



Summary of Lawsuit Filed Against HHS Approval of New Hampshire’s “Granite Advantage” Waiver

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Background

On November 30, 2018, the U.S. Department of Health and Human Services (HHS) approved New Hampshire’s request to condition Medicaid coverage of medically necessary services needed by low-income adults on work requirements and to waive retroactive coverage. The project is called “Granite Advantage.” Because HHS’s approval of Granite Advantage violates numerous provisions of law and will harm tens of thousands of individuals in New Hampshire, the [National Health Law Program](#), joined by [New Hampshire Legal Assistance](#) and the [National Center for Law and Economic Justice](#), filed a lawsuit challenging it on March 20, 2019.

Basics of the Lawsuit

The law at the heart of the case is Section 1115 of the Social Security Act. Section 1115 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. Congress stated the purpose of the Medicaid Act in the Act itself – to furnish health coverage to low-income people. The waiver can last only for as long as needed to do the experiment.

The lawsuit (initiated in a filing known as a “Complaint”) seeks to have HHS’s approval of Granite Advantage declared illegal and to enjoin the implementation of that program. According to the Complaint, in approving Granite Advantage, HHS exceeded its authority. Granite Advantage does not have an experimental purpose, it is at odds with the objectives of Medicaid because it reduces access to health coverage and services, and violates other legal requirements. This lawsuit alleges violations of the federal 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 its Centers for Medicare & Medicaid Services (CMS), as well as senior federal

officials responsible for considering, approving, and implementing Granite Advantage. (The State of New Hampshire is not sued in this lawsuit.)

The lawsuit was filed on behalf of individuals who currently have health coverage through Medicaid and will suffer serious harms under Granite Advantage. Under the program, Medicaid enrollees will have their health coverage conditioned on work requirements and retroactive coverage will be eliminated.

The plaintiffs include individuals with who depend on Medicaid coverage but whose access to health care through that coverage will be at serious risk because of the new restrictions and who will suffer other harms because of Granite Advantage. For example, plaintiff Ian Ludders is a 40-year-old man who has chosen to lead a subsistence lifestyle. He works seasonally, in orchards and farms, and there are often months he does not work 100 hours. Mr. Ludders relies on his time between jobs to grow his own food and chop the firewood he uses to heat his small cabin. These activities enable Mr. Ludders to keep his expenses down and to live the lifestyle of his choice, which prioritizes living off the land. He cannot afford private insurance. Thus, Mr. Ludders appreciates having Medicaid coverage so he can access preventive care and in case he is injured while performing often-dangerous work activities. Mr. Ludders expects that, with the work requirements in place, he will not have enough time for his subsistence activities, that his expenses will increase, and he will no longer be able to pursue the lifestyle he has chosen.

Legal Claims

Administrative Procedure Act:

The lawsuit includes two claims under the Administrative Procedure Act (APA), a federal law that has governs the way federal agencies must operate. The APA requires courts to find unlawful and set aside agency actions that fail to meet the standards set forth in the statutes that govern them, in this case the Social Security Act. For example, courts must set aside agency actions that are “an abuse of discretion or otherwise not in accordance with law.” As mentioned earlier, when HHS approved Granite Advantage, it authorized restrictive eligibility requirements that do not have an experimental purpose, that ignore provisions of the Medicaid Act that cannot be ignored, and that do not promote the objectives of Medicaid. For example, HHS is allowing New Hampshire 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 requirement 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 that encourages states to condition Medicaid coverage on work requirements and sets forth the guidelines states are to use when doing so. The lawsuit alleges that the guidance announced in this letter violates the APA by announcing a significant new Medicaid policy without going through the notice and comment process that allows the public to know about the law and comment on it.

Take Care Clause:

The Complaint also alleges a violation of the Constitution. The 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 approval of Granite Advantage violate this constitutional requirement, known as the "Take Care Clause," and form a clear basis for the District Court to declare the Granite Advantage approval 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.

Next Steps

We expect the federal defendants to file the Administrative Record promptly. They will also need to respond to the lawsuit, either by filing an "Answer" to the Complaint or otherwise responding to the merits of the claims. It is still too early to predict the timeline for the case.