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A Guide to the Lawsuit Challenging CMS's Approval of the Kentucky HEALTH Medicaid Waiver

MaryBeth Musumeci

On January 11, 2018, the Centers for Medicare and Medicaid Services (CMS) issued a State Medicaid Director letter announcing a new policy that, for the 1st time, allows states to condition Medicaid on participation in a work or "community engagement" program. The next day, CMS approved a new Medicaid waiver in Kentucky. The waiver includes a program called Kentucky HEALTH, which encompasses a work requirement as well as coverage lockouts of up to 6 months for failure to pay monthly premiums (up to 4% of income), timely renew eligibility, or timely report a change in circumstances, among other provisions. Kentucky HEALTH applies to most nonelderly adults, including low-income parents and expansion adults. The state plans to implement Kentucky HEALTH by July, 2018. On January 24, 2018, 15 Kentucky Medicaid enrollees filed a lawsuit in the U.S. District Court for the District of Columbia challenging CMS's authority to issue the work requirement policy and approve the Kentucky waiver. This issue brief answers 5 key questions about the case.[1]

Key Questions

1. Who are the Parties In the Lawsuit?

The complaint describes the 15 plaintiffs as "housekeepers and custodians, ministers and morticians, car repairmen, retired workers, students, church administrators, bank tellers, caregivers, and musicians." They range in age from 20 to 62, and rely on Medicaid for services such as check-ups, treatment for chronic conditions such as diabetes and high blood pressure, mental health and substance use disorder counseling, prescription drugs, and vision and dental care. For example,

- Ronnie Maurice Stewart is retired at 62 because he is no longer able to be on his feet all day. He receives $841 per month in Social Security benefits. Medicaid covers his treatment for chronic conditions, including diabetes, arthritis, high blood pressure, and cataracts. Before receiving Medicaid in 2014, he was unable to afford insurance.
- Michael "Popjaw" Woods is 52 and owns a car repair center. His wife, Sara, 40, cleans houses and cares for their infant granddaughter and a neighbor's child. Their income varies weekly. Both were uninsured prior to enrolling in Medicaid in 2014. With Medicaid, Mr. Woods has been able to get care for his blood pressure, which had been untreated. Mrs. Woods has received treatment for debilitating migraines and has been sober for nearly 3 years after receiving substance abuse treatment and suboxone covered by Medicaid.
- Shawna Nicole McComas is 34 and married with 4 children. She works full-time in housekeeping, where her hours vary weekly, depending on overtime. She has chronic pain from osteoarthritis and a

congenital hip condition and sees multiple specialists. She takes the bus 90 minutes each way to doctor appointments because the family does not have a car.

- David Roode is 39 years old and married without children. He is a self-employed classical musician, and his hours and income fluctuate monthly. He relies on Medicaid for regular preventive health care.

The defendants are the U.S. Department of Health and Human Services (HHS), CMS, and their principal officials, including the HHS Acting Secretary, the CMS Administrator and Principal Deputy Administrator, and the Director of the CMS Center for Medicaid and CHIP Services.

2. What are the Plaintiffs Asking the Court to do?

The plaintiffs are asking the court to declare that the work requirement policy and Kentucky's waiver are illegal and cannot be implemented because they violate the Administrative Procedures Act (APA), the Medicaid provisions of the Social Security Act, and the President's Constitutional duty to take care that laws are faithfully executed. The plaintiffs argue that HHS "bypass[ed] the legislative process and act[ed] unilaterally to 'comprehensively transform' Medicaid" using a "narrow statutory waiver authority" that has "effectively rewritten the statute." The plaintiffs argue that the Kentucky waiver puts them at risk of losing Medicaid by creating new eligibility criteria that they contend are beyond HHS's authority, such as the work requirement and the highest premiums ever permitted in Medicaid. In support, they cite Kentucky's waiver application, which projects 95,000 fewer enrollees and $2.5 billion less in spending over five years.

