Linton v Tennessee Commissioner of Health and Environment
779 F.Supp. 925 (M.D. Tenn 1990),
aff'd 65 F.3d 508 (6th Cir. 1995), cert. denied 116 St. Ct. 1546 (1996)

JOHN T. NIXON, District Judge.

Plaintiffs are before the Court seeking to enjoin a Tennessee policy through which only a portion of the beds in Medicaid participating nursing homes are certified to be available for Medicaid patients. Plaintiffs allege that this policy artificially limits the accessibility of nursing home care to indigent Medicaid patients and fosters discrimination against indigent patients by nursing homes. Plaintiffs claim that, as a result of the challenged policy, they and other individuals similarly situated face delay or outright denial of needed nursing home care, as well as displacement from current residency in nursing home facilities. Plaintiffs bring this action under ...Title VI of the Civil Rights Act of 1964....

The present case was initiated on December 1, 1987 on behalf of Mildred Lea Linton. Ms. Linton suffers from rheumatoid arthritis and has been a patient for four years at Green Valley Health Care Center in Dickson, Tennessee [hereinafter "Green Valley"]. A Medicaid patient who had been receiving skilled nursing facility (SNF) level care throughout her stay, the plaintiff received notice from State Medicaid officials that she no longer qualified for such care. The same notice advised her that she would have to move to another nursing home, an intermediate care facility (ICF), to receive the level of care to which the State believed she should be downgraded. Green Valley provides ICF care, and in fact the bed occupied by Ms. Linton was dually certified for Medicaid purposes for provision of both SNF and ICF levels of care. However, Green Valley was unwilling to care for Ms. Linton at an ICF level of reimbursement. The nursing home, which had directed the State to certify only part of its ICF beds as available to Medicaid patients, reserved the right to decertify the plaintiff's bed for Medicaid ICF participation. This decertification would have compelled the plaintiff's involuntary transfer to another facility.

On December 11, 1989, plaintiff Belle Carney, an 89 year old black woman, requested intervention. She had been diagnosed in July 1987 as requiring nursing home treatment due to Alzheimer's disease, however, no nursing home placement was found for her. Plaintiff Carney asserts that the State's limited bed certification policy...creates an artificial restriction on the number of available Medicaid beds and that it fosters discrimination against Medicaid patients by nursing homes. Plaintiff Carney's health deteriorated over a period of several months as she was moved from one inadequate placement to another. Finally, Carney's condition declined to the point than she required emergency hospitalization. Carney filed a motion to intervene at this time, and the Court affirmed the Magistrate's determination that plaintiff Carney possessed the requisite standing.

Title XIX of the Social Security Act, *42 U.S.C. § 1396* et seq. authorizes the expenditure of federal funds to enable states to furnish medical assistance to indigent individuals who are aged, blind or disabled, or who are members of families with dependent children. Tennessee participates in Title XIX for the purpose of operating such a medical assistance program ("Medicaid")[]. Approximately, seventy per cent of the cost of the Tennessee Medicaid program is paid by the Health Care Financing Administration (HCFA) of the United States Department of Health and Human Services. In return for receipt of federal subsidies, the State of Tennessee is required to administer its Medicaid program in conformity with a state plan which satisfies the requirements of Title XIX and regulations promulgated pursuant thereto, and which has been submitted to, and approved by the Secretary of Health and Human Services. *42 U.S.C. §§ 1396,* 1396a...

Tennessee's Medicaid program covers nursing home treatment at both the intermediate care and skilled nursing levels of services. ICF services...include institutional, health-related services above the level of room and board, but at a level of care below that of hospital or SNF care.[] SNF care consists of institutional care above the level of ICF services but below the level of a hospital. []

An individual's eligibility for coverage under the Tennessee Medicaid Program is determined on the basis of certain personal characteristics relating to need such as old age, disability or blindness, and on the basis of the person's indigency, measured by certain State and federal financial standards. To obtain Medicaid coverage for nursing home care the patient must first establish financial eligibility and then meet additional medical need requirements demonstrating eligibility for ICF or SNF services...

Furthermore, under the Tennessee Medicaid program, [Tennesse's] standards for admission to a SNF or ICF are as follows:

(1) Generally admissions to the facilities should be in the order that the referral was received by the facility as shown on the wait list.

(2) Documentation justifying deviation from the order of the wait list must be maintained for inspection by the Department. Deviation may be based upon medical need, or valid, consistent facility administrative policy.

(3) In the event of deviation as a result of medical need, documentation should include a narrative description of medical circumstances showing the exigent or particular need of the applicant.[]

Also, for certification of nursing homes under the Medicaid program, there are the requirements that:

1. All residents are admitted to the facility without discrimination regarding race, color or national origin.

2. The nursing home utilizes its referral sources in a manner which assures an equal opportunity for admission to persons without regard to race, color, or national origin in relation to the population of the service area or potential service area.

Tennessee has previously had a "Medicaid Bed Management Program" which represents an attempt to place a percentage limitation on the number of available Medicaid beds in nursing homes. Federal auditors recommended that this policy be discontinued, and Tennessee abolished this program on October 1, 1985.

