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July 26, 2018

STEWART V. AZAR – WHAT DOES IT MEAN FOR NEW HAMPSHIRE’S MEDICAID WORK AND COMMUNITY ENGAGEMENT REQUIREMENT? ¹

On June 29, 2018, the United States District Court in D.C. overturned Kentucky’s approved Medicaid work and community engagement requirements as inconsistent with Medicaid’s primary objective to provide medical assistance to those who can’t afford it. *Stewart v. Azar* (J. Boasberg, USDC DC 2018).

“...[T]he Secretary never adequately considered whether Kentucky HEALTH would in fact help the state furnish medical assistance to its citizens, a central objective of Medicaid. This signal omission renders his determination arbitrary and capricious. The Court, consequently, will vacate the approval of Kentucky’s project and remand the matter to HHS for further review.” (*Stewart* at. 3)

As a result of the decision, Kentucky cannot enforce its work requirement as planned.

New Hampshire,² as well as Arkansas and Indiana, have approved Section 1115 waivers requiring certain Medicaid populations to work as a condition of eligibility. While the *Stewart* decision does not directly overturn such waiver approvals, it raises questions about what would happen if these waivers were challenged on similar grounds.

BACKGROUND: WORK REQUIREMENTS IN KENTUCKY AND NEW HAMPSHIRE

KENTUCKY’S WORK REQUIREMENT

Kentucky HEALTH’s work and community engagement requirements are similar to New Hampshire’s except that Kentucky requires 80 hours a month of work or community engagement while New Hampshire requires 100 hours, and Kentucky applies its requirements not just to the Medicaid expansion population but also some traditional Medicaid populations (NH’s is limited to the Medicaid expansion population).

Kentucky’s work requirement, like New Hampshire’s, is part of a broader Section 1115 waiver program. On January 12, 2018, the Centers for Medicare and Medicaid Services (CMS) approved Kentucky’s request to:

- Include a work requirement as a condition of ongoing eligibility in Kentucky HEALTH,
- Deny 90-day retroactive coverage to enrollees,

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² For background on the state waivers and New Hampshire’s work/community engagement requirement, see Hodder, Wyman “May 31, 2018 Background Questions and Answers” <https://chhs.unh.edu/article/2018/06/roundtable-discussion-work-and-community-engagment-requirement>

- Apply monthly premiums up to 4% of income,
- Lock eligible enrollees out of coverage for failure to timely renew or timely report a change in circumstances, and
- Limit access to non-emergency medical transportation.

On June 29, 2018, the Stewart court vacated the waiver and its eligibility restrictions.

NEW HAMPSHIRE'S WORK REQUIREMENT

New Hampshire's work and community engagement requirements are in a slightly different procedural place. While CMS has blessed the program in principle, the requirements cannot be applied to the new Granite Advantage Program without additional procedural steps.

By way of background, in 2017, New Hampshire submitted an application to CMS to amend the New Hampshire Health Protection Program's (NHHPP) Section 1115 Premium Assistance waiver in order to require work and community engagement for NHHPP enrollees. CMS granted this waiver on May 7, 2018 for a limited time, until December 31, 2018, and only as part of the NHHPP Premium Assistance Program. SB 313, signed on June 29, 2018, changed the law by discontinuing NHHPP's Premium Assistance Program and extending coverage to Medicaid expansion adults through Medicaid managed care.³ The new program is called Granite Advantage and begins on or about January 1, 2019.

In order to apply the work and community engagement requirements to the Granite Advantage Program, New Hampshire must seek waiver approval from CMS. Therefore, New Hampshire is filing the Granite Advantage Health Care Program Section 1115(a) Demonstration Waiver application on or after July 20, 2018⁴ asking to apply the approved 100-hour work and community engagement requirements to the Medicaid expansion adults. In the waiver application, New Hampshire seeks permission to do the following:⁵

- Apply the work and community engagement requirement to the Granite Advantage Program on or after January 1, 2019,
- Continue to deny 90-day retroactive coverage to enrollees,
- Include a citizenship documentation requirement,
- Implement an asset test,

³ The Medicaid expansion adults are those who have incomes between 0-138% of the Federal Poverty Limit and don't otherwise qualify for Medicaid. NH plans to offer Medicaid coverage to these adults through the Granite Advantage managed care program beginning on January 1, 2019. These adults will be referred to as Granite Advantage Program enrollees or Medicaid expansion adults.

