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## NOTE

### THE FAILURE OF THE TENTH CIRCUIT TO ADDRESS THE DUE PROCESS CONCERNS RAISED BY THE CENTERS FOR MEDICARE AND MEDICAID SERVICES' INCREASING REGULATIONS

*Brooke Ferenczy*<sup>†</sup>

#### ABSTRACT

The Centers for Medicare & Medicaid Services (CMS) is an agency under the United States Department of Health and Human Services, which Congress created to help the government carry out public policy. Congress makes certain laws, and CMS issues regulations that expand on Congress's laws that specifically address the Medicare and Medicaid programs. Medicare is a program designed to provide health insurance to people sixty-five years old and older, as well as individuals with certain disabilities, while Medicaid is a program designed to provide health insurance to low-income individuals.

CMS estimates that it sets forth thousands of new or updated guidance documents each year. Health care providers seeking to qualify for Medicare or Medicaid coverage must ensure that the services they provide comply with all these regulations. One of the biggest problems that health care providers face in trying to comply with these regulations is the ever-increasing, ever-changing nature of these regulations. The enormous amount of demands makes it arduous for health care providers to meet all the requirements; CMS's tendency to alter the regulations makes it nearly impossible to comply. This raises serious concerns about due process. The problem becomes even more concerning when even the agency gets confused about its own law. When CMS has trouble keeping pace with the very regulations it issues, it would seem to violate fundamental notions of fairness to hold health care providers to these standards.

That is the very problem demonstrated in *Caring Hearts Personal Home Services v. Burwell*. Caring Hearts Personal Home Services (Caring Hearts), a health care provider that renders physical therapy and skilled nursing services to homebound Medicare patients, appealed CMS's order that Caring

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Hearts repay the government over \$800,000. The Tenth Circuit reviewed the decision, finding that CMS had applied the wrong law. In determining that Caring Hearts' services did not meet the requirements, the agency used its more recent regulations—regulations that set forth stricter requirements than the regulations that were in effect at the time Caring Hearts rendered its services. The Tenth Circuit looked back to the regulations in place at the time Caring Hearts provided the services and found that the health care provider had complied with those regulations. It thus vacated CMS's order.

The court solved the issue this case presented, but it failed to address the due process concerns this case raised. Instead of looking to the regulations in place at the time the case was filed or at the time of the hearing of the case, the court recognized the necessity of looking at the regulations in place at the time Caring Hearts rendered the services to determine whether the services complied. It would not be fair to hold health care providers to standards that were not in place at the time they issued their services—standards the health care providers could not have possibly known. While some could argue that the court should try to limit the number of regulations the agency is permitted to issue, this would not solve the problem of the enormous amount of regulations already in place and would violate the doctrine of separation of powers.

Thus, a good approach to the problem of the ever-increasing, ever-changing nature of the regulations CMS issues is to ensure that the regulations applied to a health care provider are those which were in effect at the time the health care provider rendered its services. However, the court largely ignored the due process concerns, including the requirements that the government act in accordance with the law and provide fair procedures to people found in violation of the law, and the best approach would have addressed these issues.

## I. INTRODUCTION

Long ago, James Madison—an American statesman, a Founding Father, and the fourth President of the United States—worried about a world in which the laws were so abundant that no man could possibly read them.<sup>1</sup> In the world of which Madison worried, constitutional norms of due process and fair notice would undoubtedly be at stake, because it would be unfair to expect individuals to comply with the requirements of the law if they could

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1. James Madison, *The Federalist No. 62*, reprinted in HILLSDALE COLL. POLITICS FACULTY, *THE U.S. CONST.: A READER* 335 (2012).

not be expected to know the law.<sup>2</sup> But with the establishment of executive agencies that have the authority to issue binding regulations, this world has become a reality.<sup>3</sup> Executive agencies—the very agencies that are responsible for creating and disseminating the law—seem incapable of keeping pace with their own lawmaking.<sup>4</sup> When executive agencies constantly issue new regulations and constantly change their existing regulations, even they end up confused about their own law.<sup>5</sup>

In its decision in the case of *Caring Hearts Personal Home Services v. Burwell*,<sup>6</sup> the Tenth Circuit analyzed these very issues. It determined that CMS, an executive agency that issues the regulations expanding on the laws relating to Medicare and Medicaid coverage, had applied the wrong law to Caring Hearts, a health care provider.<sup>7</sup> The court set forth a framework for deciding these types of cases, but ignored concerns with due process that the case presented.<sup>8</sup> Although the court ultimately reached the correct

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2. U.S. CONST. amend. V (“No person shall . . . be deprived of life, liberty, or property, without due process of law”).

3. See J. Harvie Wilkinson III, *Assessing the Administrative State*, 32 J.L. & POL. 239, 243 (2017) (“Today, the American regulatory landscape is composed of a diverse set of institutions - agencies, commissions, and executive departments - that, together, seem to sprawl over just about every facet of modern life.”). See also Philip Hamburger, *Early Prerogative and Administrative Power: A Response to Paul Craig*, 81 MO. L. REV. 939, 950-51 (2016).

4. See Philip Hamburger, *Early Prerogative and Administrative Power: A Response to Paul Craig*, 81 MO. L. REV. 939, 950-51 (2016) (“[M]y book argues that a characteristic feature of both absolute prerogative power and of administrative power is that they bind extralegally -- in the sense that they impose legal obligation not merely through law, but through other sorts of edicts.”); Richard W. Murphy, *Judicial Deference, Agency Commitment, and Force of Law*, 66 OHIO ST. L.J. 1013, 1019 (2005) (“The judicial choice between strong deference and independent review of agency statutory interpretations should therefore turn . . . on a balancing of the advantages of flexible agency interpretation . . . against the rule-of-law advantages that flow from using the courts to narrow agency interpretive discretion.”).

5. See Lisa Schultz Bressman, *How Mead Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1450 (2005) (“Congress should not have unlimited authority to invent procedures for administrative lawmaking that promote less accountability and tolerate more arbitrariness than we have come to accept.”). See also STEPHEN G. BREYER ET AL., *ADMINISTRATIVE LAW AND REGULATORY POLICY*, 290 (5th ed. 2002) (“In a remarkably short period, *Chevron* has become one of the most cited cases on all of American law.”).

6. *Caring Hearts Pers. Home Servs. v. Burwell*, 824 F.3d 968 (10th Cir. 2016).

7. *Id.* at 970.

8. *Id.* at 970-77. See also Richard W. Murphy, *Judicial Deference, Agency Commitment, and Force of Law*, 66 OHIO ST. L.J. 1013, 1017 (2005) (“[W]here an agency adopts an interpretation of its statute that has obvious potential to apply to many parties . . . , then this interpretation should net *Chevron*-strength deference only on the condition that the agency commits to applying it uniformly across time and parties . . .”).

conclusion, future cases should incorporate a due process analysis in addition to following the Tenth Circuit's analysis. This helps ensure that courts apply the correct law—meaning only that law which was in effect at the time the facts of the case occurred—to the facts of each case.

## II. BACKGROUND

The ever-increasing number of laws and regulations that executive agencies continue to issue makes it arduous for people and organizations not only to stay informed with them, but also to conform and comply with their demands.<sup>9</sup> The *Federal Register* contains over 70,000 pages each year, and at the end of 2013, the *Code of Federal Regulations* contained 175,496 pages, including an index that was 1,170 pages.<sup>10</sup> These numbers do not include the number of pages found in less formal policy manuals, directives, and other similar guidance documents.<sup>11</sup> The sheer amount of regulations and policies makes clear why people trying to comply with them find it difficult, if not nearly impossible, to do so. However, this problem has become so serious and widespread that now it appears that even the executive agencies that issue these regulations cannot keep pace with their ever-changing, ever-increasing nature.<sup>12</sup>

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9. See *Arizona v. United States*, 567 U.S. 387, 397 (noting “[t]he pervasiveness of federal regulation”); *Alexander v. Britt*, 89 F.3d 194, 201 (“Medicaid and AFDC applicants have been forced to litigate for more than twenty years in an effort to make the administrators comply with federal law. The administrators themselves concede that they have had significant difficulty in adhering to federal regulations.”).

