

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

**MONTE A ROSE, JR., *et al.*,**

Plaintiffs,

v.

**ALEX M. AZAR II, *et al.*,**

Defendants.

Civil Action No. 1:19-cv-2848 (JEB)

**FEDERAL DEFENDANTS' BRIEF IN RESPONSE TO THE COURT'S  
NOVEMBER 21, 2019 MINUTE ORDER**

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## I. INTRODUCTION

In their December 9, 2019 notice, ECF No. 28, the federal defendants explained that under the reasoning of this Court's decisions in *Stewart v. Azar*, 366 F. Supp. 3d 125 (D.D.C. 2019), and *Gresham v. Azar*, 363 F. Supp. 3d 165 (D.D.C. 2019), the Secretary's approval of a work and community engagement requirement in Indiana's most recent Medicaid Section 1115 project is not materially different from the approvals of the Kentucky and Arkansas work and community engagement components in *Stewart* and *Gresham*. Thus, if the D.C. Circuit were to issue a straight merits affirmance on the same grounds set forth by this Court, and did not include additional or different reasoning, the Secretary's approval of the Healthy Indiana Plan's ("HIP") work and community engagement requirement would be unlawful under circuit precedent, absent further judicial review.

Nevertheless, in the event of such a ruling by the D.C. Circuit, the Secretary's approval of the most recent version of HIP should not be vacated. Instead, the proper remedy would be to declare the approval unlawful and remand to the Secretary to determine whether to re-approve the demonstration without the work and community engagement component. In the meantime, the new SUD program and longstanding components of HIP, such as premiums and retroactive eligibility, should remain in effect during the remand.

This remedy, to be sure, would be different than the remedies ordered in *Stewart I* and *II*, *Gresham*, and *Philbrick*. In those cases, in addition to remanding to the agency, the Court vacated the challenged approval. But the circumstances here are different. As the federal defendants explained in their motion for a stay pending the D.C. Circuit's decision, *see* ECF No. 18, and as the Court appeared to recognize in granting that motion in part, *see* Minute Order (Nov. 21, 2019), HIP possesses a distinct procedural history. Many of HIP's components, such as premiums and the waiver of retroactive eligibility, have been in place in Indiana in some form—and have remained unchallenged—for years. And implementation of certain remaining components—community engagement and lockouts for

failure to complete redetermination—has been paused such that they will not harm any beneficiary during the pendency of this lawsuit, including any remand.<sup>1</sup>

Accordingly, assuming a straight merits affirmance of this Court’s reasoning in *Stewart* and *Gresham*, under the test set forth in *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm’n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993), vacatur would not be warranted. Neither beneficiaries nor the State would suffer “disruptive consequences” during a remand without vacatur, as maintaining longstanding components and the new SUD program would preserve the current status quo. And the Secretary on remand would consider whether to re-approve the demonstration without the precise component—community engagement—that would be deficient under circuit precedent. As a result, in the event the D.C. Circuit issues a straight merits affirmance of this Court’s reasoning in *Stewart* and *Gresham*, the proper remedy in this case would be to remand but not vacate the Secretary’s approval.

## II. FACTUAL BACKGROUND

### A. The Healthy Indiana Plan (“HIP”)

In 2007, the Centers for Medicare & Medicaid Services (“CMS”) approved a Section 1115 demonstration project that expanded health care coverage to certain low-income adults in Indiana who were not otherwise eligible for coverage under the Medicaid Act. *See* AR 3934. That project, the Healthy Indiana Plan (“HIP”), coupled its optional provision of health care coverage with several features, including a monthly premium requirement; termination of coverage and a 12-month lockout period for enrollees who did not pay their premiums; a lockout period for beneficiaries who did not complete the annual redetermination process by the deadline; elimination of retroactive eligibility; and

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<sup>1</sup> The Federal Defendants have conferred with counsel for Intervenor Indiana Family and Social Services Administration; counsel for the State represented that, in the event the Court remands the Secretary’s approval without vacatur, the State would maintain through the duration of the remand its voluntary suspension of the two project components that are currently paused (disenrollment due to noncompliance with the work and community engagement component and lockouts for individuals who fail to complete the redetermination process).

elimination of non-emergency medical transportation (“NEMT”). HIP 2007 Special Terms and Conditions 20–21, 25–26, 47, 48, ECF No. 1-3.

