Health Care Lawyers and Advisors
Armstrong v. Exceptional Child Center

IMPLICATIONS
The focus now shifts to CMS and its enforcement authority and capacity

- Primary enforcement tool: **withholding federal funds**, but
  
  The “stick” of withholding funds that accompanies a compliance action ultimately does not punish the state, but the very people the Medicaid Act is meant to benefit. *** In practice, a state’s noncompliance creates a damned-if-you-do, damned-if you-don’t scenario where the withholding of state funds will lead to depriving the poor of essential medical assistance.

  —Amicus Brief of former HHS officials

- “Access” rule proposed in 2011 but never finalized could be revisited

- Current State Plan approval process for rate cuts: state assessment of access required
Proposed Access Rule: As written, a heavy lift for states

- Methods for Assuring Access to Covered Medicaid Services
  - Published May 6, 2011, 76 Fed. Reg. 26342
- Provides a framework for states to assess access to care in FFS (not risk-based managed care or PCCM)
- States must perform “Medical assistance access reviews” for every covered service
  - Subset reviewed every year; all services reviewed every 5 years
- Review would include:
  - Beneficiary input
  - Data comparing Medicaid payment rates to customary charges, Medicare rates, commercial payment rates, and or/Medicaid allowable costs
  - Measures for analyzing access
    - Issues identified in the review and the state’s recommendations for addressing them
Proposed Access Rule *(cont.)*

For a rate reduction SPA:

- State must submit an access review performed in the last 12 months that demonstrates sufficient access
- Analysis of beneficiary and stakeholder input on the impact of the rate cut
- Agency must develop procedures to monitor continued access to care after implementation

The proposed rule does **not** require states to adjust payment rates
Current CMS standard questions for rate reduction SPAs: *Access Rule lite*?

- How did the state determine that the rates are sufficient to maintain access?
- What studies or surveys were conducted?
- How were providers, advocates and beneficiaries engaged in discussions around rate modification? What were their concerns?
- Is the state making any other modifications to counterbalance the cut?
- How will the state monitor the impact of the rate cut?
- What actions will the state take to counter any decrease to access that is identified in the state’s monitoring plan?
While Armstrong closes down one litigation avenue, others may remain open

- Challenges under other Medicaid Act sections still possible
  - *Armstrong* decision specific to equal access provision
  - Example: “Reasonable promptness” requirement cases
- Challenges based on state laws
- Procedural challenges
- Lawsuits against CMS
- New theories that haven’t been thought of yet!
Other implications and unknowns

• More likely:
  – Greater provider focus on negotiating rates with health plans
    • MCOs have ability to increase rates to providers
    • States are shifting access responsibility to MCOs
    • MCOs also generally have an amount they must spend on services so cannot just deny care to increase profit
    • Can go to State Medicaid Agency if MCO is not complying with its contracts
  – Continued state focus, with perhaps greater provider interest in provider taxes and supplementary payment options (DSH, UPL, negotiated rates, etc) for providers funding of non-federal share
  – Providers help fund the non-federal share through use of things such as permissible provider assessment fees and IGTs
    • Increased match allows for increased rates
• More likely - continued:
  – Providers likely to become more engaged in documenting access problems for the Medicaid enrollees they serve
  – Legislative Action
    • Example: The 2015 Indiana General Assembly restored rates to providers of services to those with intellectual impairments, in exchange for providers increasing staff wages (HB 1001) – Walmart increases, maintenance of staff
    • Take access and rate issues to another forum – the legislature.
Other implications and unknowns - continued

• **Less likely:** Congressional action to:
  – Create provider right to sue under equal access provision
  – Set floor for Medicaid rates
    • E.g., ACA temporary primary care rate increase (now expired)

• **Unknown:**
  – Impact on ACA Medicaid expansion decisions of non-expansion states
  – Others?
But what about access for Medicaid beneficiaries?

- Will there be a “race to the bottom” as states exercise new flexibility to cut rates without fear of an equal access lawsuit?
  - Probably not (See e.g., recent action in the CA State Assembly)
  - States likely to respond to actual access issues
  - But may be difficult to persuade states to pre-empt access issues before they occur
Q & A

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