The lawsuit challenges the Kentucky HEALTH program as a whole and several individual provisions, including the work requirement; premiums and associated coverage delays, penalties and lockout; increased cost-sharing for non-emergency use of the emergency room; coverage lockouts for failure to timely renew eligibility or report a change in circumstances; and elimination of retroactive coverage and non-emergency medical transportation. It also points out that the work requirement policy, on which the Kentucky waiver is based, was issued after the public comment period for the waiver closed.

3. What Has CMS Said About Its Authority to Issue the New Policy and Approve the Kentucky Waiver?

CMS's new policy explains that it is allowing waivers to test whether "requiring work or community engagement. . . will result in more beneficiaries being employed or engaging in other productive community engagement, thus producing improved health and well-being." CMS has determined that programs "designed to promote better mental, physical, and emotional health" or, separately, "to help individuals and families rise out of poverty and attain independence" will further program objectives. CMS explains that there are other determinants of health in addition to high-quality health care and cites "a growing body of evidence suggest[ing] that targeting certain health determinants, including productive work and community engagement, may improve health outcomes." The guidance acknowledges that "[t]his is a shift from prior agency policy" but maintains that "it is anchored in historic CMS principles that emphasize work to promote health and well-being." For example, CMS cites the Medicaid buy-in option, which expands financial eligibility to enable working people with disabilities to maintain coverage, and the option to provide supported employment services to people with disabilities, although "receipt of these supports is not a condition of eligibility or coverage."

In a letter accompanying the Kentucky waiver, CMS explains that the waiver is "likely to assist in improving health outcomes;. . . address behavioral and social factors that influence health outcomes;. . . incentivize beneficiaries to engage in their own health care and achieve better health outcomes; and. . . familiarize beneficiaries with a benefit design that is typical of what they may encounter in the commercial market and thereby facilitate smoother beneficiary transition to commercial coverage."

4. What are the Legal Questions for the Court?

HHS relied on its authority under Section 1115 of the Social Security Act to issue the work requirement policy and the Kentucky waiver. Section 1115 permits the HHS Secretary to waive certain provisions of federal Medicaid law to allow states to undertake experimental, pilot or demonstration projects that the Secretary determines will further program objectives. Under the APA, the court will review the administrative record to determine if HHS acted lawfully. The court can set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," contrary to the Constitution, outside the scope of the agency's statutory authority, issued without required procedures, unsupported by substantial evidence, or unwarranted by the facts.[2] The court might consider whether the work policy and the Kentucky waiver qualify as an experiment; whether the Secretary exceeded his authority when determining that the new policies further Medicaid objectives; whether the new policies are supported by evidence in the administrative record; and whether the work policy should have been issued using formal notice and comment rule-making.

5. What are the Next Steps?

The defendants have 60 days to respond to the complaint. They also need to file with the court the administrative record that forms the basis of the agency's decisions. The plaintiffs are seeking to have the case certified as a class action on behalf of all Kentucky residents enrolled in Medicaid on or after January 12, 2018, a group that they anticipate numbers in the hundreds of thousands. The plaintiffs also are asking the court for a preliminary injunction, which would prevent implementation of the work policy and the Kentucky waiver until a final decision in the case.

Looking Ahead

While the Kentucky lawsuit proceeds, there are currently 9 other states (AR, AZ, IN, KS, ME, MS, NH, UT, & WI) with pending waiver applications seeking work requirements for expansion adults and/or low-income parents. Policymakers and other stakeholders in these states will be watching the Kentucky case to see how CMS responds to the complaint and what the court decides and waiting to see whether CMS approves more waivers with work requirements, on what terms, and whether litigation follows in other states.

Endnotes

[1] No. 1:18-cv-00152. The case is currently known as *Stewart v. Hargan* but is likely to change to *Stewart v. Azar* with the confirmation of the new HHS Secretary.

[2] 5 U.S.C. § 706.