

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

MISSOURI DEPARTMENT  
OF SOCIAL SERVICES  
221 West High Street  
Jefferson City, Missouri 65101

Plaintiff,

v.

Civ. No. 1:20-cv-3611

UNITED STATES DEPARTMENT  
OF HEALTH AND HUMAN SERVICES  
200 Independence Avenue, SW  
Washington, DC 20201

and

ALEX M. AZAR II  
Secretary of the United States Department  
of Health and Human Services,  
in his official capacity,  
200 Independence Avenue, SW  
Washington, DC 20201

Defendants.

**COMPLAINT**

**INTRODUCTION**

1. The Medicaid program, codified at Title XIX of the Social Security Act (“SSA”), is “a cooperative endeavor in which the Federal Government provides financial assistance to participating States to aid them in furnishing health care to needy persons.” *Harris v. McRae*, 448 U.S. 297, 308 (1980).

2. The Missouri Department of Social Services (“DSS,” “Missouri,” or “the State”), seeks review of a final administrative decision by the United States Department of Health and

Human Services (“HHS”) Departmental Appeals Board (“Board”) disallowing \$487,351 in federal reimbursement for contraceptive drugs provided to Medicaid-eligible individuals during calendar years (“CY”) 2009 and 2010. The HHS Departmental Appeals Board acts for the Secretary in disputes involving Medicaid disallowances. *See* 42 U.S.C. § 1316(e)(2)(A).

3. Most of a State’s medical assistance expenditures are reimbursable at the “federal medical assistance percentage,” which in Missouri’s case was approximately 73 percent in 2009 and 2010. However, Section 1903(a)(5) of the SSA provides that HHS shall reimburse a State for 90 percent of the amount expended which is “attributable to the offering, arranging, and furnishing . . . of family planning services and supplies.” 42 U.S.C. § 1396b(a)(5).

4. In the decision for which review is sought, the Board concluded that DSS was not entitled to reimbursement at 90 percent for contraceptive drugs which it could not establish were prescribed “for a family planning purpose,” even though there was no question that all of the questioned expenditures were for contraceptives.

5. Section 1903(a)(5) of the Social Security Act does not support a distinction between reimbursement for contraceptives expressly prescribed for family planning purposes and those that may have been prescribed for other purposes. Moreover, any such requirement would be contrary to sound medical practice, significantly intrude on patient privacy, and impede access to contraception, contrary to congressional intent.

6. The HHS Departmental Appeals Board’s decision upholding the disallowance of \$487,351 in federal funds is arbitrary, capricious, an abuse of discretion, and not in accordance with either the text or the purpose of the Medicaid statute. The Court should set aside the Board’s decision and the underlying disallowance.

## JURISDICTION AND VENUE

7. This action arises under Section 1116 of the Social Security Act, 42 U.S.C. § 1316(e)(2)(C), and Section 10 of the Administrative Procedure Act, 5 U.S.C. § 704. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1361.

8. Venue is proper under 28 U.S.C. § 1391(e)(1) and 42 U.S.C. § 1316(e)(2)(C).

## PARTIES

9. Plaintiff Missouri Department of Social Services is the “single State agency” responsible for administration of the State of Missouri’s participation in the federal Medicaid program. *See* 42 U.S.C. § 1396a(a)(5).

10. Defendant United States Department of Health and Human Services (“HHS”) is the federal agency responsible for administering the Medicaid program.

11. Defendant Alex. M. Azar II is the Secretary of HHS and is responsible for the overall administration of the agency. He is sued in his official capacity.

## STATUTORY AND REGULATORY BACKGROUND

### The Medicaid Program and Medicaid Funding

12. Medicaid is a cooperative federal-state program in which the federal government provides financial assistance to participating States in connection with the provision of health care to lower-income individuals and families, referred to as “medical assistance.” Under the federal Medicaid statute (Title XIX of the Social Security Act, 42 U.S.C. §§ 1396 *et seq.*), States are entitled to federal reimbursement for their expenditures on medical assistance pursuant to a “state plan” approved by the Centers of Medicare & Medicaid Services (“CMS”) within HHS. *See id.* § 1396a-b.

13. The federal government's share of a State's expenditures under the Medicaid program is called "federal financial participation" ("FFP"). 42 C.F.R. § 400.203; 45 C.F.R. § 95.4. States are entitled to FFP for a specified percentage of the actual costs they incur in providing health care to their Medicaid-eligible populations. *See* 42 U.S.C. § 1396b(a).

14. For most Medicaid program expenditures for healthcare services and supplies, the federal government reimburses States at the "federal medical assistance percentage" ("FMAP"), which varies by State based on per capita income and can range from a statutory minimum of 50 percent to a maximum of 83 percent. *Id.* §§ 1396b(a)(1), 1396d(b).

15. Using the statutory formula, Missouri's FMAP was initially calculated to be 63.19 percent for fiscal year ("FY") 2009 and 64.51 for FY 2010. 72 Fed. Reg. 67,306 (Nov. 28, 2007); 73 Fed. Reg. 72,052 (Nov. 26, 2008). However, it was temporarily increased to 73.27 percent through December 31, 2010, pursuant to the American Recovery and Reinvestment Act of 2009 ("ARRA"). *See* 74 Fed. Reg. 38630 (Aug. 4, 2009).

#### **The 90 Percent Match Rate for Family Planning Services and Supplies**

16. The Medicaid statute authorizes FFP at rates higher than the FMAP for some expenditures. For example, States receive FFP at the rate of 90 percent for state Medicaid program expenditures "attributable to the offering, arranging, and furnishing . . . of family planning services and supplies." 42 U.S.C. § 1396b(a)(5); 42 C.F.R. § 433.10(c)(1).

17. Section 1905(a)(4)(C) of the Social Security Act requires state Medicaid programs to furnish "family planning services and supplies . . . to individuals of child-bearing age (including minors who can be considered to be sexually active) who are eligible under the State plan and who desire such services and supplies." 42 U.S.C. § 1396d(a)(4)(C).

18. These sections were added to the Social Security Act in 1972. *See* Social Security Amendments of 1972, Pub L. No. 92-603, 86 Stat. 1462. The legislative history makes clear that such services are to be “voluntary and confidential.” S. Rep. 92-1230, at 67 (1972).

19. Neither the Social Security Act nor federal regulation define family planning “services and supplies.” *See* 42 C.F.R. § 440.40(c) (reserving definition).

20. However, since 1988, Section 4270.B.1 of the State Medicaid Manual (“SMM”) has provided that “pharmaceutical supplies and devices to prevent conception” are eligible for FFP at the 90 percent rate.

21. In the following subsection, the Manual goes on to state that FFP at the 90 percent rate is not available for “costs related to” procedures “performed for medical reasons,” such as a hysterectomy or removal of an intrauterine device due to infection. That section explains that “[o]nly items and procedures clearly provided or performed for family planning purposes may be matched at the 90 percent rate.” SMM § 4270.B.2.

#### **The CMS Financial Management Review Guide for Family Planning Services**

22. CMS has periodically published a “Financial Management Review Guide” (“Review Guide”) governing “reviews of claims for family planning services.” There are versions of the Review Guide from 1991, 2002, and 2010. The 2002 Review Guide was the version applicable during calendar year (“CY”) 2009, the first year at issue in this matter, and the 2010 Review Guide was the version applicable during CY 2010, the second year at issue.

23. Both applicable versions of the Review Guide include a review of the statute, the legislative history, CMS guidance to States and regional offices on family planning issues, and HHS Departmental Appeals Board decisions involving claims for family planning.

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