

Calif. Medicaid cuts pit HHS vs. DOJ



Kathleen Sebelius's office has worked with allies outside the administration on the issue. | AP Photo

By [J. LESTER FEDER](#) | 6/7/11 4:46 AM EDT

Much of the health policy world was stunned when acting Solicitor General Neal Katyal filed an amicus brief in a Supreme Court case on May 26 arguing against Medicaid patients and providers suing California over changes to its Medicaid program.

“Every health policy person and every lawyer in the administration [was] on [the opposite side] — the ‘good guy’ side,” said a Capitol Hill source with knowledge of the deliberations.

Advocates for Medicaid beneficiaries say the case, *Douglas v. Independent Living Center of Southern California*, is important because it will be very difficult to enforce states’ obligations under Medicaid if the Supreme Court accepts Katyal’s argument. This could not only hurt beneficiaries who would have little recourse if Medicaid denies life-saving benefits, but it could also undermine the Patient Protection and Affordable Care Act, which relies on states to implement key components. The court will hear the case in the next term.

With such high stakes, Health and Human Services Secretary Kathleen Sebelius made efforts to head off Katyal’s opinion, and her office worked with allies outside the administration to try to get the White House to steer the Justice Department away from taking this stand. HHS also issued a proposed rule on access to services in hopes that the court will decide the case is moot.

The individuals bringing the case allege the state of California cut its payments to providers so much that it made it impossible for beneficiaries to access the services the Medicaid statute requires. They argue that the supremacy clause of the Constitution means federal courts should prevent the state from taking this action because it violates federal law.

The Supreme Court is considering only a technical question: Do individuals have the right to bring a suit under the supremacy clause against the state for its administration of the Medicaid program?

If it rules that they do not, the federal government will have to step in to ensure compliance, and its only lever — withholding Medicaid funds — could hurt the very beneficiaries that the government wants to protect, advocates warn. Advocates also fear a broad ruling could set a precedent of blocking suits against states that fail to follow the ACA.

Advocates were pleased in December when Katyal initially opposed the Supreme Court's taking the case, which would have allowed the 9th Circuit opinion that froze California's cuts to Medicaid reimbursements to stand.

But after the Supreme Court agreed to hear the case, Katyal did what Medicaid advocates had feared. His amicus brief on the merits was stunning, they said, because he not only sided against the individuals bringing suit but also made a remarkably broad case against giving individuals standing in such situations.

"We spent essentially a year battling over this, a number of us battling away on this case," said one Sebelius ally outside of government. "The whole thing turned into a rout."

Neither HHS, the Department of Justice nor the White House would comment on the internal deliberations over this case, but an administration official defended the brief as going only as far as it needed to address the issues raised by the parties to the suit.

California Democratic Rep. Henry Waxman, whose office was a "hotbed" of organizing on the issue, according to an individual involved in the effort, told POLITICO the blame for Katyal's position lies with the president.

"Ultimately, if you have the [Justice Department] taking one position and HHS and others are taking a different position, ... the president's supposed to decide. He evidently decided to let this brief go through, and this is a serious mistake," Waxman said.

But Lisa Blatt, who spent 13 years at the Justice Department and handled cases involving Medicaid in the Solicitor General's Office, argued that there's "no mystery at all here."

"It's just that the government is very protective of state plans," she said. "This is consistent with what the government has always filed" when it has weighed in on related matters.

Matt Salo, executive director of the National Association of Medicaid Directors, said there's a good reason for the brief. If the Supreme Court finds individuals have standing to challenge issues like payment rates, he warned, "what you will have is unmitigated litigation clogging up the courts."

Gordon Bonnyman, executive director of the Tennessee Justice Center, took a much darker view of the filing.

"I understand [the Solicitor General's Office] had to write a brief, and I understand it is an open question where reasonable people could disagree," he said. "What is more remarkable ... [is that] they took a position that was antithetical to the effective implementation of the Affordable Care Act and they addressed questions that were somewhat gratuitous in doing that," he said.

Sara Rosenbaum, chairwoman of the health policy department at George Washington University, agreed.

The ACA will add an estimated 16 million people to Medicaid rolls. If the court follows Katyal's argument, Rosenbaum said, "It would be like having an insurance policy on paper and no real way to enforce the kind of assistance that real people in the real world are supposed to get."

And, she added, there's "no stopping point ... in terms of its spillover effects" if the Supreme Court broadly restricts individuals' access to the courts over state implementation of such a federal program.

Under the ACA, for example, individuals might not be able to sue if a state sets up an unfair enrollment process through the exchanges, or health plans may not be able to sue if a state sets up improper requirements on insurers.

The administration official vehemently disputed that this position harms the health reform law.

"In no way does this undermine the [Justice] Department's ability to defend the Affordable Care Act," he said, adding that the health reform law includes some provisions that explicitly spell out certain "privately enforceable rights."

As for Medicaid, the official argued the new rule proposed in response to the suit will protect beneficiaries even if they cannot go to court. But Medicaid advocates say it lacks teeth, and states complain that it is unworkable.

Waxman said he is not leaving the solicitor general's position unchallenged and will file an amicus brief with some colleagues countering the solicitor general's view.

"I think this undercuts the president's health care bill," he said, which is a real problem at a time when "we see a lot of states not anxious to live up to the requirements of the Affordable Care Act."