Plaintiffs challenge what they refer to as an unwritten limited bed certification policy....Tennessee's policy... appears to serve the interests of nursing homes who wish to participate in the Medicaid program while also maintaining a separate private pay facility offering the same type of care....

Federal Medicaid law mandates that states set their Medicaid payments to nursing homes at levels which are "reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities in order to provide care and services in conformity with applicable State and Federal laws, regulations and quality and safety standards ..." 42 U.S.C. 1396a(a)(13)(A)....

...[P]rivate pay rates are set by the market, a market in which there are more patients seeking care than there are beds to accommodate them. There are waiting lists to gain admission to nursing homes throughout Tennessee. As a result of this situation, unregulated private pay rates are substantially higher than Medicaid payments, and nursing home operators prefer private pay patients. Tennessee's present certification program allows nursing home operators to give preference to private pay patients by reserving for their exclusive use beds which are, due to lack of certification, unavailable to Medicaid patients...

The effects of the limited bed certification policy take a number of different forms. The policy leads to disruption of care and displacement of Medicaid patients after they have been admitted to a nursing home. Such displacement often occurs when a patient exhausts his or her financial resources and attempts transition from private pay to Medicaid. In this situation, a patient who already occupies a bed in a nursing home is told that his or her bed is no longer available to the patient because he or she is dependent upon Medicaid. Furthermore, displacement also occurs when patients at the SNF level who are covered by Medicare, the Veterans Administration or private insurance, transfer to the ICF level of care where they are dependent on Medicaid because their prior coverage does not cover intermediate care. Involuntary transfers are triggered on other occasions when a patient already on Medicaid at an SNF level of reimbursement is reclassified to an ICF level of care.

Despite the State's assertions that complaints of improper or involuntary transfers have been rare, and when such complaints have been raised, they have been promptly resolved, the Court finds that the limited bed certification policy has caused widespread displacement. Furthermore, the Court finds that the patients and their families faced with the displacement

situation are often under the impression that the State itself has caused the displacement and is unlikely to seek help from the State against the nursing home who appears to be "on their side." The Court is persuaded by the depositions, affidavits and exhibits concerning the severe impact of the limited bed certification policy. Finally, the Court is mindful of the Medicaid eligibility rules which allow eligibility for relatively more affluent patients already residing in nursing homes than those seeking initial admission. This phenomenon combined with the limited bed certification policy often renders the poorest and most medically needy Medicaid applicants unable to obtain the proper nursing home care...

Disparate Impact on Minorities

The Court finds that the plaintiff has established by a preponderance of the evidence that the Tennessee Medicaid program does have a disparate and adverse impact on minorities. Because of the higher incidence of poverty in the black population, and the concomitant increased dependence on Medicaid, a policy limiting the amount of nursing home beds available to Medicaid patients will disproportionately affect blacks.

Indeed, while blacks comprise 39.4 percent of the Medicaid population, they account for only 15.4 percent of those Medicaid patients who have been able to gain access to Medicaid-covered nursing home services. In addition, testimony indicates that the health status of blacks is generally poorer than that of whites, and their need for nursing home services is correspondingly greater. Finally, such discrimination has caused a "dual system" of long term care for the frail elderly: a statewide system of licensed nursing homes, 70 percent funded by the Medicaid program, serves whites; while blacks are relegated to substandard boarding homes which receive no Medicaid subsidies....

Plaintiffs' Claims Under
Title VI of the Civil Rights Act of 1964

Title VI of the Civil Rights Act of 1964 provides, in relevant part:
"No person in the United States shall on the ground of race, color or national origin ... be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. s 2000d. Regulations under Title VI provide that a state in its administration of the federally funded program cannot:

> ... directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color or national origin.

45 C.F.R. 80.3(b)(2).

The Supreme Court decisions that interpret Title VI proscribe state policies and practices that have racially disparate and discriminatory effects. In Guardians Ass'n v. Civil Service

Commn., 463 U.S. 582 (1983), the Supreme Court held that Title VI reaches unintentional disparate impact discrimination as well as deliberate racial discrimination. However, unless discriminatory intent is shown, declaratory and injunctive relief should be the only available remedies for Title VI violations. However, as explained in the Supreme Court's subsequent decision in Alexander v. Choate:

> In Guardians, we confronted the question whether Title VI of the Civil Rights Act of 1964, 42 U.S.C. s 2000d et seq., which prohibits discrimination against racial and ethnic minorities in programs receiving federal aid, reaches both intentional and disparate-impact discrimination. No opinion commanded a majority in Guardians, and Members of the Court offered widely varying interpretations of Title VI. Nonetheless, a two-pronged holding on the nature of the discrimination proscribed by Title VI emerged in that case. First, the Court held that Title VI itself directly reached only instances of intentional discrimination. Second, the Court held that actions having an unjustifiable disparate impact on minorities could be redressed through agency regulations designed to implement the purposes of Title VI. In essence, then, we held that Title VI had delegated to the agencies in the first instance the complex determination of what sorts of disparate impacts upon minorities constituted sufficiently significant social problems, and were readily enough remediable, to warrant altering the practices of the federal grantees that had produced those impacts. [footnotes omitted].

