

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF FLORIDA  
PENSACOLA DIVISION**

Case No. 3:15-cv-193-MCR-CJK

RICK SCOTT, in his official capacity  
as Governor of Florida; et al.,  
Plaintiffs,  
v.

UNITED STATES DEPARTMENT OF  
HEALTH AND HUMAN SERVICES;  
et al.,  
Defendants.

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**MEMORANDUM OF *AMICUS CURIAE* LEAGUE OF WOMEN VOTERS OF  
FLORIDA, FLORIDA COMMUNITY HEALTH ACTION INFORMATION NETWORK,  
AND FLORIDA LEGAL SERVICES IN SUPPORT OF DEFENDANTS' OPPOSITION  
TO A PRELIMINARY INJUNCTION**

Florida's highest state officials have asked this Court for emergency relief related to the State's Low Income Pool ("LIP")—a Medicaid demonstration project that, in April 2014, Florida officials agreed would end on June 30, 2015. Nonetheless, Plaintiffs now argue that the Secretary of the Department of Health and Human Services ("Secretary" or "DHHS") violated the anti-coercion rules established in *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012), during recent negotiations over the State's request to extend the current LIP funding beyond the agreed-upon cut off date. The Department of Justice has ably explained why this lawsuit is utterly lacking in merit. This case is not about illegal coercion or any other genuine legal claim. Rather, this lawsuit reflects political concerns and sentiments about the role of Medicaid in covering low-income, uninsured Floridians and appears to be an attempt by Florida officials to improve their negotiating posture with the federal authorities.

The State officials did not submit a formal request to DHHS for reauthorizing the LIP until the end of May; an APA administrative record is only now being created; and, to date, DHHS has not made a final decision on the State's request. When it does make that decision, DHHS will act under section 1115 of the Social Security Act—a provision that grants broad authority to the Secretary to approve requests and unlimited discretion to deny them.

INTEREST OF THE AMICI & CORPORATE DISCLOSURE STATEMENT

*Amici* organizations are not publicly held companies. None have parent corporations.

*Amici* are Florida-based consumer, educational, and legal services organizations whose members, constituents, and clients are directly affected by the Florida Medicaid program. The **League of Women Voters of Florida** works to expand participation in the democratic process and has made access to health care for all Floridians a legislative priority. **Florida Community Health Action Information Network (CHAIN)** is a statewide consumer health care advocacy organization working on access to health care. **Florida Legal Services, Inc.** is a statewide legal services program with expertise in the Florida Medicaid program and a focus on ensuring access to health care for low-income Floridians.

ARGUMENT

**I. Section 1115 of the Social Security Act grants the Secretary of the Department of Health and Human Services broad discretion to decide whether to approve or deny experimental, pilot, or demonstration projects.**

Section 1115 of the Social Security Act allows the Secretary of DHHS to waive compliance with most (but not all) of the Medicaid statutory requirements “to the extent and for the period he finds necessary” to enable a State or States to carry out an “experimental, pilot, or demonstration project which, in the judgment of the Secretary, is likely to assist in promoting the

objectives of” the Medicaid Act.<sup>1</sup> 42 U.S.C. § 1315(a); *see* 42 C.F.R. § 431.404. Upon its enactment, Congress stated that section 1115 was intended to allow “experimental projects designed to test out new ideas and ways of dealing with the problems of public welfare recipients” that are “to be selectively approved,” “designed to improve the techniques of administering assistance and related rehabilitative services,” and “usually cannot be statewide in operation.” S. Rep. No. 87-1589, 87th Cong., 2d Sess. at 19-20, *reprinted in* 1962 U.S.C.C.A.N. 1943, 1961-62, 1962 WL 4692 (1962).

