



Summary of Lawsuit Filed Against HHS Approval of “Arkansas Works” Amendment

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Background

On March 5, 2018, the Department of Health and Human Services (HHS) approved an amendment to Arkansas’s existing section 1115 waiver (“AR Works Amendment”). The original waiver was approved by the Obama administration to expand Medicaid coverage in the State. Because the AR Works Amendment violates numerous provisions of law and will gravely harm thousands of Arkansans, the National Health Law Program (NHeLP) brought a lawsuit challenging it on August 14, 2018. NHeLP brought the lawsuit together with the Legal Aid of Arkansas and Southern Poverty Law Center.

Section 1115 of the Social Security Act allows HHS to waive some designated federal Medicaid requirements if, and only if, those waivers have an experimental purpose and promote the objectives of Medicaid (to *furnish* health coverage to low-income people) and only for so long as needed to do the experiment. In approving the AR Works Amendment, HHS exceeded its authority – the Amendment is not experimental, it *reduces* access to health coverage and services, and violates other legal requirements.

Basics of the Lawsuit:

The lawsuit (initiated in a filing known as a “Complaint”) seeks to have the AR Works Amendment declared illegal and to enjoin its implementation. This lawsuit alleges violations of the Administrative Procedure Act (APA) 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 & Medicaid Services (CMS), as well as senior officials

responsible for considering, approving, and implementing the AR Works Amendment. (The State of Arkansas is not sued in this lawsuit.)

The lawsuit was filed on behalf of individuals who currently have health insurance coverage through Medicaid and will suffer serious harms under the AR Works Amendment. The plaintiffs include individuals with chronic conditions who depend on the continuous health coverage that Medicaid has allowed. Under the AR Works Amendment, Medicaid enrollees will have their health insurance coverage conditioned on work requirements and will see their current retroactive coverage eliminated. They will be limited to on-line portals for reporting activities to the State (even though the majority of Arkansans – and particularly limited income people – do not have access to the internet or broadband services). For example, plaintiff Charles Gresham is a 37-year old man who suffers from a seizure disorder, an anxiety condition, and asthma. Mr. Gresham believes he can work and he looks for work, but he has limited options because he does not have his own transportation and his seizure disorder makes it difficult for him to find an appropriate job. Prior to getting Medicaid coverage, he was not able to afford doctor visits and medications. If he loses his coverage, this will once again be the case.

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 rewrite the Medicaid Act and undermine the ACA's Medicaid expansion through the AR Works Amendment violate this Constitutional requirement, known as the "Take Care Clause," and form a clear basis for the District Court to declare the AR Works Amendment 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 instructs the relevant federal agencies to undo the ACA. Numerous members of the Trump administration have worked to implement this goal.

Administrative Procedure Act

The lawsuit also includes two 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 the standards set forth in the statutes

they govern them, in this case the Social Security Act. 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 AR Works Amendment HHS used section 1115 to approve amendments that do not have an *experimental purpose*, that ignore provisions of the Medicaid Act that cannot be ignored, and/or do not *promote the objectives of Medicaid*, as required by the statute. For example, HHS approved a waiver allowing Arkansas 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 Amendment will reduce access and coverage rather than furnish health coverage, it violates the section 1115 requirement to *promote the objectives of Medicaid*.

The second APA violation identified in the lawsuit concerns a policy guidance improperly implemented by CMS. 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. The policy encourages states to impose work requirements on Medicaid enrollees.

Next Steps

We expect the government to file the Administrative Record promptly. They will also need to file an “Answer” to the lawsuit. It is still too early to predict the timeline for the case.