10. Clyde Wayne Crews, *New Data: Code of Federal Regulations Expanding, Faster Pace under Obama*, COMPETITIVE ENTER. INST. (March 17, 2014), <https://cei.org/blog/new-data-code-federal-regulations-expanding-faster-pace-under-obama>.

11. See 21 C.F.R. § 10.115 (2017); U.S. ENVTL. PROT. AGENCY, *Laws & Reg.* (Updated Nov. 28, 2018), [www.epa.gov/laws-regulations](http://www.epa.gov/laws-regulations); Jessica Mantel, *Procedural Safeguards for Agency Guidance: A Source of Legitimacy for the Administrative State*, 61 ADMIN. L. REV. 343, 353 (2009).

12. See, e.g., Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1372-80 (1992) (advocating that agencies use notice-and-comment rulemaking for policies intended to establish mandatory standards or binding obligations); Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 DUKE L.J. 381, 421-22 (1985) (advocating that agencies allow postadoption public participation for non-legislative rulemaking).

### A. Due Process

Due process is one of the foundational concepts of America's governmental history.<sup>13</sup> There are two general types of due process: procedural due process and substantive due process.<sup>14</sup> Procedural due process requires not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet them.<sup>15</sup> Substantive due process involves the right not to be subject to "arbitrary or capricious" action by a state, either by legislative or administrative action.<sup>16</sup> The only command the United States Constitution states twice is the right to due process.<sup>17</sup> The Fifth Amendment of the United States Constitution states that no person shall "be deprived of life, liberty, or property, without due process of law."<sup>18</sup> The Fourteenth Amendment gives a similar command, declaring that no state shall "deprive any person of life, liberty, or property, without due process of law."<sup>19</sup>

James Madison once wrote,

It will be of little avail to the people that the laws are made by men of their own choice if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; . . . or undergo such incessant changes that no man, who knows what the law is today, can guess what it will be tomorrow.<sup>20</sup>

Due process provisions in the United States Constitution seek to solve this problem James Madison envisioned. The two amendments assure that all levels of American government must operate within the law and provide fair procedures.<sup>21</sup>

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13. U.S. CONST. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

14. Peter J. Rubin, *Square Pegs and Round Holes: Substantive Due Process, Procedural Due Process, and the Bill of Rights*, 103 COLUM. L. REV. 833, 833-49 (2003) (discussing the roles substantive due process and procedural due process play in the structure of the United States government).

15. See *Swarthout v. Cooke*, 562 U.S. 216, 220-22 (2011).

16. See *Pearson v. Grand Blanc*, 961 F.2d 1211, 1217, 1221-27 (6th Cir. 1992).

17. U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

18. U.S. CONST. amend. V.

19. U.S. CONST. amend. XIV, § 1.

20. James Madison, *The Federalist No. 62*, reprinted in HILLSDALE COLL. POLITICS FACULTY, *THE U.S. CONST.: A READER* 335 (2012).

21. U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

To determine whether the government has violated the due process requirements, the court usually considers three factors.<sup>22</sup> First, the court will look to the private interest the official action will affect.<sup>23</sup> Second, the court will consider the risk of an erroneous deprivation of such interest through the procedures used, as well as the probable value of additional or alternative procedural safeguards.<sup>24</sup> Third, the court will analyze the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or alternative procedural requirement would entail.<sup>25</sup>

*B. The Centers for Medicare and Medicaid Services*

CMS is an agency of the United States Department of Health and Human Services that provides healthcare coverage to over 100,000,000 people through Medicare, Medicaid, the Children's Health Insurance Program, and the Health Insurance Marketplace.<sup>26</sup> The Centers' primary goal is to achieve a high-quality health care system.<sup>27</sup> It also strives for better care at lower costs and improved health.<sup>28</sup> One of its main programs is Medicare, a health insurance program for people "age 65 or older," people "under age 65 with certain disabilities," and people "of all ages with End-Stage Renal Disease (permanent kidney failure requiring dialysis or a kidney transplant)."<sup>29</sup> Medicare has hospital insurance, which helps cover inpatient care in hospitals and skilled nursing facilities; medical insurance, which helps cover doctors' services and outpatient care; and prescription drug coverage, which helps lower prescription drug costs and helps protect against higher costs in the future.<sup>30</sup>

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22. *Biliski v. Red Clay Consol. Sch. Dist. Bd. of Educ.*, 574 F.3d 214, 220 (3rd Cir. 2009).

23. *Id.*

24. *Id.*

25. *Id.*

26. OFFICE OF ENTER. DATA & ANALYTICS, *CMS Fast Facts*, CTRS. FOR MEDICARE & MEDICAID SERVS. (July 2018), available at <https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/CMS-Fast-Facts/index.html>.

27. *Centers for Medicare & Medicaid Services*, KAGGLE, INC. [www.kaggle.com/cms](http://www.kaggle.com/cms) (last visited Feb. 1, 2019).

28. *Id.*

29. *Medicare Program – General Information*, CTRS. FOR MEDICARE & MEDICAID SERVS., <https://www.cms.gov/Medicare/Medicare-General-Information/MedicareGenInfo/index.html> (last visited Oct. 28, 2017).

30. *Id.*

To qualify for Medicare coverage, an individual must meet the detailed requirements that CMS sets forth.<sup>31</sup> CMS provides access on its website to the regulations and guidelines it issues.<sup>32</sup> The website contains an enormous amount of information, including links to various forms of guidance, administrative simplification, legislation, regulations, policies, review boards, and administrative decisions.<sup>33</sup> It also lists links to different sites organized by provider types and special topics.<sup>34</sup> It is clear that Medicare is a complicated program.<sup>35</sup> Each year, CMS “issues thousands of new or revised guidance documents,” and health care providers must follow these guidance provisions exactly if they want Medicare to cover the services they provide to the elderly or disabled.<sup>36</sup>

The Center for Medicaid and CHIP Services is one of the centers within CMS.<sup>37</sup> This center is the “focal point” of Medicaid, the Children’s Health Insurance Program, and the Basic Health Program.<sup>38</sup> Medicaid “provides health coverage to low-income people;” the Children’s Health Insurance Program “provides federal matching funds to states to provide health coverage to children in families with incomes too high to qualify for Medicaid, but who can’t afford private coverage;” and the Basic Health Program “allows states an option to provide affordable coverage and better continuity of care for people whose income fluctuates above and below Medicaid and CHIP eligibility levels.”<sup>39</sup>

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31. See, *Medicare Coverage – General Information*, CTRS. FOR MEDICARE & MEDICAID SERVS., <https://www.cms.gov/Medicare/Coverage/CoverageGenInfo/index.html> (last visited Sept. 25, 2017).

32. *Regulations & Guidance*, CTRS. FOR MEDICARE & MEDICAID SERVS., <https://www.cms.gov/Regulations-and-Guidance/Regulations-and-Guidance.html> (last visited Oct. 28, 2017).

33. *Id.*

34. *Id.*

35. *United States ex rel. Wilkins v. United Health Grp., Inc.*, 659 F.3d 295, 310 (3d Cir. 2011) (“Furthermore, we think that anyone examining Medicare regulations would conclude that they are so complicated that the best intentioned plan participant could make errors in attempting to comply with them.”).

36. See Jessica Mantel, *Procedural Safeguards for Agency Guidance: A Source of Legitimacy for the Administrative State*, 61 ADMIN. L. REV. 343, 353 (2009).

37. *About Us*, MEDICAID.GOV, <https://www.medicaid.gov/about-us/index.html> (last visited Oct. 28, 2017).