Courts have repeatedly upheld the Secretary’s broad discretion to decide the who, what, when, where, and how of an experimental project under section 1115. For example, the Ninth Circuit Court of Appeals has noted that section 1115 projects must test experimental or novel approaches and that it “was not enacted to enable states to save money or to evade federal requirements but to ‘test out new ideas and ways of dealing with the problems of public welfare recipients.’” *Beno v. Shalala*, 30 F.3d 1057, 1069 (9th Cir. 1994) (citation omitted); *see also*, *e.g.*, *Aquayo v. Richardson*, 352 F. Supp. 462, 470 (S.D.N.Y. 1972), *aff’d*, 473 F.2d 1090 (2d Cir. 1973) (affirming Secretary’s broad authority, stating “this is an experimental program of limited duration; a thorough evaluation after the program has run its course should disclose whether it has resulted in an actual, substantial diminution of benefits to welfare recipients”). Significantly, section 1115 was not designed to function as a funding stream—which is clearly what the Plaintiffs want. As noted by the Ninth Circuit, “Section 1115 does not establish a new, independent funding source,” nor does it “confer[] discretion on the Secretary to interpret § 1115

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<sup>1</sup> Section 1115 was included in the Welfare Amendments of 1962, Pub. L. No. 87-543, § 122, and extended to include Medicaid when that program was enacted in 1965, Social Security Amendments of 1965, Pub. L. No. 80-97, 42 U.S.C. § 1315.

as establishing a new, freestanding assistance scheme.” *Portland Adventist Medical Center v. Thompson*, 399 F.3d 1091, 1097-98 (9th Cir. 2005).

In sum, section 1115 only authorizes the Secretary to approve time-limited experimental, pilot, or demonstration projects. Within these parameters, the Secretary has broad, but limited, discretion to determine when an experiment may start; and the Secretary has full discretion to determine when an experiment should be denied or ended.

**II. Florida’s Low Income Pool received approval for a time-limited experiment, and the Secretary has discretion to decide that the experiment should end or be reduced.**

**A. The time-limited approval for a demonstration LIP and “final” transition**

The Secretary of DHHS granted Florida permission to establish the LIP in 2006, as part of a section 1115 Demonstration Waiver (“the Waiver”). The overarching purpose of the Waiver was to allow the State to ignore certain, otherwise mandatory provisions of the Medicaid Act as it shifted enrollees into a managed care delivery system. While the mandatory enrollment in managed care was limited to a five-county pilot, the LIP program applied statewide. *See* Ctrs. for Medicare & Medicaid Servs., *Medicaid Reform Section 1115 Demonstration – Special Terms and Conditions*, 7-8, 24 (2006) (“2006 Waiver Terms and Conditions”).

The LIP program allowed Florida to provide supplemental payments to certain types of health care providers—payments above the State’s usual payment rates—to help them offset the cost of caring for Medicaid beneficiaries and uninsured individuals. According to the study design for the Waiver, the State would implement the LIP as “a new approach for providing reimbursement for the provision of services for the uninsured or underinsured” and over the course of the five-year demonstration period, answer the following research questions:

- How many individuals receive services through the LIP?
- How do the individuals who receive services through the LIP vary according to their age, gender, ethnicity, and other characteristics?

- What are the amount and type of services provided through the LIP?
- How many and what types of providers receive reimbursement from the LIP?
- How much reimbursement is received by each provider?

Univ. of Florida, Agency for Health Care Admin., et al. *Evaluating Medicaid Reform in Florida* 10 (Mar. 2006) (on file with *amici* counsel).

The research questions for the LIP demonstration were straight forward; however, early on, the Secretary of DHHS was informed that the supplemental funding scheme was “problematic.” U.S. Gov’t Accountability Office, *Medicaid Demonstration Waivers: Recent HHS Approvals Continue to Raise Cost and Oversight Concerns* 28 (Jan. 2008) (GAO-08-87) (finding DHHS had not adequately ensured the “fiscal integrity” of the Medicaid program); *see also* Navigant Healthcare, *Study of Hospital Funding and Payment Methodologies for Fla.* (Feb. 27, 2015) (finding “audits are not performed for the LIP program,” “few if any standard reports,” “very little review,” and insufficient monitoring manpower) (“Navigant Report”). ECF No. 15-3, at 31-32, 149, 188.

