NATIONAL DISABILITY RIGHTS NETWORK

Protection & Advocacy for Individuals with Disabilities

April 23, 2015

Sylvia Matthews Burwell
Secretary
U.S. Department of Health and Human Services
200 Independence Avenue, S.W.
Washington, D.C. 20201

Re: Need for Strong Response to Second Circuit Court of Appeals' Inquiry in *Davis v. Shah*

Dear Secretary Burwell:

We are a diverse group of advocates from various disability, disease and provider groups who have come together to voice our serious concern with the positions taken by the state of New York in *Davis v. Shah*, which is currently pending in the Second Circuit Court of Appeals. We write to urge your agency to respond forcefully to the questions presented to it by the Court on January 12, 2015, so as to prevent a severe weakening of CMS's long-standing interpretations ensuring basic protections under the Medicaid program. As explained below, we come from across the country, from states both within and outside the region covered by the Second Circuit, but we all share a common concern that a circuit ruling unfavorable to the plaintiffs could wreak havoc for millions of low income Americans on Medicaid, especially those with severe disabilities.

At issue in the *Davis* case is the permissibility of severe restrictions on access to two kinds of items, compression stockings and orthopedic shoes, which are needed, for example, by individuals with diabetes to prevent amputations or, where amputations have already occurred, to allow them to walk. New York's legislature adopted a change in law in 2011 which expressly allows individuals with favored diagnoses to get these items, while those with any other diagnosis cannot receive these services, **regardless of medical need.**

Attempting to defend this explicit form of diagnosis-based decision making, New York argues that these items are neither medical supplies nor medical equipment, and therefore are not covered under the mandatory Medicaid "home health benefit." They further argue that these items are covered only under an optional Medicaid benefit category (prosthetic services) and that for **any** optional category of services, a state is completely free to discriminate on the basis of diagnosis and to refuse to provide medically needed services, as long as a bare "majority" will have their medical needs met under the limited list of covered medical conditions.

This interpretation, firmly rejected by your agency in 1998, in what is known as the

DeSario directive, would gut the most basic substantive protections under the Medicaid program and would introduce a dangerous form of across-the-board rationing, because no one treatment is needed by a majority of Medicaid enrollees under any optional benefit category (most Medicaid coverage categories are optional benefits). It is quite obvious where this would lead, with many states choosing to not cover expensive diagnoses and only covering less costly ones, for some or all optional benefit categories. Individuals with severe disabilities would presumably be the first to have their medical conditions excluded from coverage.

We have reviewed the detailed memorandum dated April 16, 2015 which was provided to Melissa Harris at the Centers for Medicare and Medicaid Services by attorneys in New York, Connecticut and Texas (attached), and agree with the concerns stated therein and with their request that your agency respond forcefully on the questions posed by the Second Circuit Court of Appeals in its letter to your agency. We also agree that, if your agency does not so act, permanent harm will likely be done, not only to the agency's long-standing policy but also to its impending home health regulations, which would be severely undermined before they are even issued.

Accordingly, we urge HHS to respond to the inquiry by the Court of Appeals on each of the points set forth in the attorneys' April 16th memo to Ms. Harris, by the May 12th deadline provided by the Court. Specifically, we urge your agency to advise the Court of Appeals that:

1. These items are indeed medical supplies or equipment under the mandatory home health benefit.
2. These items must in any event be assessed under ANY Medicaid benefit category—mandatory or optional—under which they might fall.
3. It is impermissible for a state Medicaid program to ration based on diagnosis discrimination under any optional (or mandatory) benefit category, with the "most" test an inappropriate restriction on scope of coverage under Medicaid.

Thank you for your attention to this issue of great importance to the Medicaid recipients we serve, including particularly those with disabilities, throughout the country. Our group can be contacted through Eric Buehlmann, Director of Public Policy for the National Disability Rights Network at Eric.Buehlmann@ndrn.org or 202-408-9514 x121.

Respectfully yours,

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Nathan W. Moon, Chair, Government Affairs Committee

Enc. Memorandum dated April 16, 2015 to Melissa Harris, CMS

cc: Andy Slavitt, Administrator, Centers for Medicare and Medicaid Services
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