38. *Id.*

39. *Id.*



### C. *Lax v. Astrue*

In *Lax v. Astrue*,<sup>40</sup> the Tenth Circuit explored the idea of an agency applying the wrong law to the facts of a case.<sup>41</sup> The claimant filed an application for social security disability benefits, claiming that he was disabled, as he had previously been wounded by a gunshot.<sup>42</sup> Because of his injury, he could not lift objects and had difficulty standing for certain lengths of time, had trouble concentrating and remembering, and suffered from other “mental health issues.”<sup>43</sup> The Commissioner of Social Security denied his application, and the claimant filed suit in federal court for a review of the denial.<sup>44</sup> The Tenth Circuit stated that the proper standard of review of the Commissioner’s decision involved determining whether the evidence in the record supported the factual findings and whether the Commissioner applied the correct legal standards.<sup>45</sup> Thus, this case established the standard courts use today in reviewing an executive agency’s decision; a federal court must analyze the legal standards that the agency applied and determine whether these standards were correct.<sup>46</sup>

### D. *Sandoval v. Aetna Life and Casualty Insurance Company*

In *Sandoval v. Aetna Life and Casualty Insurance Company*,<sup>47</sup> the Tenth Circuit reviewed the decision of a plan administrator for the Employee Retirement Income Security Act.<sup>48</sup> The plaintiff was covered by an employee benefit plan governed by the Employee Retirement Income Security Act of 1974, which included benefits for long-term disability.<sup>49</sup> After reviewing medical records, the plan administrator determined that the plaintiff no longer met the requirements of the plan and terminated his benefits as a

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40. *Lax v. Astrue*, 489 F.3d 1080 (10th Cir. 2007).

41. *Id.* at 1089.

42. *Id.* at 1081.

43. *Id.*

44. *Id.* at 1082.

45. *Id.* at 1084.

46. *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (“[T]he action of ‘each authority of the Government of the United States’ . . . is subject to judicial review except where there is a statutory prohibition on review or where ‘agency action is committed to agency discretion by law.’”) (quoting 5 U.S.C. § 701 (1964 ed., Supp. V)).

47. *Sandoval v. Aetna Life & Cas. Ins.*, 967 F.2d 377 (10th Cir. 1992).

48. *Id.* at 378.

49. *Id.*

result.<sup>50</sup> The plaintiff filed suit for a review of the decision in state court, but the defendant removed the case to federal court.<sup>51</sup> The federal district court found that the plaintiff did qualify to receive benefits, but that the plaintiff had failed to submit the necessary medical records to the plan administrator.<sup>52</sup> Therefore, the district court affirmed the plan administrator's decision, concluding that it was not arbitrary or capricious.<sup>53</sup> On appeal, the Tenth Circuit used the arbitrary and capricious standard, looking for both lack of substantial evidence and a mistake of law, which would indicate an arbitrary and capricious decision.<sup>54</sup>

### III. AN ANALYSIS OF THE TENTH CIRCUIT'S DECISION IN *CARING HEARTS PERSONAL HOME SERVICES V. BURWELL*

The problems resulting from CMS's large amount of regulations and frequently changing regulations came to fruition in the case of *Caring Hearts Personal Home Services v. Burwell*.<sup>55</sup> It became clear that not only do health care providers have trouble keeping pace with and conforming their services to these regulations, but that CMS also has trouble doing so.<sup>56</sup> Although not specifically analyzed by this case, this problem raises significant due process concerns for health care providers seeking to render services in compliance with these regulations.

#### A. *Overview of the Case*

*Caring Hearts Personal Home Services v. Burwell* illustrates the problems health care providers face in trying to conform the services they provide to the changing law that CMS issues.<sup>57</sup> These problems can be solved through a due process analysis, even though that is not exactly the approach the Tenth Circuit took to resolve these issues.

Congress enacted a statute stating that Medicare may only pay for services that are reasonable and necessary.<sup>58</sup> This statute says,

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50. *Id.* at 379.

51. *Id.*

52. *Id.*

53. *Sandoval*, 967 F.2d at 379.

54. *Id.* at 380.

55. *Caring Hearts Pers. Home Servs., Inc. v. Burwell*, 824 F.3d 968 (10th Cir. 2016).

56. *Id.* at 969-70.

57. *Id.* ("What happens if we reach a point where even these legislating agencies don't know what their own 'law' is? That's the problem we confront in this case.")

58. 42 U.S.C. § 1395y(a)(1)(A) (2017).

Notwithstanding any other provision of this subchapter [42 USCS §§ 1395 et seq.], no payment may be made under part A or part B of this subchapter [42 USCS §§1395c et seq. or 1395j et seq.] for any expenses incurred for items or services which . . . are not reasonable and necessary for the diagnosis or treatment of illness or injury or to improve the functioning of a malformed body member.<sup>59</sup>

Moreover, in the case of home health services, Congress has stated that the government may only pay for services that are “required because the individual is or was confined to his home.”<sup>60</sup> However, Congress has failed to provide more specific guidance regarding what services qualify as “reasonable and necessary”<sup>61</sup> and which patients qualify as “confined to [their] home.”<sup>62</sup> To provide guidance as to the meaning of these terms, CMS has issued its own regulations.<sup>63</sup> These regulations define terms and state more rules that health care providers must follow in order to receive payment from the government under Medicare.<sup>64</sup> CMS has frequently revised these regulations over time.<sup>65</sup>

Caring Hearts provides physical therapy and skilled nursing services to Medicare patients that are confined to their homes.<sup>66</sup> CMS audited Caring Hearts and found that it had provided services to some patients who did not qualify as being confined to their homes under CMS’s regulations.<sup>67</sup> It also found that Caring Hearts had provided some services that did not qualify as reasonable and necessary, and that Caring Hearts failed to provide sufficient documentation for some of its services.<sup>68</sup> CMS thus determined that the government had paid Caring Hearts \$800,000 to which it was not entitled and ordered Caring Hearts to pay this money back to the government.<sup>69</sup> The

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59. *Id.*

60. 42 U.S.C. § 1395f(a)(2)(C) (2017).

61. 42 U.S.C. § 1395y(a)(1)(A) (2017).

62. 42 U.S.C. § 1395f(a)(2)(C) (2017).

63. *Caring Hearts Pers. Home Servs.*, 824 F.3d at 970.

64. *Home Health Providers, CTRS. FOR MEDICARE & MEDICAID SERVS.*, <https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/CertificationandCompliance/HHAs.html> (last visited Mar. 1, 2019).

65. *Caring Hearts Pers. Home Servs.*, 824 F.3d at 970.

66. *Id.*

67. *Id.*

68. *Id.* at 974.

69. *Id.* at 970.

district court affirmed CMS's denial of relief, and Caring Hearts appealed the order.<sup>70</sup>

The Tenth Circuit analyzed the facts of this case and the regulations that CMS applied to these facts.<sup>71</sup> It concluded that CMS had applied the wrong law.<sup>72</sup> In 2008, when Caring Hearts provided the services at issue, there were regulations in place with which it complied.<sup>73</sup> However, in performing its audit, CMS applied regulations that it had issued years after Caring Hearts provided these services.<sup>74</sup> Moreover, the regulations it applied were stricter and more difficult to follow than the ones in place at the time Caring Hearts rendered its services.<sup>75</sup> Thus, Caring Hearts properly complied with the regulations CMS had issued at that time, and CMS was wrong to deny coverage for these services.<sup>76</sup> The Tenth Circuit reversed the decision of the district court.<sup>77</sup>

In determining that CMS applied the wrong law, the Tenth Circuit looked at each of the two categories of requirements that Caring Hearts had failed to satisfy: that its patients did not qualify as homebound and that it did not provide enough documentation to prove that its services were reasonable and necessary.<sup>78</sup>

In 2008, at the time when Caring Hearts rendered its services, the regulations in place stated that in general, a patient would be considered confined to his home when he has "a condition due to an illness or injury that restricts [his] ability to leave the place of residence except with the aid of: supportive devices such as crutches, canes, wheelchairs, and walkers."<sup>79</sup>

The Tenth Circuit then looked at the patients to whom Caring Hearts provided services under this definition of homebound.<sup>80</sup> In its decision, it provided an example of one of these patients.<sup>81</sup> An eighty-five-year-old patient weighed 352 pounds and had been diagnosed with diabetes, high

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70. *Id.* at 977.

