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Opinion No. 00-016

TennCare/House Bill 2002

QUESTIONS

House Bill 2002 proposes to establish a cause of action for damages for enrollees of behavioral health organizations (BHOs) and health management organizations (HMOs). The bill requires BHOs and HMOs to base their treatment decisions and utilization review decisions upon the higher of generally accepted standards of health care practice among BHOs or HMOs or generally accepted standards of health care practice in the medical community. It provides that BHOs and HMOs have the duty to exercise ordinary and reasonable care when making treatment decisions and applying treatment policies, and that they are liable for damages for harm to enrollees if the damages are proximately caused by failure to exercise ordinary and reasonable care.

The bill states that it does not apply to the TennCare program and to several government sponsored health insurance plans.

1. Because Tennessee precedent establishes that unequal treatment of the Medicaid/TennCare population has a disparate and adverse impact on minorities, does excluding TennCare participants from the coverage of House Bill 2002 violate Title VI of the 1964 Civil Rights Act?

2. Is there a sufficient rational basis to justify the provisions of HB 2002 that create dissimilar treatment between enrollees participating in commercial HMOs and those who participate in government affiliated HMOs?

OPINIONS

1. First, as HB 2002 is evidently facially neutral legislation and not intentionally discriminatory, it is our opinion that its exemption of the TennCare program would not violate Title VI itself. Second, as to a claim of disparate impact under the U.S. Department of Health and Human Services' Title VI regulations, resolution of such a claim requires extensive and often complex factual analysis. We have insufficient factual information to analyze such a claim. Finally, while we have some doubt whether a claim that HB 2002 would result in actionable disparate impact under HHS Title VI regulations could ever be legally sufficient,

in view of the novelty of your question, the lack of similar precedent, and the doctrine of primary jurisdiction, we would advise that the question be posed to the Secretary of the U.S. Department of Health and Human Services and/or the Health Care Financing Administration. The Secretary and HCFA have continuing and detailed authority to determine ongoing compliance with the TennCare waiver; they also have responsibility for monitoring and enforcing Title VI compliance in the TennCare program.

2. Yes.

ANALYSIS

1. TennCare is a Medicaid demonstration waiver program under 42 U.S.C. § 1315. The state provides Medicaid services pursuant to waivers of federal Medicaid requirements and subject to continuing unwaived provisions of title XIX of the Social Security Act (hereinafter "Medicaid Act"), 42 U.S.C. §§ 1396, *et seq*. TennCare contracts with managed care organizations (HMOs and BHOs) to deliver necessary medical care to enrollees through networks of subcontracting health care providers.

The Medicaid Act requires that states provide medical assistance to their eligible enrollees with "reasonable promptness." 42 U.S.C. § 1396a(a)(8). It also requires that states provide such methods and procedures relating to the utilization of care and services as may be necessary to assure quality of care. 42 U.S.C. § 1396a(a)(30)(A). Violations of these provisions of the Medicaid Act have been held actionable under 42 U.S.C. § 1983. *Sobky v. Smoley*, 855 F. Supp. 1123, 1147 (E.D. Cal. 1994)(42 U.S.C. § 1396a(a)(8), the "reasonable promptness" provision of the federal Medicaid Act, confers enforceable rights on Medicaid beneficiaries under 42 U.S.C. § 1983); *Arkansas Medical Society v. Reynolds*, 6 F.3d 519, 527-528 (8th Cir. 1993)(42 U.S.C. § 1396a(a)(30)(A), the "equal access" provision of the federal Medicaid Act, may be enforced by Medicaid recipients and providers using 42 U.S.C. § 1983). Additionally, in approving the TennCare demonstration waiver in November 1993, the Health Care Financing Administration (HCFA) of the Department of Health and Human Services (HHS) imposed a number of "Special Terms and Conditions" upon the state, including standards for access to many of the health care services provided through the TennCare program. For example, the terms and conditions establish HCFA's standards for access to pharmacy services as the "usual and customary" transport time, not to exceed 30 minutes, "except in rural areas where community access standards and documentation will apply." *See* Opin. Atty. Gen. 98-081 (4/7/98).

