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Sotomayor Seems Wary Of 'Magic Words' For Medicaid Rights

By **Hayley Fowler**

Law360 (April 2, 2025, 8:38 PM EDT) -- The U.S. Supreme Court's liberal bloc on Wednesday bristled at the notion that "magic words" were necessary to cement a public insurance program recipient's right to sue, suggesting that a private right of action is inherent in the Medicaid Act's provider choice provision.

The words "right" or "shall" don't appear anywhere in the any-qualified-provider provision, counsel for the South Carolina Department of Health and Human Services said during oral argument, defending its position that the act does not permit Medicaid recipients to claim that a state's disqualification of a healthcare provider violates their civil rights.

The absence of those words belies the Fourth Circuit's conclusion that beneficiaries have a right to choose their doctors, argued John Bursch of Alliance Defending Freedom, an amicus supporting the health department.

When Justice Sonia Sotomayor cautioned that he was "coming very close" to arguing in favor of "magic words," Bursch countered that he wouldn't fight the justices "if you say that these are magic words."

Justice Sotomayor cut him off.

"No," she said. "You would like us to, but assume that I don't want to."

Justice Elena Kagan seemed similarly averse, suggesting later in the argument that the any-qualifed-provider provision as written already creates an obligation for the state that effectively establishes a right, with or without "magic words."

The Supreme Court's conservative majority, meanwhile, seemed open to adopting a more bright-line standard that would settle what Justice Brett Kavanaugh characterized as confusion in the lower courts as to what counts as "rights-creating" language in federal statutes.

Justice Kavanaugh questioned what specific words Bursch would include on a list of such language, to which Bursch said "rights," "entitlement," "privilege" and "immunities."

"You could define it as that universe," Bursch said. "You know, I don't think that's a magic word, but if it is … then it's a clear instruction to Congress, and we all know."

In response, Justice Kavanaugh said he's "not allergic to magic words because magic words, if they

represent the principle, will provide the clarity that will avoid the litigation that is a huge waste of resources for states, courts, providers, beneficiaries and Congress."

Kyle Hawkins of the U.S. Solicitor General's Office, arguing for the federal government as amicus in support of Medina, seemed less confident that there is an all-inclusive list of words the court could adopt as rights-conferring. Though he said the words Bursch gave "sound right," he also pointed to phrases like "shall be," saying the high court should look for "words that have a real rights-creating pedigree in our nation's history and legal traditions."

Justice Kavanaugh, however, said that opens the door to interpretation and creates "line-drawing problems."

"I don't know that there's a way to avoid line-drawing problems without saying that we need the word 'right' and exclusively 'right' and nothing else," Hawkins responded.

When faced with the same question from Justice Kavanaugh, Nicole Saharsky of Mayer Brown LLP, arguing for Planned Parenthood, said rights-creating language protects an individual or entitles that person to something.

In Medicaid's provider choice provision, Saharsky pointed to the words "any qualified and willing provider," which she said prevents the state from arbitrarily disqualifying providers. She said the combined language clearly establishes the individual beneficiary's right, and she argued against the adoption of "magic words."

"In all of the court's cases that have required clear statements in other contexts, the court has said, look, it's not magic words, we don't tell Congress how to write statutes," Saharsky said.

The justices spent roughly an hour and a half Wednesday parsing through the language of Section 1396a(a)(23)(A) of the Medicaid Act, also known as the any-qualified-provider provision.

The provision, which requires state Medicaid plans to allow beneficiaries to obtain medical care from any qualified provider of their choice, was the basis for a lawsuit filed by Medicaid recipient Julie Edwards and Planned Parenthood South Atlantic after South Carolina decided in 2018 to deem all abortion providers unqualified to provide family planning services. Gov. Henry McMaster announced the policy change in light of a state law that prohibits using public funds to pay for abortions.

On appeal to the Fourth Circuit, a three-judge panel ruled last year that individuals can sue under federal civil rights laws to enforce Medicaid's provider choice provision. In doing so, the 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 U.S. Supreme Court agreed in December to take up the case, limiting its inquiry to whether beneficiaries have a right to choose their provider and consequently can sue for deprivation of those rights under Title 42 U.S. Code Section 1983, a federal statute that allows a person to sue state and local government officials they believe have violated their civil rights — also known as a Section 1983 claim.

Central to that question during Wednesday's arguments was the high court's June 2023 decision in Health and Hospital Corp. of Marion County v. Talevski.

In that case, the justices upheld an individual's right to bring a Section 1983 claim to enforce a provision of the Federal Nursing Home Reform Act. Bursch argued Talevski set a higher bar for establishing a private right to sue — one he said the any-qualified-provider provision doesn't meet.