71. *Caring Hearts Pers. Home Servs.*, 824 F.3d at 970.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at 976.

77. *Caring Hearts Pers. Home Servs.*, 824 F.3d at 977.

78. *Id.* at 971-75.

79. *Id.* at 971.

80. *Id.* at 972.

81. *Id.* at 971.

blood pressure, and several other medical conditions.<sup>82</sup> He primarily used a wheelchair and sometimes used a walker or a cane, but he could not walk twenty feet without difficulty.<sup>83</sup>

CMS determined that this patient did not satisfy the requirements of being homebound and thus concluded that Medicare did not have to pay for the services Caring Hearts provided to him.<sup>84</sup> In its determination, CMS found that the evidence failed to establish that this patient's attempt to leave home required a "considerable and taxing effort."<sup>85</sup> At the time of this determination, the regulations in place required a patient to be unable to leave home even with a wheelchair and required that any attempt to leave home involve a considerable and taxing effort.<sup>86</sup> However, these regulations were not in place at the time Caring Hearts rendered its services to this patient. While the two sets of regulations sound similar, they have importance differences, and the court noted that these differences were crucial to a fair understanding of the case.<sup>87</sup>

The court recognized that, while the regulations in place at the time of CMS's determination asked whether a patient could leave home with a supportive device, the regulations in place at the time Caring Hearts rendered its services asked whether a patient could leave home without a supportive device.<sup>88</sup> The regulations that CMS later enacted thus imposed a stricter standard with which health care providers had to comply, namely, that a patient had to be unable to leave home even with the help of some device; whereas, under the regulations in effect earlier, a patient only had to be unable to leave home by himself.<sup>89</sup> The patient in this case satisfied the requirements of the regulations in place when Caring Hearts rendered its services because he used a wheelchair practically all the time and had difficulty walking twenty feet.<sup>90</sup> But he would not qualify as homebound under the stricter standard that CMS later issued.<sup>91</sup>

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82. *Id.*

83. *Caring Hearts Pers. Home Servs.*, 824 F.3d at 971.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* at 971-72.

88. *Id.*

89. *Caring Hearts Pers. Home Servs.*, 824 F.3d at 972.

90. *Id.*

91. *Id.*

Caring Hearts could not have possibly been expected to comply with these later standards because they did not exist at the time it rendered its services.<sup>92</sup> The court even noted that it is likely that CMS “issued its current regulations narrowing the class of persons who qualify as homebound specifically to preclude relief in future cases exactly like this one.”<sup>93</sup>

Although the court did not address it specifically, it would violate essential notions of due process to demand a health care provider to abide by rules that were not in place at the time it acted.<sup>94</sup> This problem violates the Due Process Clause’s commitment to legality, which echoes the traditional American philosophy that the government should function in accordance with the law. By making up standards that did not exist at the time of the action, the government agency did not act in accordance with the law at the time.

CMS next determined that Caring Hearts failed to provide documentation sufficient to show that its services were reasonable and necessary.<sup>95</sup> The Tenth Circuit again provided an example of a situation that involved services that CMS deemed were not reasonable and necessary.<sup>96</sup> Caring Hearts provided physical therapy to a seventy-one-year-old woman who suffered from diabetes, degenerative joint disease, chronic obstructive pulmonary disease, and pain in her lower back, hips, and right leg.<sup>97</sup> After walking a short distance, she experienced fatigue and weakness.<sup>98</sup> To increase her strength and decrease her pain, multiple doctors prescribed physical therapy for her.<sup>99</sup> After Caring Hearts provided her with physical therapy, the patient’s ability to walk increased by fifty percent, and she testified that the pain in her back decreased from a six out of ten to a three or four out of ten.<sup>100</sup>

Even under these facts, CMS concluded that Caring Hearts failed to produce sufficient documentation to show that the physical therapy it

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92. *Id.*

93. *Id.*

94. *See Lewis v. Am. Cyanamid Co.*, 155 N.J. 544, 573 (1998) (“Under New Jersey law, ‘codes or regulations not in effect at the time of manufacture of the product cannot be admitted to establish the standard for that design.’”). *See also Strickland v. Washington*, 466 U.S. 668, 684-85 (1984) (“The Constitution guarantees a fair trial through the Due Process Clause, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause . . .”).

95. *Caring Hearts Pers. Home Servs.*, 824 F.3d at 974.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

provided this patient was reasonable and necessary.<sup>101</sup> CMS argued that Caring Heart's documents did not include progress notes for this patient at each visit, and they did not include sufficient quantitative data.<sup>102</sup> However, the relevant statute, 42 U.S.C. § 1395y(a)(1)(A), does not offer healthcare providers guidance as to what qualifies as "reasonable and necessary" services, but instead merely declares that Medicare will not pay for services that are not "reasonable and necessary for the diagnosis or treatment of illness or injury or to improve the functioning of a malformed body member."<sup>103</sup> Therefore, instead of relying on this statute to support its conclusion that Caring Hearts did not provide sufficient documentation, CMS relied on regulations it issued, repeatedly citing 42 C.F.R. § 409.44(c)(2)(ii)(H)(4), and then shortening its citations to simply § 409.44(c), to support its decision denying Caring Hearts relief.<sup>104</sup>

In evaluating these claims, the Tenth Circuit looked back at the regulations issued and cited by CMS.<sup>105</sup> The court found that in 2008, when Caring Hearts rendered its services, 42 C.F.R. § 409.44(c)(2)(ii)(H)(4) did not exist.<sup>106</sup> In fact, the court noted that that regulation did not even exist at the time the case was decided and, in fact, *never* existed.<sup>107</sup> Once again, it appeared that CMS seemed to be confused about the very regulations it issued—possibly, and probably, due both to the large amount of regulations and to the ever-changing nature of the regulations.<sup>108</sup>

The court did its best to determine what regulation CMS meant to cite. It found that the agency meant to rely on 42 C.F.R. § 409.44(c)(2)(i)(F)(4), rather than 42 C.F.R. § 409.44(c)(2)(ii)(H)(4).<sup>109</sup> However, CMS did not issue this regulation until November 2010, while Caring Hearts provided its health care services in 2008.<sup>110</sup> In 2008, 42 C.F.R. § 409.44(c)(2)(i) only had one paragraph that simply required that a provider's physical therapy services be

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101. *Caring Hearts Pers. Home Servs.*, 824 F.3d at 974.

102. *Id.*

103. 42 U.S.C. § 1395y(a)(1)(A) (2017).

104. *Caring Hearts Pers. Home Servs.*, 824 F.3d at 974-75.

105. *Id.* at 975.

106. *Id.*

107. *Id.*

108. *See* AAA Pharm., Inc. v. United States, 108 Fed. Cl. 321, 327 (2012) (noting "the many regulations that govern" those "under the Medicare program"). *See also* S.D. v. Hood, 391 F.3d 581, 595-96 (2004) ("As the agency entrusted with the administration of the Medicaid statute, CMS is required to determine that each state plan is in conformity with the specific requirements of the Medicaid act.").

109. *Caring Hearts Pers. Home Servs.*, 824 F.3d at 975.

110. *Id.*

safe and effective treatment under accepted standards of medical practice.<sup>111</sup> Thus, at the time Caring Hearts rendered its services, there were no regulations that required specific documentation. The court looked at the regulations in place at the time Caring Hearts provided its services and found that its physical therapy services were consistent with accepted standards of medical practice, just as the regulations required.<sup>112</sup> The court, therefore, focused on this approach in determining that CMS was wrong in its decision to require Caring Hearts to repay it a large amount of money.

Another approach the court could have taken was from a due process perspective. It would violate due process and common notions of fairness to hold Caring Hearts to standards that did not exist at the time it performed its actions. Due process requires that the government act in accordance with whatever law there may happen to be, and it also requires that before depriving someone of life, liberty, or property, the government must follow fair procedures.<sup>113</sup> By holding Caring Hearts to a higher standard than was in place at the time it acted, CMS dishonored the American observance of regular legal order.