In July 2014, Indiana submitted an application to extend HIP for five additional years, with certain modifications (“HIP 2.0”). Ind. Family & Soc. Servs. Admin., HIP 2.0 1115 Waiver Application (2014) <https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/in/Healthy-Indiana-Plan-2/in-healthy-indiana-plan-support-20-exp-app-07022014.pdf> (last visited Jan. 6, 2020). In particular, Indiana proposed to include parents and caretaker relatives and the entire Medicaid expansion population in the project. *Id.* at 4. In January 2015, CMS approved HIP 2.0 for three years, effective February 1, 2015. Letter from Marilyn Tavenner, Adm’r. Ctrs. for Medicare & Medicaid Servs., to Joseph Moser, Medicaid Dir., Ind. Family & Soc. Servs. Admin. (Jan. 27, 2015) 2–5, ECF No. 1-4 (“HIP 2.0 2015 Approval”). Also effective February 1, 2015, Indiana amended its state plan to cover the Medicaid expansion population.

As Plaintiffs themselves acknowledge, HIP 2.0’s features “mirrored those of the initial HIP project” that CMS approved in 2007. Compl. ¶ 81. For example, HIP 2.0’s approved features allowed Indiana to charge enrollees monthly premiums, terminate coverage for individuals with household incomes above 100% of the federal poverty level (“FPL”) who did not pay their premiums and impose a lockout on re-enrolling in the project for six months, not provide retroactive eligibility, and not provide NEMT for the expansion population. HIP 2.0 2015 Waiver List, ECF No. 1-4 at 7–10. Unlike the original approval of HIP in 2007, the 2015 approval of HIP 2.0 did not include a lockout for failure to complete annual redetermination by the deadline.

One new component of Indiana’s programs for HIP participants in 2015 was a “Gateway to Work” initiative, through which the State referred certain eligible HIP participants—adults who did not have a disability, were working fewer than 20 hours per week, and were not full time students—

to its workforce training and work search resources. *See* HIP 2.0 2015 Approval at 3–4. Participation in Gateway to Work was voluntary. *See id.*

On February 1, 2018, CMS approved the State’s request to amend HIP again and extend it through December 31, 2020. *See* Letter from Demetrios Kouzoukas to Allison Taylor (Feb. 2018) (“HIP 2018 Approval”), ECF No. 1-10.<sup>2</sup> Like the earlier approvals of HIP and HIP 2.0, this most recent approval permitted Indiana to continue to test the following components: charging monthly premiums, terminating coverage for individuals with household incomes above 100% of the FPL who do not pay their premiums and imposing a six-month lockout on re-enrolling in the project, not providing retroactive eligibility, and not providing NEMT for the expansion population. *See id.* In addition, the 2018 approval included a new substance use disorder (“SUD”) program. *See id.* at 3. Like the initial approval of HIP in 2007, the 2018 approval also expanded the lockout periods to apply to beneficiaries who did not complete the annual redetermination process by the deadline. *See* CMS, HIP Special Terms and Conditions at 26, ECF No. 1-10 (“2018 STCs”). However, the state has paused implementation of that component. *See* HIP Monitoring Plan, Q4 Quarterly Report 5, ECF No. 19-2 (“Effective October 18, 2018, FSSA decided to pause the implementation of the HIP lockout provision for failure to comply with the annual redetermination process . . .”).