You ask whether Tennessee "precedent establishing that unequal treatment of the Medicaid/TennCare population has a disparate and adverse impact on minorities" would lead to a conclusion that HB 2002's exclusion of TennCare participants violates Title VI. While our research has not yielded precedent which would enable us to answer all aspects of your question with a high degree of certainty, the following is our present best analysis.

Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d) was enacted to eliminate discrimination in programs and activities receiving federal funding. It provides:

> No person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving federal financial assistance.

Title VI itself "directly reach[es] only instances of intentional discrimination." *Alexander v. Choate*, 469 U.S. 287, 291, 105 S.Ct. 712, 715, 83 L.Ed.2d 661 (1985), citing *Guardians Assn. v. Civil Service Commission of New York City*, 463 U.S. 582, fn. 8, 103 S.Ct. 3221, 77 L.Ed.2d 866. As HB 2002 is evidently facially neutral legislation and not intentionally discriminatory, it is our opinion that its exemption of the TennCare program would not violate Title VI itself.

However, in *Guardians Assn. v. Civil Service Commission of the City of New York*, 463 U.S. 582, 103 S.Ct. 3221, 77 L.Ed.2d 866 (1983), the United States Supreme Court recognized that Title VI regulations[1] encompassed actions "having an unjustifiable disparate impact on minorities. . .." 469 U.S. at 292-94, 105 S.Ct. at 716. Litigation may be based upon violations of the federal regulations, which expressly include disparate impact discrimination. *See* 42 C.F.R. § 80.3(b)(2). In *Alexander v. Choate*, the Court interpreted *Guardians* as suggesting that regulations could make a disparate impact actionable in federal litigation. *Alexander v. Choate*, 469 U.S. at 294, 105 S.Ct. at 716. In *Linton by Arnold v. Carney by Kimble v. Commissioner of Health and Environment*, 779 F. Supp. 925, 934 (M.D. Tenn. 1990), the U.S. District Court for the Middle District of Tennessee found disparate impact, based upon the Title VI regulations, sufficient to provide a cause of action to permit declaratory and injunctive relief.

45 C.F.R. § 80.3(b)(2), the U.S. Department of Health and Human Services' Title VI regulation, expressly prohibits a recipient of federal funding from "utiliz[ing] criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program. . .."

Courts considering claims under Title VI regulations have looked for guidance to cases premised upon Title VII disparate impact analysis. *See, e.g., New York Urban League, Inc. v. State of New York*, 71 F.3d 1031, 1036 (2nd Cir. 1995); *Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394, 1407 & n. 14 (11th Cir. 1993). Under this framework, a plaintiff is required to prove "by a preponderance of the evidence that a facially neutral practice has a disproportionate adverse effect on a group protected by Title VI." *Sandoval v. Hagan*, 197 F.3d 484, 507 (11th

[1]The federal regulations effectuating Title VI in programs receiving federal assistance from HHS broadly define "program" to include any ". . . activity for the provision of services. . . including . . . health services . . . through contracts or other arrangements. . .." 45 C.F.R. § 80.13(g). Section 1315 waiver projects to promote title XIX are expressly listed as governed by Title VI regulations. 45 C.F.R. Pt. 80, Appendix A, #124.

Cir. 1999)(citations omitted). To prove disparate impact, a plaintiff must demonstrate three essential elements: first, a facially neutral policy casts an effect on a statutorily-protected group; second, the effect is adverse; and finally, the effect is disproportionate. *Id.* at 508. Once a prima facie showing is made, a defendant must prove that a "substantial legitimate justification" exists for the challenged practice. *Id.* at 507. If a defendant meets this burden, a plaintiff still may prevail by demonstrating that a "comparably effective alternative practice which would result in less disproportionality" exists, or that the "defendant's proffered justification is a pretext for discrimination." *Id.*

It is thus evident that resolution of claims of disparate impact under Title VI requires extensive and often complex factual analysis. In the context of your present inquiry, for example, one would have to make the prima facie determination whether a group protected by Title VI, such as African Americans, is presently represented disproportionately in the population of TennCare enrollees as compared with its representation in the enrollment population of HMOs and BHOs proposed to be governed by HB 2002. Second, assuming that one or more groups of persons protected by Title VI is represented disproportionately in the population of TennCare enrollees, one would have to analyze whether HB 2002's exclusion of the TennCare program would create an "effect" upon any such group of individuals and, if so, whether the effect would be "adverse." We have insufficient factual information to analyze such questions.