### *B. Analysis of the Case*

The Tenth Circuit skillfully crafted its opinion in *Caring Hearts Personal Home Services v. Burwell*.<sup>114</sup> However, while it vaguely, briefly mentioned a concern about due process, the court did not sufficiently analyze the case from a due process perspective.

#### 1. Analysis of the Court's Reasoning

In its reasoning, the court applied both rules established in other cases and common notions of fairness, but it did not give appropriate weight to due process concerns.

The court's reasoning is consistent with rules established in other cases.<sup>115</sup> As the Tenth Circuit established in *Lax v. Astrue*, governmental agencies cannot apply the wrong law to citizens who come before them, and federal

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111. *Id.*

112. *Id.*

113. *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976) ("Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.").

114. *Caring Hearts Pers. Home Servs.*, 824 F.3d at 968.

115. *Lax v. Astrue*, 489 F.3d 1080 (10th Cir. 2007); *Sandoval v. Aetna Life & Cas. Ins. Co.*, 967 F.2d 377 (10th Cir. 1992); *Danti v. Lewis*, 312 F.2d 345 (D.C. Cir. 1962).



courts are to review the agencies' decisions to ensure that the agencies applied the correct legal standards.<sup>116</sup> Here, the Tenth Circuit correctly reviewed the legal standard that CMS applied and found that it had applied the wrong law to Caring Hearts.

Similarly, as the Tenth Circuit established in *Sandoval v. Aetna Life & Casualty Insurance Company*, an agency decision that applies the wrong law in cases when the right law would support the citizen, and not the agency, is subject to the arbitrary and capricious label.<sup>117</sup> Here, the court found that CMS's decision not only applied the wrong law, but applied it in a case where the right law would support Caring Hearts. Allowing CMS to do so would be an arbitrary and capricious action.

Moreover, regarding common notions of fairness, the court understood the importance of applying only those regulations in place at the time Caring Hearts provided its services.<sup>118</sup> After all, it would be absurd to hold a health care provider to standards that did not even exist at the time. It might have been true that CMS's current regulations set forth strict requirements to be qualified as homebound and demand extensive documentation for every skilled nursing visit. However, back in 2008, when Caring Hearts provided the services at issue, CMS's regulations were very different and far less demanding.

The court's reasoning demonstrates the fact that CMS seems unfamiliar with its own law.<sup>119</sup> As the court noted, "This case has taken us to a strange world where the government itself—the very 'expert' agency responsible for promulgating the 'law' no less—seems unable to keep pace with its own frenetic lawmaking."<sup>120</sup> When the very agency that issues the regulations is confused about the law, it raises serious questions about due process and fair notice.

While then-Judge Gorsuch briefly mentioned that "[f]or others, it raises troubling questions about due process and fair notice—questions like whether and how people can be fairly expected to keep pace with and conform their conduct to all this churning and changing 'law,'" he did not elaborate on this important point.<sup>121</sup> Due process and its commitment to legality are at the heart of the American legal system, and by failing to address

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116. *Lax*, 489 F.3d at 1084.

117. *Sandoval*, 967 F.2d at 380.

118. *Caring Hearts Pers. Home Servs.*, 824 F.3d at 970-71.

119. *Id.* at 975-77.

120. *Id.* at 976.

121. *Id.* at 969.

due process in its reasoning, the court neglects this important doctrine that has been a part of American jurisprudence since the founding of the country.

In 1915, the Supreme Court gave more shape and meaning to the Due Process Clause in *Bi-Metallic Inv. Co. v. State Board of Equalization*.<sup>122</sup> The Court stated,

Where a rule of conduct applies to more than a few people, it is impracticable that every one should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule.<sup>123</sup>

This case established that the doctrine of due process does not apply when the government creates laws, but applies when the government acts against individuals “in each case upon individual grounds . . .”<sup>124</sup> Thus, the Due Process Clause does not govern how CMS sets the rules for qualifications under Medicare, but it does govern how that agency applies those rules to individual health care providers who are thought to have violated them. Caring Hearts had a law-based relationship with CMS and an expectation of continuation in receiving financial coverage for providing its qualifying services; thus, Caring Hearts’ relationship with CMS was a legal relationship with the government that could be regarded in some sense as an entitlement, triggering the protection of due process.<sup>125</sup> In applying the wrong regulations and standards to the services Caring Hearts provided, the executive agency violated due process, and the court should have addressed this point in order to have given a more complete analysis.

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122. *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915).

123. *Id.* at 445.

124. *Id.* at 446 (“A relatively small number of persons was concerned, who were exceptionally affected, in each case upon individual grounds, and it was held that they had a right to a hearing.”).

125. *See Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972)

To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined.

Because receiving payment from CMS is a relation the health care provider is entitled to keep until there is some reason to take it away, process is due before the payment can be taken away. In *Mathews v. Eldridge*, the Supreme Court defined an approach to how judges should ask about constitutionally-required procedures.<sup>126</sup> The Court established three factors that must be analyzed to resolve the question about what process is due:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.<sup>127</sup>

If the Tenth Circuit had used these factors, it would have become clear that CMS violated due process when it ordered Caring Hearts to repay the government over \$800,000.

First, the private interest here is very significant. A health care provider uses the money that CMS gives it to provide quality services to people in need of treatment. Ordering a health care provider to repay the government a large sum of money—money to which the provider is entitled under the law—is a weighty infringement of the provider's private interest.

In applying the second factor, the risk of error in using administrative proceedings is high. Even though Caring Hearts argued that it did not know and could not have known that its services were not permissible when rendered, and thus should not have to repay the amounts it received from CMS under 42 U.S.C. § 1395pp,<sup>128</sup> the agency rejected Caring Hearts' application for relief.<sup>129</sup> In the administrative proceeding, CMS used "regulations that were then but figments of the rule makers' imagination, still years away from adoption."<sup>130</sup> The risk of error in using administrative proceedings could be significantly reduced by adding oral or confrontational procedures of the *Goldberg* variety.<sup>131</sup>

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126. *Mathews v. Eldridge*, 424 U.S. 319 (1976).

127. *Id.* at 335.

128. 42 U.S.C. § 1395pp (2014).

129. *Caring Hearts Pers. Home Servs.*, 824 F.3d at 970.

130. *Id.*

131. See *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970) ("[T]he decision maker should state the reasons for his determination and indicate the evidence he relied on, . . . though his statement need not amount to a full opinion or even formal findings of fact and conclusions of law. And, of course, an impartial decision maker is essential.").

Finally, requiring CMS to provide a hearing before an impartial judicial officer, the right to an attorney's help, the right to present evidence and argument orally, the chance to examine all materials, or a decision limited to the record and explained in an opinion would not be a significant administrative burden. Additional administrative costs for hearings and delay in requiring repayment while those hearings are awaiting resolution to health care providers initially found undeserving of benefits would not entail a great fiscal burden on the government. Therefore, the procedures that CMS provided to Caring Hearts was a violation of due process.

## 2. Analysis of the Court's Holding

After applying both common notions of fairness as well as rules established in other cases, the court held that CMS had applied the wrong law.<sup>132</sup> It thus remanded the case to the district court so that the district court could send the case back to CMS.<sup>133</sup> This holding was consistent with the court's reasoning and rationale as it analyzed how the agency defended its conclusions.

While the Tenth Circuit would have reached the same conclusion if it had done a proper due process analysis, the court missed an important opportunity to discuss the due process concerns this case presented. Both the Fifth Amendment and the Fourteenth Amendment's Due Process Clause have as their central promise an assurance that all levels of American government—even executive agencies like CMS—will operate within the law and provide fair procedures.<sup>134</sup> The court should have addressed this point when it held that CMS wound up confused about its own law.

## C. Other Possible Solutions of the Case

After ruling that CMS had applied the wrong law, the court based its decision on the law in place at the time Caring Hearts provided its services. There were, however, several other options the court could have used in its decision of the case. The court could have applied the law in place at the time the case was filed, applied the law in place at the time of the hearing of the

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132. *Caring Hearts Pers. Home Servs.*, 824 F.3d at 970.