Years of negotiations ensued over the State’s request to extend the five-county managed care pilot statewide, including a request to extend and expand the LIP. CMS expressed repeated concerns over LIP and indicated that the “experiment” would end.<sup>2</sup> In July 2014, CMS announced: “This extension is approved for three years. . . *except for the Low Income Pool (LIP) supplemental payment authority which will be extended through June 20, 2015.*” Letter from Cindy Mann, Dir. of CMS to Justin Senior, Deputy Sec’y for Medicaid, ECF No. 30-4, at 2 (“CMS July 2014 Letter”) (July 31, 2014) (emphasis added).<sup>3</sup>

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<sup>2</sup> *See* Carol Gentry, *Huge Medicaid overhaul request nearly ready*, Health News Fla. (Aug. 1, 2001), [http://hnfarchives.org/hnf\\_stories/read/huge\\_medicaid\\_overhaul\\_request\\_nearly\\_ready](http://hnfarchives.org/hnf_stories/read/huge_medicaid_overhaul_request_nearly_ready).

<sup>3</sup> *See also*, April 11, 2014 letter stating “LIP will be expanded *only* for one year from July 1, 2014 through June 30, 2015” (emphasis added). ECF No. 30-3 at 2.

Over the course of the Waiver, the LIP was funded at approximately \$1 billion. However, for the LIP's "final" fiscal year (2014-15), CMS and Florida agreed to an increase of just over \$2 billion: "CMS and Florida agree that this one-year extension of the LIP will provide stability for providers as Florida transitions to statewide Medicaid managed care, while allowing the state to move toward a significantly reformed Medicaid payment system." CMS July 2014 Letter, ECF No. 30-4 at 2. In addition to notifying the State that the LIP would only be extended for one year, CMS required Florida to commission an independent report that would "recommend reforms to the Florida Medicaid financing system that can allow the state, beginning in state fiscal year 2015-2016, to move toward Medicaid managed care and fee-for-service payments that ensure access for Medicaid beneficiaries to providers throughout the state through such payments rather than through over reliance on supplemental payments." *Id.* This report was produced by Navigant Healthcare.

B. The Navigant Report

Plaintiffs distort the purpose and findings of the Navigant Report. According to Plaintiffs, Navigant was tasked with identifying whether the State could address CMS's concerns with LIP, and assuming the concerns could be addressed, whether LIP should continue if the State expanded Medicaid under the Affordable Care Act (ACA). *See* Compl., ECF No. 1, at ¶¶ 42-45; Pls.–Pet'rs Mem. of Law in Supp. of Mot. for Prelim. Inj., ECF No. 15-1, at 11. Plaintiffs assert that the Navigant Report concluded that the CMS concerns could be "easily and quickly implemented" and "that CMS should continue to approve and fund a modified LIP [even with Medicaid expansion]." ECF No. 1 at ¶¶ 43-45. And, purportedly supported by the Navigant Report, Plaintiffs submit their renewed LIP request as "responsive to [Navigant's] findings" and request the same level of enhanced 2014-15 *funding* with promises to make modifications for a

“redesigned LIP program” that would improve transparency in and equitable distribution of the LIP funds. *See* Pls.’ recent LIP Amendment Request to continue LIP funding at current 2014-15 level, \$2.16 billion, ECF No. 15-3 at 271, 278; ECF No. 30-11 at 5, 14.

Plaintiffs’ narrative is misleading—particularly in terms of what a recommended “modification” would be to LIP *funding* with expansion. In that regard, the Navigant Report found LIP “could justifiably be reduced....” ECF No. 15-3 at 192. Plaintiffs not only ignore this finding, they repeatedly imply that the Navigant Report’s purpose was to determine if LIP was necessary even with Medicaid expansion. *See e.g.*, ECF No. 15-3 at 271, ECF 30-11 at 5; *see also* ECF No. 1 at ¶¶ 43-45. As noted above, however, its purpose was to identify ways that Florida could move toward sustainable payment rates for providers within the managed care system adopted by the State. *See* CMS July 2014 Letter, ECF No. 30-4 at 2.

