



Summary of Lawsuit Filed Against HHS Approval of Kentucky Waivers

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Background

On January 12, 2018 the Department of Health and Human Services (HHS) approved numerous section 1115 waivers in Kentucky (KY Waivers). Because the approvals violate numerous provisions of law and will gravely harm hundreds of thousands of Kentuckians, the National Health Law Program (NHeLP) brought a lawsuit challenging them on January 24, 2018. NHeLP brought the lawsuit together with the Kentucky Equal Justice Center and the Southern Poverty Law Center. NHeLP is being assisted by the law firm of Jenner & Block.

Section 1115 of the Social Security Act allows HHS to waive some federal Medicaid requirements if, and only if, those waivers have an experimental purpose and promote the objectives of Medicaid (to furnish health services for enrollees) and only for so long as needed to do the experiment. In approving the KY Waivers, HHS exceeded its authority – the waivers are not experiments, reduce access to health services, and violate other legal requirements.

Basics of the Lawsuit

The lawsuit (initiated in a filing known as a “Complaint”) seeks to have the KY Waivers declared illegal and also to enjoin their implementation. This lawsuit is based on violations of the Administrative Procedure Act (APA), the Social Security Act (including the Medicaid Act), and the U.S. Constitution.

The lawsuit was filed in the United States District Court for the District of Columbia against HHS and the Centers for Medicare and Medicaid Services (CMS), as well as various senior officials responsible for considering, approving, and implementing the Section 1115 waivers and related policies.

The lawsuit was filed on behalf of 15 named plaintiffs – individuals who are currently obtaining their health care through Medicaid in Kentucky and will suffer serious harms under the KY Waivers – and a statewide class of similarly situated individuals. The named plaintiffs include

workers, individuals with serious health conditions, and parents. Under the KY Waivers, Medicaid enrollees will face work requirements, high premiums and penalties if they are unable to pay, loss of coverage if they fail to meet certain administrative requirements, and reduced access to services. For example, plaintiff Ronnie Maurice Stewart is a 62-year old man who suffers from diabetes, arthritis, and high-blood pressure, and was laid off from multiple jobs, was temporarily homeless, and currently lives below the poverty level. Due to his age and health, he is unlikely to be able to comply with the work requirement or afford to pay a monthly health care premium. Mr. Stewart once received a surgery covered by Medicaid that helped prevent him from going blind; without Medicaid going forward his health would be in jeopardy.

Legal Claims

Take Care Clause

This claim flows from the Trump administration's explicit efforts to dismantle the Affordable Care Act (ACA), which includes the Medicaid expansion. Congress passed the ACA, making it the law of the land. The Executive branch of the government is empowered to implement laws, but it cannot re-write or undermine them. Under Article II, Section 3 of the U.S. Constitution, the Executive must "take Care that the Laws be faithfully executed."

The Trump administration's efforts to undermine the ACA's Medicaid expansion through the KY Waivers violate this Constitutional requirement, known as the "Take Care Clause," and form a clear basis for the District Court to declare the KY Waivers unlawful. The Trump administration has taken numerous steps, to block or alter the ACA, starting with an Executive Order on his first day in office that instructed the relevant federal agencies to undo the ACA. Numerous members of the Trump administration have stated that this is their goal. As part of this goal, the administration is seeking to undermine the Medicaid expansion and transform the Medicaid program through administrative action. These actions form the basis for the Constitutional claim in the lawsuit.

Administrative Procedure Act

The lawsuit also includes a group of claims under the Administrative Procedure Act, a federal law that has long-governed the way federal agencies must operate. The APA compels courts to find unlawful and set aside agency actions that fail to meet standards set forth in the law. For example, courts must find unlawful and set aside agency actions that are "an abuse of discretion or otherwise not in accordance with law."

As mentioned earlier, in the KY Waivers HHS approved numerous section 1115 waivers that do not have an experimental purpose and/or do not promote the objectives of Medicaid, as required by the statute. For example, HHS approved a waiver allowing Kentucky to terminate individuals who fail to document that they are working, completing other employment related activities, or qualify for some kind of exception. Because this waiver does nothing to improve

access to health services, it violates the section 1115 requirement to promote the objectives of Medicaid.

The lawsuit identified numerous KY Waivers that violate the APA, including: (1) work requirements; (2) premium requirements (including waiting periods and penalties); (3) emergency room cost-sharing; (4) lockout penalties; (5) waiver of retroactive eligibility; and (6) waiver of non-emergency medical transportation.

The lawsuit identifies one final APA violation. On January 11, 2018, CMS issued a “Dear State Medicaid Director” letter. The lawsuit alleges that the guidance violates the APA by announcing a significant new Medicaid policy without going through the notice and comment process.

Next Steps

We expect the government to file the Administrative Record within 30 days. They will also need to file an “Answer” to the lawsuit.

It is still too early to predict the timeline for the case. NHeLP will pursue an injunction to block any KY Waiver provisions from going into effect while the case moves forward.