133. *Id.* at 977.

134. *See generally* Richard Milburn Pub. Charter Alt. High Sch. v. Cafritz, 798 A.2d 531, 541, 548 (D.C. 2002) (noting that “[t]he procedural due process guarantee imposes procedural requirements on the government before it deprives individuals of protected interests” and that “[t]he government function at issue here is the Board's duty to ensure that charter school students receive the type of educational opportunities and other services they deserve by overseeing the operations of public charter schools and revoking the charters of those schools that do not operate within the law.”).

case, given deference to the agency and reviewed only for abuse of discretion, or tried to restrict the number of changes CMS is permitted to make.

1. Apply the Law in Place at the Time the Case Was Filed

Some could argue that in reviewing CMS'S decision, the court should have looked to the law in place at the time the case was filed. In other words, when CMS determined that the government should not have paid for some of the services that Caring Hearts had provided and ordered Caring Hearts to return that money, the court should have looked to the regulations in place at that time to determine whether CMS was justified in its conclusion.

But this argument does not make sense. In the same way it would violate notions of fairness and due process to hold health care providers, such as Caring Hearts, to CMS's current regulations, it would violate these same basic notions to hold them to standards at the time of the filing of the case. After all, it could very well be that the law in place at the time the case was filed had changed since the time the health care provider rendered its services, especially considering the vast number of changes to its regulations that CMS issues. If the court had applied the law in place at the time the case was filed, it would not solve any of the problems it found in CMS's decision, namely that it was not fair to deny payment to Caring Hearts after it had complied with the relevant regulations in place at the time it provided its services—the only regulations with which it possibly could have conformed. Therefore, applying the law in place at the time the case was filed does not solve the due process concerns that were raised in the case of *Caring Hearts Personal Home Services v. Burwell*.<sup>135</sup>

2. Apply the Law in Place at the Time of the Hearing of the Case

Some others may argue that the court should have applied the law in place at the time of the hearing. Thus, instead of looking to the time when the services were rendered, the court should have looked at the regulations in place at the time the case was heard. This is apparently the approach the United States District Court for the District of Kansas took in deciding this case before Caring Hearts appealed to the Tenth Circuit. The district court issued an order affirming CMS's denial of relief.<sup>136</sup> It accepted CMS's arguments and applied the law that was in place at the time of the hearing—exactly the law the agency wanted to be applied and exactly the law that the Court of Appeals found was the wrong law to be applied.

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135. *Caring Hearts Pers. Home Servs.*, 824 F.3d at 969.

136. *Id.* at 977.

But again, this approach has little merit. Applying the law in place at the time of the hearing raises at least as many issues as applying the law in place at the time the case was filed. The ever-changing and ever-increasing regulations issued by CMS<sup>137</sup> makes it likely that the regulations in place at the time of the hearing of the case would be different than the regulations in place at the time the nursing facility provided its services. In this case, that was precisely the issue. The regulations in place at the time of the hearing of the case were stricter, and thus Caring Hearts did not meet these standards.<sup>138</sup> However, it met the standards from the regulations that were in place at the time it issued its services.<sup>139</sup> It would be unfair to hold Caring Hearts to standards that were not in place at the time it issued its services—standards of which Caring Hearts could not possibly have been aware of and about which Caring Hearts could not possibly have known. In fact, even more than simply being unfair, it would violate due process and fair notice. Holding Caring Hearts to a standard that did not exist at the time it acted would constitute arbitrary and capricious action by CMS because that would equate to applying the wrong law.<sup>140</sup> Thus, applying the law in place at the time of the hearing of the case is not a suitable alternative to the way the Tenth Circuit decided the case in *Caring Hearts Personal Home Services v. Burwell*.<sup>141</sup>

### 3. Give Deference to the Agency and Review Only for Abuse of Discretion

Another option the court could have employed in deciding the case is to give deference to the agency and only review the agency's decision for clear errors. This may have been the approach the District Court for the District of Kansas took in first deciding the case before Caring Hearts appealed.<sup>142</sup> The district court affirmed CMS's denial of relief under 42 U.S.C.S. § 1395pp.<sup>143</sup> The district court seemed to defer to CMS without checking to make sure the agency had applied the correct legal standards.<sup>144</sup> The court

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137. *Regulations & Guidance*, CTRS. FOR MEDICARE & MEDICAID SERVS., <https://www.cms.gov/Regulations-and-Guidance/Regulations-and-Guidance.html> (last visited Oct. 28, 2017).

138. *Caring Hearts Pers. Home Servs.*, 824 F.3d at 972.

139. *Id.*

140. *Sandoval v. Aetna Life & Cas. Ins. Co.*, 967 F.3d at 380 (10th Cir. 1992).

141. *Caring Hearts Pers. Home Servs.*, 824 F.3d at 968.

142. *Caring Hearts Pers. Home Servs. v. Sebelius*, 2014 U.S. Dist. LEXIS 120077 (D. Kan. Aug. 28, 2014).

143. *Caring Hearts Pers. Home Servs.*, 824 F.3d at 977.

144. *Caring Hearts Pers. Home Servs. v. Sebelius*, 2014 U.S. Dist. LEXIS 120077, at \*6.

noted that it “gives broad deference to the Secretary’s interpretation of its own regulations.”<sup>145</sup> Thus, it appears that the district court deferred to CMS, in large part due to the fact that Medicare and Medicaid are such complex and technical regulatory programs.<sup>146</sup> Moreover, the district court looked to the Administrative Procedures Act.<sup>147</sup> This Act, which was enacted in 1946, gives a court the power to set aside an agency decision only if the agency’s decision is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”<sup>148</sup> or “unsupported by substantial evidence in a case . . . reviewed on the record of an agency hearing provided by statute.”<sup>149</sup>

However, a court’s duty is to make sure the correct law has been applied in every case.<sup>150</sup> When reviewing an agency decision, a court must determine whether the agency’s decision is supported by substantial evidence in the record and whether the agency applied the correct law.<sup>151</sup> The court must give deference to the agency’s findings of fact, but the court does not give deference to the agency’s findings of law.<sup>152</sup> While it may be true that a court needs to give deference to an agency’s interpretation of its own regulations,<sup>153</sup> this does not mean that a court should not review the legal standards that an agency used in making its findings. Rather, a court has a duty to apply the correct law as interpreted by that agency, while still ensuring that the law the agency applied is correct.

In this case, while the district court correctly gave deference to CMS’s interpretation of its own regulations, it did not make any effort to make sure those regulations were the correct regulations to apply.<sup>154</sup> In contrast, the Tenth Circuit both correctly gave deference to CMS’s interpretation of its own regulations and correctly checked the regulations to make sure they were the correct legal standards to apply.<sup>155</sup>

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145. *Id.*

146. *Id.*

147. *Id.*

148. 5 U.S.C. § 706(2)(A).

149. 5 U.S.C. § 706(2)(E).

150. *Lax*, 489 F.3d at 1084.

151. *Id.*

152. Exec. Dir. *ex rel. Carey v. Sebelius*, 698 F. Supp. 2d 436, 439 (D. Vt. 2010) (citing 42 U.S.C. § 405(g)).

153. *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994).

154. *Caring Hearts Pers. Home Servs. v. Sebelius*, 2014 U.S. Dist. LEXIS 120077, at \*6 (D. Kan. Aug. 28, 2014).

155. *Caring Hearts Pers. Home Servs., Inc. v. Burwell*, 824 F.3d 968, 970 (10th Cir. 2016).

Giving deference to the agency's decision, including both deference to the agency's interpretation of its own regulations and deference to the regulations the agency used in making its decision, would hinder a reviewing court from fulfilling its judicial duty of ensuring the correct legal standards are applied in every case. The United States Constitution ensures that no citizen will be deprived of life, liberty, or property without due process of the law; foregoing the appropriate procedures would be a violation of due process.<sup>156</sup> This is why the court should have also analyzed the facts of this case from a due process perspective.