In any event, however, we have some doubt whether a claim that HB 2002 results in actionable disparate impact under HHS Title VI regulations would ever be legally sufficient. The governing HHS regulation, 45 C.F.R. § 80.3(b)(2), prohibits a recipient of federal funding from "utiliz[ing] criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program. . .." (emphasis added). Thus, in determining whether HB 2002's TennCare exemption violates 45 C.F.R. § 80.3(b)(2), threshold legal questions must be addressed whether such exemption could ever "have the effect of subjecting individuals to discrimination because of their race, color, or national origin," or could ever "have the effect of defeating or substantially impairing accomplishment of the objectives of the [TennCare] program."

We have some doubt that, as a matter of law, the exemption could have such effects. For example, we are unaware of any authority, under federal or state law, for the proposition that an "objective" of the TennCare program is to accord enrollees an individual right to sue for negligence damages in state court. Moreover, even assuming, for purposes of argument, that such individual right of action could be viewed as consistent with such federal Medicaid Act requirements as "reasonable promptness" (42 U.S.C. § 1396a(a)(8)) and "equal access" (42 U.S.C. § 1396a(a)(30)(A)), we note that federal law already grants TennCare enrollees the right to enforce such federal statutory requirements upon the state through actions under 42 U.S.C. §

1983.[2] Therefore, even making the assumptions described in the previous sentence, we have some doubt that the exemption of TennCare enrollees from the coverage of HB 2002's right to sue in state court for damages in negligence could ever be viewed as having the "effect of defeating or substantially impairing accomplishment of the objectives of the [TennCare] program," as is required for an actionable violation of 45 C.F.R. § 80.3(b)(2).

We assume that the "precedent" referred to in your question is *Linton by Arnold v. Carney by Kimble v. Commissioner of Health and Environment*, 779 F. Supp. 925 (M.D. Tenn. 1990). We do not believe, however, that the *Linton* decision is inconsistent with our discussion in the previous paragraph. In *Linton*, a class of Medicaid recipients challenged the state's policy of certifying only a portion of Medicaid participating nursing homes for availability for Medicaid patients. The U.S. District Court for the Middle District of Tennessee found that this policy allowed nursing home operators to give preference to private pay patients by reserving for their exclusive use beds which were, due to lack of certification, unavailable to Medicaid patients. 779 F. Supp. at 932. The Court found that the policy caused "widespread displacement" and "severe impact." *Id*. It concluded that this state policy "offend[ed] not only the purpose of the federal [Medicaid] statute, but also its literal language." *Id.* at 933. It determined that the policy violated multiple Medicaid Act regulations. *See generally*, 779 F. Supp. at 935-936. Thus, in *Linton*, the Court's additional conclusion that the challenged state policy violated Title VI regulations was accompanied by findings of clear adverse effect upon African Americans and clear violations of the objectives of the Medicaid program.[3] In our view, the *Linton* decision does not, in and of itself, mandate a conclusion that HB 2002's exemption of the TennCare program would constitute a violation of Title VI disparate impact prohibitions.

In view of the novelty of your question, the lack of similar precedent, and the doctrine of primary jurisdiction, we would advise that the question be posed to the Secretary of the U.S. Department of Health and Human Services and/or the Health Care Financing Administration. First, the Secretary and HCFA have continuing and detailed authority to determine ongoing compliance with the TennCare waiver. *See* Opin. Atty. Gen. 98-081 (4/7/98). Additionally, "responsibility for monitoring and enforcing Title VI rests with the federal agencies that extend financial assistance." *Madison-Hughes v. Shalala*, 80 F.3d 1121, 1126 (6th Cir. 1996)(citations

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[2] Of course, such actions under 42 U.S.C. § 1983 require that the alleged violation have been perpetrated by a person acting "under color of [a state] statute, ordinance, regulation, custom or usage." 42 U.S.C. § 1983. Such actions are thus not available to enrollees of private, non-government sponsored health care plans, such as the HMO and BHO enrollees who would be covered under HB 2002.