### C. What the proposed LIP cut means to safety net providers

Plaintiffs’ allegation that Florida health care providers are “bracing for a \$2.2 billion hit” if the Court denies Plaintiffs’ requested relief, ECF No. 1 at ¶ 63, ignores the structure of the LIP funding scheme. To begin with, the only funding that will be lost when the experiment ends is federal matching funds (approximately 58%, or \$1.25 of \$2.16 billion in FY 2014-15).<sup>4</sup> Moreover, unlike the rest of Florida’s Medicaid program, federal LIP dollars are matched primarily with local—rather than state—funds. ECF No. 15-3 at 20-21. Under the LIP program, local governments transfer funds to the Medicaid program, which are then returned to designated local providers at an enhanced rate. *Id.* Plaintiffs make the unsupported assertion that localities would likely not continue their contributions to local safety-net providers without the

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<sup>4</sup> The federal match, or “FMAP”, for Florida is 58%. In other words, 58 cents of each dollar spent for these programs comes from the federal government, and 42 cents from the state. *See* The Henry J. Kaiser Family Foundation, Federal Medical Assistance Percentage (FMAP) for Medicaid and Multiplier, *available at* <http://kff.org/medicaid/state-indicator/federal-matching-rate-and-multiplier/>.

LIP enhancement. ECF No. 1 at ¶63. To the contrary, providers, including the State’s largest safety net provider, would presumably continue to receive local funding—funding that would simply be retained locally rather than be sent to the state for LIP purposes. *See e.g.*, Fla. Stat. 212.055(5)(d) & (7), Miami-Dade County, Fla., Code § 29-99 (2015) (half-cent sales tax approved by voters to support the local safety-net hospital).

It should also not be forgotten that the funding amount CMS authorized for 2014-15, in what the parties agreed would be the “final” year of LIP, doubled the previous nine years of LIP funding. ECF No. 30-9 at 4. For nine of the experiment’s ten years, Florida Medicaid and Florida hospitals relied on the exact same amount of money that CMS has indicated will be available in FY 2015-16. *Id.* In sum, Plaintiffs greatly exaggerate the loss of funds. It is difficult to see how the loss of LIP funding could possibly trigger a coercion analysis under *NFIB*. *Compare Miss. Comm’n on Env’tl. Quality v. EPA*, \_\_\_ F.3d \_\_\_, 2015 WL 3461262, \*33-35 (D.C. Cir. Jun. 2, 2015) (doubting whether *NFIB* coercion inquiry was required where Texas had accepted federal funds under the program for many years and was not surprised by a “dramatically new condition,” but finding Texas failed to meet its burden of establishing unconstitutionality where any loss in federal funding for the program represented less than four percent of the state budget). Moreover, it is squarely within the Secretary’s discretion under section 1115 to reduce or eliminate LIP.

D. Plaintiffs’ shifting rationale

In response to questions from state Senators about the scheduled end of the LIP, Justin Senior, Deputy Secretary for Medicaid, expressed optimism that the federal government would



preserve most of the Program’s funding. Health Policy Meeting (Mar. 4, 2015).<sup>5</sup> Mr. Senior initially acknowledged the federal government’s reluctance to fund LIP costs associated with uncompensated care delivered to individuals who could be covered through an expansion of Medicaid. He explained, however, that “the lion’s share” of the LIP pool *is not associated with uncompensated care*,<sup>6</sup> “let alone uncompensated care for people that would be picked up in an expansion.” *Id.* (emphasis added).<sup>7</sup>