Moreover, a mere abuse of discretion standard implies that an agency has discretion in making its decisions based on the regulations it issues. But if CMS has discretion in interpreting its regulations to determine whether government coverage is warranted, then these decisions become merely arbitrary and capricious decisions, which are forbidden as violations of due process.<sup>157</sup> Therefore, the court should not have given deference to the agency and reviewed only for an abuse of discretion.

#### 4. Restrict the Number of Changes the Agency is Permitted to Make

One of the biggest problems confronted in the case of *Caring Hearts Personal Home Services v. Burwell* was the ever-increasing and ever-changing regulations CMS issues.<sup>158</sup> Another possible solution to this case would be for the court to restrict the number of new regulations and changes to previous regulations that CMS is permitted to make. This may involve putting a numerical limit on the changes the agency could make each year or setting a page limit for the regulations the agency is permitted to issue. In any case, the goal of this approach to the problem would be to attempt to make it easier and more reasonable for health care providers to conform their behavior to the law in place. With fewer regulations, or at least fewer changes to the existing regulations, health care providers would have a better chance of being able to take steps to ensure that their policies and practices comply with the regulations, thus ensuring that their services would meet the requirements to be covered by government funding.

While this seems like a wise approach, it too has its limitations. First, because the amount of regulations CMS already has in place has grown so enormous,<sup>159</sup> it would be arduous for the agency to reduce its regulations to a limited number. Even if only the number of changes were limited, CMS

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156. U.S. CONST. amend. V.

157. *Sandoval v. Aetna Life & Cas. Ins. Co.*, 967 F.2d 377, 380 (10th Cir. 1992).

158. *Caring Hearts Pers. Home Servs.*, 824 F.3d at 970.

159. *Regulations & Guidance*, *supra* note 137.



would likely encounter difficulty due to the large number of regulations.<sup>160</sup> Any change would likely require changes to multiple other regulations in effect, thus making it difficult for CMS to comply with the limited number of changes permitted.

Moreover, it is doubtful that a court has the power or authority to limit the number of regulations CMS can issue. CMS is an agency of the United States Department of Health and Human Services.<sup>161</sup> It creates regulations under the authority of Congress to help the government carry out public policy.<sup>162</sup> To allow courts to limit the number of regulations CMS is permitted to issue or even to limit the number of changes the agency is permitted to make would seem to interfere with Congress' lawmaking power and usurp the powers of the legislative branch.

Even if the court could limit the number of regulations CMS was permitted to issue or change, the limitations would not solve the due process problems which arose—but which the Tenth Circuit largely ignored—in the case of *Caring Hearts Personal Home Services v. Burwell*.<sup>163</sup> Still, in this case, CMS held Caring Hearts to standards that were not in place at the time the health care provider rendered its services.<sup>164</sup> Limiting the number of regulations CMS could issue does not solve the problem it created in ordering Caring Hearts to repay the government over \$800,000.<sup>165</sup> Therefore, it is doubtful that limiting the number of regulations CMS is permitted to issue or limiting the number of changes to its regulations the agency is permitted to make would solve the problems confronted in this case.

#### D. *Why This Case Was Decided Correctly—Even Though the Court Ignored Due Process*

The court in *Caring Hearts Personal Home Services v. Burwell*<sup>166</sup> came to a correct conclusion for several reasons. First, the Tenth Circuit only held the health care provider to standards that were in place at the time of its actions. Second, all the other possible solutions to this case, which were discussed in

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160. *Id.*

161. *About CMS*, CTRS. FOR MEDICARE & MEDICAID SERVS., <https://www.cms.gov/> (last visited Oct. 12, 2017).

162. *Laws & Regulations*, U.S. Department of Health & Human Services, <https://www.hhs.gov/regulations/index.html> (last visited Dec. 28, 2017).

163. *Caring Hearts Pers. Home Servs.*, 824 F.3d at 969.

164. *Id.* at 972.

165. *Id.* at 970.

166. *Id.* at 968.

Section C,<sup>167</sup> fall short in providing an adequate alternative to the process the Tenth Circuit used in this case.

### 1. The Correct Conclusion

In its decision, the Tenth Circuit looked back to the regulations in place at the time Caring Hearts rendered its services to determine whether it met the standards that CMS had set forth.<sup>168</sup> The court recognized that the growing number of formal rules that agencies issue makes it difficult for people to keep up with these regulations.<sup>169</sup> In particular, the court acknowledged the fact that the number of regulations issued by CMS has grown so exorbitantly that it is hard for health care providers to carry on their services in compliance with them.<sup>170</sup> The Tenth Circuit was aware that the large number of federal regulations “raises troubling questions about due process and fair notice – questions like whether and how people can be fairly expected to keep pace with and conform their conduct to all this churning and changing ‘law.’”<sup>171</sup> In fact, the court recognized that this case made it clear that voluminous laws create problems not just for the people trying to conform to them but also for the legislating agencies who create the laws.<sup>172</sup> *Caring Hearts Personal Home Services v. Burwell* demonstrated the fact that the problem has reached the point where even the legislating agencies do not know what their own law is.<sup>173</sup>

To solve this problem, the Tenth Circuit looked only to regulations issued by CMS that were in effect at the time Caring Hearts provided its care.<sup>174</sup> This approach looks only to the regulations that Caring Hearts knew or should have known at the time it rendered its services.<sup>175</sup> Thus, the court holds the health care provider only to those standards which were controlling at the time care was provided, rather than holding it to arbitrary standards found in regulations CMS later issued.

The Tenth Circuit failed to address the due process concerns in this case. Nonetheless, it came to the correct conclusion and holding due to its careful analysis and its commitment to fairness. A thorough due process rationale

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167. *Supra* Section III.C.

168. *Caring Hearts Pers. Home Servs.*, 824 F.3d at 971.

169. *Id.* at 969.

170. *Id.* at 970.

171. *Id.* at 969.

172. *Id.* at 969-70.

173. *Id.*

174. *Caring Hearts Pers. Home Servs.*, 824 F.3d at 971.

175. *Id.* at 972.

would have made the court's analysis more complete and would have given future courts guidance in deciding cases where executive agencies enforce incorrect legislation after revising and reshaping it through the exercise of delegated legislative authority.

## 2. Other Possible Solutions Unrealistic or Unfair

Any other possible solution to the issue presented in *Caring Hearts Personal Home Services v. Burwell*—other than a more thorough due process analysis—is not an adequate solution to the problem. As discussed earlier, other possible solutions to the case include applying the law in place at the time the case was filed, applying the law in place at the time of the hearing of the case, giving deference to the agency and reviewing only for abuse of discretion, and restricting the number of changes the agency is permitted to make.<sup>176</sup> Each of these alternatives has its own weaknesses, and none of them solve the problems confronted in the case.

First is the option of applying the law in place at the time the case was filed.<sup>177</sup> This approach raises the same due process concerns presented in *Caring Hearts Personal Home Services v. Burwell*. It is quite possible that the controlling regulations at the time the case was filed would be different than the regulations in effect at the time *Caring Hearts* provided its care. This again would subject the health care provider to standards of which it could not have possibly been aware at the time it decided which patients to accept and what types of services to provide. Thus, this approach is not a reasonable alternative to the case because it fails to address the due process problems.

Second is the option of applying the law in place at the time of the hearing of the case.<sup>178</sup> This approach is very similar to the first alternative and presents the same due process concerns. The regulations in effect at the time of the hearing of the case could very well be different from the regulations in effect at the time *Caring Hearts* rendered its services. It would be unfair to hold the health care provider to regulations which did not exist—regulations which, as the Tenth Circuit notes, “*Caring Hearts* couldn’t have known about at the time it provided its services.”<sup>179</sup> Therefore, this approach would be just as unfair as applying the current regulations, which the Tenth Circuit found to be unjust and which also violated due process.

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176. *Supra* Section III.C.

177. *Supra* Section III.C.1.

178. *Supra* Section III.C.2.

179. *Caring Hearts Pers. Home Servs.*, 824 F.3d at 970.