469 U.S. 287 (1985).

The plaintiffs have shown that the defendants' limited bed certification policy has a disparate impact on racial minorities in Tennessee. The burden of proof next falls upon the defendants to show that the disparate impact is not unjustifiable. The defendants state that the "self-selection preferences" of the minorities, based upon the minorities reliance upon the extended family, lack of transportation, and fear of institutional care, adequately explain the disparate impact.[] This explanation, however, is not sufficient justification for minority underrepresentation in nursing homes. Therefore, the defendants have failed to meet their burden of proof under Alexander v. Choate.

Because past racial discrimination was the product "of invidious animus ... rather than thoughtlessness and indifference", Alexander v. Choate, [] statistical evidence of disparate racial impact of state policies in federally funding programs can establish liability under Title VI for declaratory and injunctive relief, if the agency has not addressed them. Guardians Ass'n v. Civil Service Commn. of New York, []. See also Weathers v. Peters Realty, 499 F.2d 1197, 1201-02 (6th Cir.1974). The Court is convinced that the Tennessee limited bed certification policy has had a disparate adverse impact on black Medicaid recipients in Tennessee. Furthermore, provider agreements which permit providers to serve Medicaid patients in only a limited number of their available beds are invalid under Medicaid regulations codified at 42 C.F.R. § 442.12(d)(2):

> A provider agreement is not a valid agreement for purposes of this part, even

though certified by the State survey agency, if the facility fails to meet the civil rights requirements set forth in 45 C.F.R. Parts 80, 84, and 90.

The Court recognizes that under Title VI, deference is accorded to the Title VI administrative agency to cure the discriminatory effects of the particular program. To be sure, THDE employs Ms. Beverly Bass as a director to monitor Title VI compliance. However, even Bass concedes that under the TDHE certification policy black Medicaid recipients are displaced or denied admission to nursing homes....Prior TDHE studies identified the status of minority citizen in Tennessee's Medicaid Program and the reasons for lack of minority participation. Yet, despite these studies, the Commissioner implemented a policy that fosters and continues the egregious status of minority Medicaid patients within the program. In these circumstances, continued deference to the administrative agencies is inappropriate. To cure the effects of this policy, judicial intervention is necessary. To accomplish this, the Court ORDERS the Commissioner, in consultation with the HCFA, to submit a plan for court approval that will redress the disparate impact upon eligible minority Medicaid patients' access to qualified nursing home care due to the THDE certification policy and the State's past noncompliance with Title VI...

NOTES AND QUESTIONS

1. What is the role of motive in Title VI? How does the definition of discrimination for purposes of Title VI compare with the version you learned in constitutional law? How does it compare with the definition of discrimination used for the ADA and Section 504?

2. As explained in *Linton*, the Title VI statute prohibits intentional discrimination. The Title VI regulations prohibit both intentional discrimination and facially neutral policies and practices that have a racially disparate impact. To establish a prima facie case of disparate impact, a Title VI plaintiff must demonstrate that the defendant used a specific practice that causes a disproportionate adverse impact. How did the Linton plaintiffs establish a prima facie case?

3. Once a plaintiff establishes a prima facie case, the burden then shifts to the defendant to justify the challenged practice. According to *Linton*, what does a Title VI defendant have to show to justify a policy that has a disparate racial impact? Why did the court reject Tennessee's justification?

4. *Bryan v Koch*, 627 F.2d 612 (2d Cir. 1980), and *NAACP v Medical Center, Inc*., 657 F.2d 1322 (3d Cir. 1981), both involved challenges to public hospital closings and relocations. Both courts found that the hospitals' decisions to relocate did not violate Title VI because though the siting decisions had a disparate racial impact, the defendant hospitals put forward a legitimate nondiscriminatory reason for their decisions. Basically, the courts found that because the decisions to relocate were rationally related to a legitimate hospital need Title VI was not violated.

5. In Title VI cases involving allegations of disparate impact discrimination in federally funded education, courts have articulated a different standard that defendants must meet to justify a policy or practice with a disparate racial impact. The defendant must show that the challenged practice is an "educational necessity", that is, that the challenged practice is "demonstrably necessary to meeting an important educational goal." If this showing is made, the plaintiff can still prevail by demonstrating that a less discriminatory alternative exists. *See, e.g.*, Elston v Talladega County Bd. of Education, 997 F.2d 1394 (11th Cir. 1993). How would this test work in health care discrimination cases? What policies and practices with a disparate racial impact would violate Title VI?

6. What kinds of concerns should justify a disparate racial impact in federally funded health care? How should concerns about cost and cost-containment be viewed?

7. Title VI reaches only programs and activities that are federally funded. What health care activities does it *not* reach.

8. The law review article that follows provides some of the history of Title VI and health care. It explains why the *Linton* case could not be filed today. (Make sure and look for that as you read the article). It also explores the importance of Section 1557 of the Affordable Care Act, a provision we looked at earlier in the course, in the context of race and health. How does Section 1557 expand the reach of civil rights protections beyond those available via Title VI?