

Supreme Court relief is needed, the advocates said, because the Fifth Circuit incorrectly applied the high court's undue burden standard in a way that "departs radically" from Supreme Court precedent. The Fifth Circuit erred, they said, by holding that:

- courts may not evaluate whether laws that restrict access to abortion actually further a valid state interest;
- the drastic reduction in the number and geographic distribution of abortion clinics caused by the requirements didn't operate as a substantial obstacle to abortion access in Texas; and
- the district court shouldn't have considered the way the provisions operate as evidence of their purpose.

The application was presented to Justice Antonin Scalia in his capacity as circuit justice for the Fifth Circuit. Scalia requested that the state file a response by Oct. 9.

J. Alexander Lawrence, of Morrison & Foerster LLP, New York; and Stephanie Toti, David Brown, Janet Crepps and Julie Rikelman, of the Center for Reproductive Rights, New York, are representing the advocates.

Full text of the application is at <http://op.bna.com/hl.nsf/r?Open=mapi-9ppkix>.

## New York

### Health Centers Obtain Appellate Relief In Lawsuit Challenging Medicaid Payments

Federally qualified health centers (FQHCs) in New York may pursue additional relief on claims that state rules for awarding them certain supplemental, or "wraparound," payments don't comply with the Medicaid Act, a federal appeals court ruled Oct. 7 (Cmty. Health Care Ass'n of N.Y. v. Shah, 2d Cir., No. 13-771, 10/7/14).

The U.S. Court of Appeals for the Second Circuit, vacating and remanding in part a federal trial court decision, said the FQHCs provided sufficient evidence at the summary judgment stage to support their claim that state regulations don't ensure they will receive the reimbursement required by 42 U.S.C. § 1396a(bb)(5) for treating Medicaid managed care beneficiaries.

The court vacated in part an injunction granted by the trial court and ordered further proceedings on the methodology for calculating the state's prospective obligation to make a wraparound payment to FQHCs that provide services pursuant to a contract with a managed

care organization (MCO). The trial court failed to ensure that the relief it ordered, with respect to which entity—the state or the FQHC—must absorb the risks of nonpayment by MCOs, was properly incorporated into the methods used to determine prospective payment rates, it said.

The court affirmed the trial court in most other respects, finding that the state generally was entitled to use a prospective methodology to calculate an FQHC's wraparound payment—to make up the difference between its costs and the amount it received from the MCOs. It also agreed that the providers raised valid arguments as to why other aspects of the way the state decides how much FQHCs are due in supplemental payments didn't comply with the Medicaid Act, the appeals court said.

**Risk of Nonpayment.** The court specifically addressed the situation where an MCO fails to pay an FQHC for services to a Medicaid MCO beneficiary and where an FQHC treats an enrollee of an MCO with which it doesn't have a contract. In both cases, state law allows the FQHC to be left "holding the bag," with no MCO payment and no supplemental payment available, the court said.

State procedures for challenging an MCO's refusal to pay for services to a covered enrollee were insufficient to justify denying FQHCs the injunctive relief they sought. That relief entitled FQHCs to bill the Department of Health directly when the MCO refuses to pay, the court noted.

It also agreed with the trial court's determination that the DOH adequately adopted reimbursement rate-setting methodologies that set "peer group" reimbursement ceilings; that set compensation for offsite and group psychotherapy services; and that required dental examinations and cleanings to, in most cases, be compensated as one visit.

Some of those rates and methodologies were approved by the Centers for Medicare & Medicaid Services, whose judgment on their adequacy and compliance with Section 1396a(bb) was subject to deference. The remainder upheld by the Second Circuit were reasonable and consistent with the Medicaid Act's requirements, the court said.

Feldesman Tucker Leifer Fidell LLP, Washington, and Menz Bonner Komar & Koenigsberg LLP, New York, represented the FQHCs. The Office of the Attorney General, New York, represented the state.

The court's decision is available at [http://www.bloomberglaw.com/public/document/Community\\_Health\\_Care\\_Associat\\_v\\_New\\_York\\_State\\_Department\\_of\\_H\\_D](http://www.bloomberglaw.com/public/document/Community_Health_Care_Associat_v_New_York_State_Department_of_H_D).