⁴ DHHS plans to submit the waiver as approved by the Joint Fiscal Committee at its July 20, 2018 meeting. See <https://www.dhhs.nh.gov/ombp/medicaid/granite.htm>

⁵ NH DHHS is also seeking to amend its State Plan Amendments in order to transition the NHHPP population to managed care. <https://www.dhhs.nh.gov/ombp/medicaid/granite.htm#spa>

- Require applicants to provide all necessary information regarding financial eligibility, assets, residency, citizenship or immigration status and insurance coverage to the department,
- Require applicants to inform the department of any changes in status, and
- Discontinue co-pays.

Once CMS has received New Hampshire’s Granite Advantage Program waiver application, a federal 30-day public-notice period will begin and CMS must wait at least 45 days before rendering a final decision.⁶

SUMMARY OF THE KENTUCKY DECISION

THE SECRETARY FAILED TO FIND THAT THE KENTUCKY WAIVER PROMOTES THE OBJECTIVES OF THE MEDICAID ACT

The *Stewart* Court reaffirmed that the Medicaid program’s purpose is to provide medical assistance in the form of coverage and care to those who can’t afford it. When a state asks to avoid Medicaid rules through a Section 1115 demonstration waiver, the Secretary must determine whether the waived program promotes the objectives of the Medicaid Act and helps the state provide health coverage for Medicaid beneficiaries. *Stewart* at 36.

The Secretary failed to ask the key questions: 1) will the program cause recipients to lose coverage? and 2) will the program help promote coverage? *Id.* As evidence of the Secretary’s failure, the court noted:

- 1) “ the record contains a rather stunning lack of discussion about the effect of Kentucky HEALTH on health coverage...”
- 2) The Secretary “never provided a bottom-line estimate of how many people would lose Medicaid with Kentucky HEALTH in place.”
- 3) “...For starters, the Secretary never once mentions the estimated 95,000 people who would lose coverage, which gives the Court little reason to think that he seriously grappled with the bottom-line impact on healthcare....”
- 4) “Nor did he “request... additional information related to the project’s impact on recipients” or offer “any information refuting plaintiffs’ substantial documentary evidence” that the action would reduce healthcare coverage.”

Stewart at 36-38.

The Secretary argued that the Kentucky HEALTH demonstration:

⁶ From a procedural (as opposed to a political) standpoint, if the work and other waiver requirements are not approved for the Granite Advantage Program or are otherwise challenged, SB 313’s severability clause could apply, leaving the Medicaid managed care program in tact covering the expansion adults while the requirements are under review.

- 1) Was likely to assist in improving health outcomes;
- 2) Would address behavioral and social factors that influence health outcomes;
- 3) Would incentivize beneficiaries to engage in their own health care and achieve better health outcomes; and
- 4) Would 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.

Stewart at 35. The Court found the Secretary’s many reasons for granting the waiver, reasons that included improving overall health and cutting costs, did not make up for his failure to consider whether the program improved access to health coverage. “[T]his focus on health is no substitute for considering Medicaid’s central concern: covering health costs.” *Stewart* at 44. Ultimately, the Court determined that improving health is not the same as providing health care coverage.

Kentucky also argued that costs savings could be achieved through the waiver, but the Court found there was little evidence Kentucky would experience a financial collapse without the waiver or that cutting costs for the expansion group was the “best remedy for any budget woes.” *Stewart* at 52. The Court also criticized public statements by officials about how CMS would use its waiver authority to reduce the impact and costs of Medicaid expansion, and considered such statements evidence of CMS’s overall arbitrary intent to reduce access to health benefits. *Stewart* at 5-7.

WERE THE JUSTIFICATIONS THE SECRETARY GAVE TO SUPPORT NEW HAMPSHIRE’S WORK REQUIREMENT WAIVER THE SAME AS THOSE REJECTED BY THE STEWART COURT?