The 2018 approval also permitted Indiana to reformulate the “Gateway to Work” program into a mandatory work and community engagement requirement, *see* HIP 2018 Approval, which came into effect in January 2019, *id.*, and has phased in over time, *see* 2018 STCs at 14. According to the terms of the program, every December the State will review enrollees’ compliance with the community engagement requirement over the course of the calendar year. *Id.* at 15. If an enrollee who was subject to the requirement failed to meet it in more than four months of the year, the State will suspend

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<sup>2</sup> Upon Indiana’s application for, and CMS’s approval of, the program’s renewal in 2018, the program is now simply referred to as “HIP.”

coverage on the first day of the next calendar year. *Id.* Beneficiaries can regain coverage through certain activities and circumstances. *Id.* at 16. Originally, the state planned to begin suspending coverage for non-compliant beneficiaries on December 31, 2019. *Id.* at 15.

### **B. Procedural History**

On September 23, 2019, Plaintiffs filed this lawsuit, challenging the Secretary's 2018 extension and amendment of the HIP project. *See* Compl. Plaintiffs raise specific challenges to: (1) the work and community engagement component; (2) the premium requirements; (3) lockouts for failure to comply with the Medicaid redetermination procedures; (4) the waiver of the retroactive eligibility requirement; and (5) the waiver of the NEMT benefit. *See* Compl. ¶¶ 241–73. In addition, Plaintiffs challenge the project as a whole, which includes the SUD program, as well as a state Medicaid Director letter that HHS issued in January 2018. Compl. ¶¶ 227–40, 274–91.

On October 31, 2019, Indiana announced that its Family and Social Services Administration will not suspend the benefits of any Medicaid beneficiary for failure to comply with the Gateway to Work program until this lawsuit is resolved. *See* ECF No. 19-1. While beneficiaries can still report their qualifying community engagement activities and hours to the state, no consequences will flow from a beneficiary's failure to do so. *Id.*

The federal defendants and intervenor-defendant Indiana moved this Court for a stay of the litigation in light of (1) Indiana's decision to pause HIP's redetermination lockout provision and disenrollments due to noncompliance with community engagement; and (2) the impending decision from the D.C. Circuit on similar legal issues pertaining to the Secretary's approvals of Medicaid demonstration projects in Kentucky and Arkansas. *See* Federal and State Defs.' Joint Mem. in Supp. of Mot. for a Stay, ECF No. 19. This Court granted in part and denied in part defendants' motion and instructed the parties to indicate whether they believe that "the approval of Indiana's work requirements is materially different from that of Kentucky's or Arkansas's" or whether "a D.C. Circuit

merits affirmance in the Kentucky and Arkansas cases would also bar the work requirements here.” *See* Minute Order (Nov. 21, 2019). This Court further instructed that (1) the Defendants shall file any brief by January 6, 2020, explaining why “the approval of Indiana’s work requirements is materially different” and/or why even if it is not different, “other challenged components of HIP should not be struck down in the event the D.C. Circuit affirms this Court’s rulings on the Kentucky and Arkansas approvals.” *Id.*

The federal defendants notified this Court that under the reasoning of the Court’s decisions in *Stewart* and *Gresham*, the Secretary’s approval of HIP’s work and community engagement component is not materially different from the approvals of the Kentucky and Arkansas work and community engagement components and, therefore, if the D.C. Circuit were to issue a straight merits affirmance in *Stewart v. Azar*, No. 19-5096 (D.C. Cir.), and *Gresham v. Azar*, No. 19-5094 (D.C. Cir.), on the same grounds set forth by this Court, and did not include additional or different reasoning, the Secretary’s approval of HIP’s work and community engagement requirement would be unlawful under circuit precedent, absent further judicial review. Notice by Fed. Defs., ECF No. 28. However, the federal defendants also stated that the other components of HIP, such as the waiver of retroactive eligibility and monthly premium requirement, should not be vacated in light of HIP’s distinct procedural history. *Id.*

On December 16, 2019, Kentucky moved to dismiss the *Stewart* appeals because the State had terminated its Medicaid demonstration project. *See* Intervenor-Defendant-Appellant Commonwealth of Kentucky’s Mot. to Voluntarily Dismiss Appeal, *Stewart v. Azar*, 19-5095 (D.C. Cir.) (Dec. 16, 2019). The federal government did not oppose dismissal of the *Stewart* appeals but requested that the D.C. Circuit address, in its *Gresham* opinion, the reasoning of the district court’s opinion in *Stewart* and the

Secretary's underlying November 2018 approval of the Kentucky demonstration.<sup>3</sup> Response to Kentucky's Mot. to Dismiss *Stewart* Appeals, *Stewart v. Azar*, 19-5095 (D.C. Cir.) (Dec. 18, 2019).

