

4th Circ. Won't Let SC Medicaid Drop Planned Parenthood

By Kellie Mejdrich

Law360 (March 5, 2024, 5:29 PM EST) -- The Fourth Circuit rejected on Tuesday South Carolina's attempt to terminate its Medicaid provider agreement with Planned Parenthood, unpersuaded by the state's argument that a recent U.S. Supreme Court decision compelled a different outcome.

In a 33-page published opinion, a three-judge panel affirmed a South Carolina district court's order from 2020 permanently enjoining the disqualification of Planned Parenthood from the state's Medicaid program.

The panel said its ruling to affirm the lower court's injunction marked the third time the appellate court ruled individuals could sue under federal civil rights laws to enforce the Medicaid Act's free-choice-of-provider provision. In addition to an earlier decision in the appeal that also affirmed the permanent injunction in 2022 — which the Supreme Court vacated and remanded over the summer after justices issued a decision involving private rights of action to enforce federal law in June 2023 — the appellate court affirmed a preliminary injunction against the state in 2019.

"Preserving access to Planned Parenthood and other providers means preserving an affordable choice and quality care for an untold number of mothers and infants in South Carolina," the panel said.

As it emphasized in prior rulings in the case, which Planned Parenthood South Atlantic and Medicaid patient Julie Edwards first brought against the director of the South Carolina Department of Health and Human Services in 2018, the panel said Tuesday its decision was "not about funding or providing abortions." But the decision affirms a block on South Carolina from being able to drop Planned Parenthood South Atlantic from the state's Medicaid program.

That action by the state of South Carolina — directed through an executive order from the state's governor in 2018 — was based on an argument that federal funding from the Medicaid program was indirectly subsidizing abortions at Planned Parenthood. The current director of the South Carolina Department of Health and Human Services and defendant in the suit is Robert M. Kerr.

The appellate panel said Tuesday its analysis would be the same "regardless of whether South Carolina wanted to divert the funds because Planned Parenthood provided cancer screening, pregnancy testing, or any other medical care it is qualified to provide."

The panel directly rejected the state's argument that the U.S. Supreme Court's June 2023 decision in *Health and Hospital Corp. of Marion County v. Talevski* set a higher bar for establishing a private right

and said it disagreed that the decision "compels the conclusion that the free-choice-of-provider provision cannot be enforced by individual Medicaid beneficiaries."

In that case, the high court upheld the right of a nursing home resident's family to sue an Indiana care home under the Federal Nursing Home Reform Act for what the family alleged was negligent care. Justices upheld an individual's right to bring a Section 1983 claim — made under Title 42 U.S. Code Section 1983, a federal statute which allows a person to sue state and local government officials they believe have violated their civil rights — to enforce provisions of federal nursing home law.

In its Tuesday opinion, the panel said the Supreme Court outcome didn't change its analysis that Medicaid patients could sue under Section 1983 to stop South Carolina from blocking their access to healthcare providers at Planned Parenthood.

"While Talevski offered an illuminating analysis of the issue before us and a useful new example of provisions enforceable via § 1983, we do not read it as toppling the existing doctrinal regime," the panel said.

The panel added that the free-choice-of-provider provision under the Medicaid Act would pass any new test set by the Talevski decision.

"Accordingly, we remain in the good company of four of our sister circuits and reaffirm that a Medicaid beneficiary may use § 1983 to vindicate her right under the Medicaid act to freely choose among qualified healthcare providers, of which Planned Parenthood is one."

U.S. Circuit Judge Julius N. Richardson said in a brief concurrence that he agreed that the appellate court was "bound to stand by our previous holding" that Medicaid patients had individual rights to see Planned Parenthood providers that were enforceable under Section 1983.

But he said he was writing separately in the case "to ask for clarity on the precedential status" of the Supreme Court's 1990 decision in *Wilder v. Virginia Hospital Ass'n* as well as its 1997 decision in *Blessing v. Freestone*.

Judge Richardson said while Talevski offered a different path than the other two cases, it didn't reject either case completely.

"We continue to lack the guidance inferior judges need," Judge Richardson said.

John Bursch, an attorney for South Carolina's health and human services director, said in a statement provided after the decision published Tuesday: "We are reviewing the decision and will consider our options."

"As Judge Richardson notes in his concurring opinion, the issues presented in this case are in dire need of clarity that only the U.S. Supreme Court can provide. In fact, the circuits are split 5-2 on the question presented," Bursch said.

Alexis McGill Johnson, president and CEO of Planned Parenthood Federation of America, said in a statement Tuesday that the ruling "makes clear what we've long said: State politicians cannot block people with low incomes from choosing the Medicaid provider they know and trust — and that includes Planned Parenthood affiliates."

U.S. Circuit Judges J. Harvie Wilkinson III, James A. Wynn Jr. and Julius N. Richardson sat on the panel for the Fourth Circuit.

Planned Parenthood and Edwards are represented by Avi M. Kupfer and Nicole A. Saharsky of Mayer Brown LLP, by Jennifer Sandman of Planned Parenthood Federation of America and by M. Malissa Burnette and Kathleen McDaniel of Burnette Shutt & McDaniel PA.

Kerr is represented by John J. Bursch and Christopher P. Schandavel of Alliance Defending Freedom and by Kelly M. Jolley and Ariail B. Kirk of Jolley Law Group LLC.

The case is Planned Parenthood South Atlantic v. Kerr, case number 21-1043, in the U.S. Court of Appeals for the Fourth Circuit.

--Editing by Nick Petruncio.

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