Plaintiffs now urge that the LIP not be cut because, contrary to Mr. Senior’s March statement to the Legislature, LIP funds *are* associated with significant uncompensated care costs.<sup>8</sup> In support, Florida relies on a 2012 report by the Urban Institute which estimated the costs of uncompensated care in each state after Medicaid was expanded. Not surprisingly, the report found that states with large numbers of immigrants ineligible for Medicaid, *e.g.* Florida, would still have significant uncompensated care costs. ECF No. 1 at ¶ 35 (“Those sorts of costs [citing the 2012 Urban Institute] are precisely what Florida—with the long-time approval and support of the federal government—has developed its LIP program to address.”). *See also* ECF No. 1 at ¶¶ 6, 34, 56 (asserting that LIP funds are needed to help hospitals offset the costs of

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<sup>5</sup> *Hearing on Health Care Coverage Option Before the Comm. on Health Policy*, 2015 Regular Sess. (Fl. 2015) (statement of Justin Senior, Medicaid Director of AHCA), [https://www.flsenate.gov/media/videoplayer?EventID=2443575804\\_2015031070](https://www.flsenate.gov/media/videoplayer?EventID=2443575804_2015031070).

<sup>6</sup> The Navigant Report does not support this position. According to the Report, most of the LIP for public hospitals *was* used to cover the cost of the uninsured. (“[P]ayments from the traditional \$1 billion LIP program to Non-State Government Owned hospitals *primarily contribute* to those hospitals’ costs of caring for the uninsured.”) (emphasis added) ECF No. 15-3 at 192.

<sup>7</sup> Ostensibly in support of their claim of “good faith” in addressing CMS’ concerns over LIP, Plaintiffs repeatedly reference Florida’s promise to CMS that no future LIP funding would be used to cover the costs of treating individuals who would be eligible for coverage under Medicaid expansion. *See* ECF No. 1 at ¶¶ 6, 50, 55, 59; ECF No. 15-1 at 5, 13, 15.

<sup>8</sup> *See* Pls.’ recent LIP Amendment Request to continue LIP funding at current 2014-15 level, \$2.16 billion, ECF No. 15-3 at 278; ECF No. 30-11 at 14.

treating indigent immigrants ineligible for Medicaid expansion). Thus, after asserting that most of the LIP is not used to cover uncompensated care costs and promising CMS that no future LIP would be used to cover costs associated with for individuals *eligible for Medicaid expansion*,<sup>9</sup> Florida now argues that LIP cannot be reduced due to the large a amount of uncompensated care funding for individuals *ineligible for Medicaid expansion*. Problematically, this new argument ignores the express agreement between the parties in the 2014 Special Terms and Conditions (STC) prohibiting Florida from using LIP for costs associated with certain individuals ineligible for Medicaid due to their immigration status, *see* STC #72. ECF No. 30-4 at 43.

To recap the State's ever-shifting position: (1) first, the Deputy Sec'y for Medicaid told State legislators that the "lion's share" of LIP funding was not used to cover the costs of the uninsured; (2) Plaintiffs promised CMS that no future LIP funds would be used to cover the costs of uninsured individuals who would be eligible under a Medicaid expansion; (3) Plaintiffs then abandoned the argument that most of the LIP is not used to cover the uninsured; and (4) Plaintiffs now insist LIP should not be cut because the funding is needed to pay for the costs of treating uninsured individuals who are ineligible for Medicaid because of their immigration status, even though the State previously promised CMS that it would not use the LIP in this way.

### **CONCLUSION**

*Amici* respectfully ask the Court to deny the Plaintiffs' motion for preliminary injunction or, in the alternative, petition for a writ of mandamus, as requested by the Secretary of DHHS.

Respectfully submitted,

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<sup>9</sup> *See supra* note 7, at 9.

Dated: June 9, 2015

Respectfully submitted,

League of Women Voters of Florida  
Florida Community Health Action Information Network  
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By their counsel,

/s/ Miriam Harmatz

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/s/ Miriam Harmatz  
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