Third is the option of giving deference to the agency and reviewing only for abuse of discretion.<sup>180</sup> This is likely the approach the district court took in deciding this case.<sup>181</sup> While it may seem to be fair to give deference to the agency, especially because the agency has the power to issue and interpret the regulations, this approach has several problems. Giving the agency this much power could raise serious concerns about the separation of powers. It is troublesome that an agency exercising legislative authority would also have judicial authority in determining how its regulations apply to individual parties. Also, CMS should not be permitted to make arbitrary and capricious decisions about who qualifies under its regulations.<sup>182</sup> It is the duty of the court to ensure that the correct legal standards are applied.<sup>183</sup> Moreover, even if this approach were used, the agency abused its discretion in applying the wrong law to Caring Hearts.<sup>184</sup> Thus, even under this alternative, the court should have the authority to review the agency's decision and determine whether the health care provider complied with the regulations in effect at the time it rendered its services.

Fourth is the option of restricting the number of changes the agency is permitted to make.<sup>185</sup> This approach initially appears attractive especially because of the voluminous number of regulations in effect and the ever-changing nature of these regulations. However, this approach also raises concerns about the separation of powers. The agencies issuing the regulations are acting with legislative power, and the judicial branch does not have the authority to limit or restrict legislative power. Furthermore, the number of regulations has already grown so large that restricting the number of additional regulations or the number of changes to the regulations would hardly solve the problems already created by these regulations.<sup>186</sup> Therefore, this approach is unreasonable because it is doubtful that it would truly solve the issues already presented and would likely usurp the legislative authority to issue rules and regulations.

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180. *Supra* Section III.C.3.

181. *Caring Hearts Pers. Home Servs. v. Sebelius*, 2014 U.S. Dist. LEXIS 120077 (D. Kan. Aug. 28, 2014).

182. *Sandoval v. Aetna Life & Cas. Ins. Co.*, 967 F.2d 377, 380 (10th Cir. 1992).

183. *Lax*, 489 F.3d at 1084.

184. *Caring Hearts Pers. Home Servs.*, 824 F.3d at 970.

185. *Supra* Section III.C.4.

186. *Regulations & Guidance*, *supra* note 137.

#### IV. PROPOSAL FOR HOW FUTURE CASES SHOULD DECIDE SIMILAR ISSUES

While *Caring Hearts Personal Home Services v. Burwell*<sup>187</sup> provides a good starting example, future cases deciding similar issues should also incorporate a due process approach. A proper framework of analysis for deciding cases in which a legislating agency and an individual disagree on which law is the correct law to apply is to look at the law applicable at the time of the facts of the case. Courts should apply this law to the facts of the case, while also ensuring that due process is satisfied.

##### A. *Look at the Law Applicable at the Time of the Facts of the Case*

When a citizen claims that an agency has applied the wrong law, the first step a court should take is to determine the law applicable at the time of the facts of the case. This involves two processes: understanding the law then in place and determining how a reasonable person would understand and apply that law.

###### 1. Understand the Law Then in Place

A court must understand the law in place at the time of the facts of the case. The Tenth Circuit exemplified this first step of the process in *Caring Hearts Personal Home Services v. Burwell* when it looked to the regulations that were in effect at the time *Caring Hearts* provided its care.<sup>188</sup> It is only fair to hold citizens to laws and regulations about which the citizen could have known at the time of the facts of the case.<sup>189</sup> Thus, a court must apply only the regulations in force at the time the citizen does, or fails to do, the act in dispute.<sup>190</sup>

###### 2. Determine How a Reasonable Person Would Understand and Apply the Law

After understanding the law that was in place at the time of the facts of the case, it is necessary for a court to determine how a reasonable person would understand and apply that law to the facts. In *Caring Hearts Personal Home Services v. Burwell*, the Tenth Circuit employed this step of the process next when it analyzed how a reasonable person would understand the language of the statute that CMS issued.<sup>191</sup> Fairness requires not only the correct law be applied, but also that a reasonable interpretation of that law be applied to each case. To determine a reasonable interpretation, courts need to look at

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187. 824 F.3d at 968.

188. *Id.* at 970.

189. *Id.*

190. *Id.*

191. *Id.* at 972.

the view of the agency that created the law as well as textual evidence.<sup>192</sup> Textual clues include the plain and ordinary meaning of words, surrounding sentences, and canons of interpretation, such as the assumption that law-making bodies mean the same thing when they use the same word in consecutive sentences.<sup>193</sup> Thus, as the Tenth Circuit demonstrated, a court must determine a reasonable reading of the regulation at issue.<sup>194</sup>

### B. *Apply the Law to the Facts of the Case*

After determining the correct law to be applied in the case, the next step is to apply that law to the facts of the case. This process also involves two similar steps: applying only the law in place at the time of the facts of the case and not applying previously controlling law or law that was enacted after the facts of the case took place.

#### 1. Apply Only the Law in Place at the Time of the Facts of the Case

As the Tenth Circuit established, it is only fair to apply the law in place at the time of the facts of the case.<sup>195</sup> Thus, after the court determines which law is applicable, it is important that a court only apply that law to the facts of the case. The Tenth Circuit used this process in the case of *Caring Hearts Personal Home Services v. Burwell* when it applied only the regulations that were in place at the time Caring Hearts rendered its services.<sup>196</sup>

#### 2. Apply Only Contemporary Law

When applying only the law in place at the time of the facts of the case, it is important for a court not to apply previously controlling law or law that was enacted after the facts of the case took place. In *Caring Hearts Personal Home Services v. Burwell*, the Tenth Circuit refused to apply regulations that CMS had issued after Caring Hearts provided its care.<sup>197</sup> The Tenth Circuit also rejected the application of an interpretation of the regulation that the agency had advocated in previous litigation.<sup>198</sup> The court noted that “in administrative law the post-hoc rationalizations of counsel may not provide grounds for sustaining an agency decision.”<sup>199</sup> In the interest of fundamental

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192. *Id.*

193. *Caring Hearts Pers. Home Servs.*, 824 F.3d at 972.

194. *Id.* at 972.

195. *Id.* at 970.

196. *Id.* at 971-72.

197. *Id.*

198. *Id.* at 974.

199. *Caring Hearts Pers. Home Servs.*, 824 F.3d at 974.

fairness, it is necessary that a court refuse to apply any law other than that which was in place at the time the facts of the case took place.

### 3. Ensure Due Process Is Satisfied

As the only right that the Constitution stated twice, due process is arguably one of the most guarded rights in American jurisprudence.<sup>200</sup> Assuring that all levels of American government operate within the law and provide fair procedures is essential in deciding all cases. Thus, courts should ensure that all executive agencies act only in accordance with law and that everyone receives the ordinary procedures of law. By following the Supreme Court's approach in *Mathews v. Eldridge* and using the three factors that case sets forth,<sup>201</sup> courts can safeguard the commitment to legality that is at the heart of the American legal system.

## V. CONCLUSION

*Caring Hearts Personal Home Services v. Burwell*<sup>202</sup> is a challenging case which demonstrates the problems created when agencies issue so many regulations that even they have difficulty keeping up with them. When agencies apply regulations that were not controlling at the time the facts of the case occurred, it violates fairness because citizens could not possibly have known about these regulations and should not be expected to comply with them.

To solve the problems presented, courts should apply the framework established by the Tenth Circuit in *Caring Hearts Personal Home Services v. Burwell* as well as a due process analysis to cases with similar issues. Courts must first determine the correct law to be applied, which involves understanding the law in effect at the time the facts of the case took place and deciding how a reasonable person would understand and apply this law. Courts must then apply this law to the facts of the case, and in doing so, a court must take care to ensure that only the correct law is applied and that no other law—including both previously controlling law and law that was later enacted—is applied to the case at issue. Then, courts need to ensure that the government is functioning in accordance with the law and providing proper procedures to those determined to be in violation of the law. This process comports with due process and guarantees fairness to citizens trying to conform their behavior to the requirements of the law.

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200. U.S. CONST. amends. V, XIV, § 1.

201. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

202. *Caring Hearts Pers. Home Servs.*, 824 F.3d 968 (10th Cir. 2016).