[3] Similar comments can be made about another more recent decision. In *Sandoval v. Hagan*, a 1999 decision of the 11th Circuit Court of Appeals, the Court affirmed the trial court's findings that an Alabama Department of Public Safety policy requiring administration of driver's license examinations only in the English language constituted disparate impact on the basis of national origin in violation of federal Title VI regulations. The Court of Appeals' decision was not only premised upon factual findings of "significant impact [upon] Alabama residents of foreign descent, in both an adverse and disproportionate manner," but was also accompanied by conclusions that Supreme Court precedent and longstanding congressional provisions and federal agency regulations had instructed state entities that implementation of English-only rules constitutes a prima facie case of national origin discrimination. *Sandoval v. Hagan*, 197 F.3d 484, 510-511 (11th Cir. 1999).

omitted). The Secretary of HHS, through HCFA, is the federal agency that extends financial assistance to the TennCare program.

2. Your second question inquires whether there is a sufficient rational basis to justify the provisions of HB 2002 that create dissimilar treatment between enrollees participating in commercial HMOs and those who participate in government affiliated HMOs.

This issue involves application of principles of equal protection of the laws under the Tennessee Constitution. Article XI, Section 8 provides:

> The Legislature shall have no power to suspend any general law for the benefit of any particular individual, nor to pass any law for the benefit of individuals inconsistent with the general laws of the land; nor to pass any law granting to any individual . . . rights, privileges, immunities, . . . or exemption other than . . . by the same law extended to any member of the community, who may be able to bring himself within the provisions of such law.

Citizens are classified under Article XI, Section 8 of the Constitution when the object of the Legislature is to confer upon them certain rights, privileges, immunities or exemptions not enjoyed by the community at large. *Tennessee Small School Sys. v. McWherter*, 851 S.W.2d 139, 152-53 (Tenn. 1993).

If a legislative classification does not affect a fundamental right or a suspect class, it is subject to the "rational basis" test and will be upheld if there is a rational basis for the legislation. *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976). As noted by the Tennessee Supreme Court, "[i]f any possible reason can be conceived to justify the classification, or if the reasonableness be fairly debatable, this Court must uphold it. ... A classification is not unconstitutional merely because in practice it results in some inequality, where the classification has a reasonable basis." *Estrin v. Moss*, 221 Tenn. 657, 667, 669, 430 S.W.2d 345 (1968).

Although the proposed legislation provides no facial justification for creation of a classification which would exempt TennCare enrollees from the right to sue their HMOs and BHOs in state court for damages for negligent treatment decisions and utilization decisions, there is certainly a conceivable basis for justifying the classification. As we have noted previously in this opinion, TennCare enrollees, unlike enrollees in non-government sponsored health care plans, already have a federally-conferred right of action under 42 U.S.C. § 1983 for violation of their statutory rights under the federal Medicaid Act. Furthermore, under the Medicaid Act, TennCare enrollees have the right to, and have been accorded, strong procedural protections allowing them to grieve and receive fair hearings when their TennCare managed care organizations and behavioral health organizations take action to delay, deny, reduce, suspend or terminate medical assistance in the TennCare program. *See, e.g., Daniels v. Wadley*, 926 F.

Supp. 1305 (M.D. Tenn. 1996). In view of such already-existing rights and protections for TennCare enrollees, the Legislature could make a rational determination to exclude TennCare enrollees from legislation establishing a new state court right of action for negligence damages against HMOs and BHOs.

Likewise, while we have not been presented with reasons for HB 2002's exclusion of state and local government employees who are enrolled in government sponsored health plans, we can conceive of reasons which could be offered in justification of such exclusion. Depending upon the information available to it, for example, the Legislature could determine that inclusion of public employees within the coverage of the bill would increase costs to state and local government in an unacceptable amount.

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