The Court’s decision in *Stewart* was carefully drafted to apply to Kentucky’s program and not to overturn other existing waivers or outlaw work requirement waivers completely. However, CMS Administrator Seema Verma approved NH’s work and community engagement waiver for reasons similar to Kentucky’s. In her May 7, 2018 letter approving New Hampshire’s original work requirement waiver, she explains CMS “examined whether the demonstration as amended was likely to assist in improving health outcomes, whether it would address behavioral and social factors that influence health outcomes; and whether it would incentivize beneficiaries to engage in their own health care and thereby achieve better health outcomes.”⁷ CMS supported New Hampshire’s waiver because the “the demonstration is likely to assist in improving health outcomes through strategies that promote community engagement and address certain health determinants.”

New Hampshire and CMS have another chance to focus on access to health coverage while the waiver is under renewed consideration. Recently, New Hampshire explained that the current Granite Advantage Program waiver requests will help individuals subject to the work and

⁷ CMS Approval Letter, May 7, 2018 <https://www.dhhs.nh.gov/pap-1115-waiver/documents/cms-approval-letter-05072018.pdf>

community engagement requirements achieve positive health outcomes, obtain sustained employment, and gain access to employer sponsored or individual market coverage.⁸ New Hampshire also argues that the elimination of retroactive coverage will reduce churn and encourage beneficiaries to maintain coverage.⁹

WHAT DOES THE DECISION MEAN FOR NEW HAMPSHIRE'S GRANITE ADVANTAGE PROGRAM?

Preparations for implementation of New Hampshire's work and community engagement requirements continue, despite the decision in *Stewart v. Azar* and the questions it raises about how New Hampshire's work and community engagement waiver will be extended to the Granite Advantage Program. To meet the *Stewart* court's review standard, New Hampshire and CMS will have to demonstrate how the waived programs of Granite Advantage promote access to health coverage and services for low income adults.¹⁰ Under the Administrative Procedures Act, the same rigorous review could be applied to a decision by CMS regarding New Hampshire's pending waiver application if a challenge is initiated.¹¹ However, CMS still has time to apply different considerations to New Hampshire's waiver and its impact on health care coverage.

WHAT'S NEXT FOR WORK REQUIREMENTS?

CMS has reopened the comment period for the Kentucky waiver until August 18 in order to inform future decisions on whether CMS will re-approve the plan, including the work and community engagement requirements.¹² Simultaneously, the White House released a report by the Council of Economic Advisors saying the "time is right" to impose work requirements on all non-cash welfare programs, specifically, food stamps (SNAP), housing assistance and Medicaid.¹³ CMS is certainly not backing away from work requirements and is looking for paths forward.¹⁴

For details on the Granite Advantage Health Care Program Section 1115(a) Demonstration Waiver, see, <https://www.dhhs.nh.gov/ombp/medicaid/granite.htm#spa>

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⁸ It is unclear whether individuals eligible for Granite Advantage but unable to meet the waiver requirements will be also eligible for tax credits and cost sharing subsidies through healthcare.gov.

⁹ <https://www.dhhs.nh.gov/ombp/medicaid/documents/ga-presentation.pdf>

¹⁰ S. Rosenbaum, Medicaid Work Requirements: Inside the Decision Overturning Kentucky HEALTH's Approval, Health Affairs, July 2, 2018; <https://khn.org/news/despite-u-s-courts-ruling-medicaid-work-requirements-advance-in-other-states/>

¹¹ Plaintiffs are fifteen (15) Kentucky residents currently enrolled in the Kentucky Medicaid program who are in danger of losing their health insurance as a result of the waiver approval. After much litigation on the point, the Court found the plaintiffs had the legal right to challenge the decision.

¹² <https://public.medicaid.gov/connect.ti/public.comments/viewQuestionnaire?qid=1897699>

¹³ July 2018 Report by the Council of Economic Advisors, "Expanding Work Requirements in Non Cash Welfare Programs," <https://www.whitehouse.gov/wp-content/uploads/2018/07/Expanding-Work-Requirements-in-Non-Cash-Welfare-Programs.pdf>

¹⁴ <http://www.modernhealthcare.com/article/20180718/NEWS/180719901>