

Legal Sidebar

Courts Grapple with States' Efforts to Bar Medicaid Funds from Providers that Also Perform Abortions

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At the same time as Congress is considering [legislation](#) that would block federal funds from being awarded to Planned Parenthood, [some states](#) are also pursuing their own measures to limit that organization and similar entities from receiving reimbursement under the respective states' Medicaid plans. However, the shared federal-state nature of Medicaid may limit states' authority to exclude certain providers.

At issue is Section [1902\(a\)\(23\)](#) of the Social Security Act, also called the "freedom of choice" or "any willing provider" provision. It requires a state Medicaid plan to allow Medicaid beneficiaries to obtain medical assistance "from any institution, agency, community pharmacy, or person, qualified to perform the service or services required." Because this provision has been [interpreted](#) by the United States Supreme Court to provide Medicaid beneficiaries with "[the right to choose among a range of qualified providers, without government interference,](#)" it has served as a federal limit on states' efforts to exclude health care providers from Medicaid on the basis that the provider performs abortions or operates facilities in which abortions may be performed.

Nevertheless, some state actions to disqualify providers from reimbursement have been upheld based on a provider's failure to comply with state and federal requirements related to factors such as fraud or abuse, quality of medical care, physical services, nursing services, pharmaceutical services, medical records, and physical environment. In the context of a nursing home, the Supreme Court [noted](#) that Section 1902(a)(23) "confers an absolute right to be free from government interference with the choice to remain in a home that continues to be qualified," but that "it clearly does not confer a right on a recipient to enter an unqualified home ... nor does it confer a right on a recipient to continue to receive benefits for care in a home that has been decertified." Similarly, other courts have also upheld state restrictions on provider reimbursement that were based on whether the provider had [sufficient training or certifications](#) for specialized procedures. Other proposals that arguably had a more tenuous relationship with patient safety have not fared as well, such as a plan to limit access to providers based on the providers' [geographical location](#) within the state.

Particularly relevant to recent events, the "freedom of choice" provision has been interpreted by several federal courts of appeal to prohibit the application of Indiana and Arizona state laws that would exclude providers from Medicaid solely because they also performed certain abortions. Federal law independently prohibits the [use of Medicaid funds to pay for abortions](#), with some discrete exceptions. However, the state laws at issue in these cases would have additionally prohibited Medicaid providers from performing abortions where Medicaid funds would not have been used. The shared motivation of both states in these cases was a desire to avoid "indirect subsidization of abortion." The [Seventh Circuit](#) and the [Ninth Circuit](#) respectively held that exclusions based solely on those policy grounds were not consistent with the "freedom of choice" provision. In these courts' opinions, the term "qualified" in Section 1902(a)(23) "unambiguously relates to a provider's fitness to perform the medical services the patient requires." In contrast, the courts found that the justifications asserted by the states enacting the defunding provisions were "unrelated to provider qualifications."

In a variation of the above, a federal district court in Louisiana issued a [preliminary injunction](#) in October blocking the state from implementing its plan to bar Medicaid reimbursement to a Planned Parenthood affiliate. Distinguishing itself from the Indiana and Arizona cases discussed above, Louisiana had alleged suspected infractions of state and federal

law that were specific to the excluded provider as the basis of its decision to withhold funding. However, the district court found that the asserted claims were either unsubstantiated or not actually indicative of unlawful conduct. As a result, the court held that the potential harm from a violation of Section 1902(a)(23) outweighed the state's claims and warranted the issuance of a preliminary injunction. Louisiana has appealed the decision, and it is currently pending before the Fifth Circuit.

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