Bursch also said Talevski should have driven home for the lower courts that the Supreme Court's previous rulings from the 1980s and the 1990s in Blessing v. Freestone, Wilder v. Virginia Hospital Association and Wright v. City of Roanoke Redevelopment and Housing Authority — all of which dealt with private rights of action under Section 1983 — no longer apply.

But the Fourth Circuit still seemingly relied on those cases in crafting its opinion, Bursch said.

"I think you do need to be more clear," he told the justices. "If you really want to put a stake in those cases, you're going to have to do it in writing."

According to Bursch, the provision at issue in Talevski was set apart in a separate bill of rights that clearly established a guaranteed right for the individual, laying the foundation for a Section 1983 claim. By contrast, Bursch argued, the word "right" is nowhere to be found in the Medicaid Act's provider choice provision. As such, he said, states were never put on clear notice that they could be sued under that provision when they agreed to the Medicaid Act's conditions.

But Justice Kagan said the any-qualified-provider provision imposes an obligation on the state, which she said is nearly impossible to distinguish from a right.

"The state has an obligation to ensure that a person — I don't even know how to say [it] without saying 'right' — has a right to choose their doctor," she said. "That's what this provision is. It's impossible to even say the thing without using the word 'right.'"

Bursch described it as the "difference between a benefit and a right," pointing to the U.S. Supreme Court's 2002 decision in Gonzaga University v. Doe. In that case, he said, the justices clarified that "there's a difference between a duty to provide a benefit and a right that subjects you to 1983 liability."

He also said individuals and providers have access to an administrative appeals process to challenge any adverse rulings. But Justice Sotomayor said that process is limited to Medicaid recipients who were denied services that were actually rendered. "If a doctor can't render them," she said, "then they can't sue under that."

In its brief on appeal, South Carolina had argued in part that the any-qualified-provider provision appeared in a list of more than 80 other requirements for state Medicaid plans. According to Bursch, the states need only be in "substantial compliance," meaning there's wiggle room in terms of how far they can deviate from those requirements.

The sole punishment for straying too far is the withholding or rescission of federal funds, Bursch said. But that's up to the discretion of the secretary of the U.S. Department of Health and Human Services, he said.

"If you have a right, it's something that can't be taken away," Bursch told the justices. "And so, in a context where the state can not be following or administering that provision at all and the secretary can say 'no harm, no foul,' that's the exact opposite of a right."

In response, Justice Ketanji Brown Jackson pointed to what's known as the Suter fix, in which Congress clarified that such provisions are not unenforceable as individual rights merely because they appear in a list of plan requirements.

Justice Kagan then raised the same argument with counsel for the federal government.

"Not everything in that list is a right, but the fact that it's in that list is pretty irrelevant to the question of whether something is a right," she said.

Separately, Justice Sotomayor questioned why withholding federal funds from a state that violates the Medicaid plan requirements is an adequate remedy to someone losing their choice of provider.

"It does seem awfully odd to think that that is a remedy at all because what you would be doing would be depriving thousands of other Medicaid recipients of coverage in a particular state over the fact that an individual has been denied something that the provision says they're entitled to," she said.

When Justice Jackson later asked whether the federal government has ever withheld Medicaid funding from a state for violating the any-qualified-provider provision, Hawkins said he didn't know of an instance in which that occurred. But, he said, that only "suggests that states are complying in the aggregate."

Saharsky, arguing for Planned Parenthood, said the fact that DHHS has never cut off funding to a state is exactly why the provider choice provision is "meaningless" if Medicaid recipients can't sue under Section 1983.

"If this provision is not enforceable under Section 1983, it's not going to be enforced," she said.

Medina is represented by John J. Bursch, James A. Campbell, Erin M. Hawley, Christopher P. Schandevel and Caroline C. Lindsay of Alliance Defending Freedom, and Kelly M. Jolley and Ariail B. Kirk of Jolley Law Group LLC.

Planned Parenthood is represented by Nicole A. Saharsky, Miriam R. Nemetz, Minh Nguyen-Dang, Carmen Longoria-Green and Malori McGill Fery of Mayer Brown LLP, and Jennifer Sandman and Hannah Swanson of Planned Parenthood Federation of America.

The federal government is represented by Kyle D. Hawkins, Sarah M. Harris, Brett A. Shumate, Edwin S. Kneedler, Zoe A. Jacoby, Joshua M. Salzman and Laura E. Myron of the U.S. Department of Justice.

The case is Medina v. Planned Parenthood South Atlantic et al., case number 23-1275, in the U.S. Supreme Court.

--Additional reporting by Kellie Mejdrich, Ryan Harroff and Katie Buehler. Editing by Amy French.

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