### III. ARGUMENT

In granting in part the federal defendants' request for a stay of proceedings while the D.C. Circuit considers the appeals in *Gresham* and *Stewart*, this Court appeared to recognize that HIP possesses a distinct procedural history: namely, that unlike the other Section 1115 approvals that have come before this Court, the most recent approval of HIP consists of both (a) certain new components that since have been paused (community engagement and redetermination lockouts), and (b) components that have been in effect in the State in some form, and remained unchallenged, for years. As a result, it would make little sense to issue a ruling upsetting HIP's long-established components and its new SUD program before a decision by the D.C. Circuit.

For the same reasons, it also makes little sense to immediately vacate HIP's longstanding components and its SUD program in the event the D.C. Circuit issues a straight merits affirmance of this Court's reasoning in *Stewart* and *Gresham*. The work and community engagement requirement will cause beneficiaries no harm during the course of any remand, and many of the other components of HIP have been in place in some form for years. In addition, the new SUD program provides critical services to Indiana in light of the State's substance abuse epidemic. HIP 2018 Approval at 4. Moreover, unlike the Court's prior holding in *Stewart I*, here neither the Secretary nor the plaintiffs have treated the SUD program as a separate approval. *See Stewart v. Azar*, 313 F. Supp. 3d 237, 258–59 (D.D.C. 2019) (*Stewart I*). Accordingly, the proper remedy following a straight merits affirmance by the D.C. Circuit would be to remand the Secretary's approval without vacating it, thus permitting HIP's longstanding components and its SUD program to remain in effect while the Secretary considers

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<sup>3</sup> Plaintiffs have opposed this request. Appellees' Response to Kentucky's Mot. to Dismiss *Stewart* Appeals, *Stewart v. Azar*, 19-5095 (D.C. Cir.) (Dec. 20, 2019).

whether to re-approve the demonstration *without* the work and community engagement requirement. If the Secretary does re-approve the demonstration in such form, plaintiffs can then decide whether they still desire to challenge HIP's remaining components, despite the absence of a work and community engagement requirement.

This remedy plainly would be warranted under the two factors set forth in *Allied-Signal*, 988 F.2d at 150–51, which look to the “seriousness of the order’s deficiencies” and “the disruptive consequences of an interim change that may itself be changed.” If the D.C. Circuit were to issue a straight merits affirmance, the deficiencies it would identify likely would relate principally to the work and community engagement requirement specifically analyzed by this Court—a component that the Secretary could exclude in any re-approval. Thus, the identified deficiencies would not be “serious” for purposes of the remand, because the agency would have a square opportunity to resolve them by re-approving the demonstration without the community engagement component. And although plaintiffs allege that many of HIP's components are independently unlawful, *see* Compl. ¶¶ 241–273, the D.C. Circuit is unlikely to address the propriety of components other than the work and community engagement requirement, nor has this Court itself yet addressed the merits of components like premiums or lockout periods. Simply put, HIP's recently added work and community engagement requirement should not be treated as a hook to vacate longstanding components or the SUD program when the purpose of remand would be to consider whether to re-approve the demonstration without community engagement.

At the same time, if the Court were to vacate HIP's approval following a straight merits affirmance by the D.C. Circuit, longstanding components would lose effect while the Secretary re-considers whether to re-approve those exact components. This could create serious confusion for beneficiaries and disruption for the State: for example, HIP's premium requirement would end, only to be potentially re-approved in short order in a different version of the project, leaving beneficiaries

and Medicaid administrative officials in Indiana struggling to keep up with the shifting state of conditions on Medicaid coverage. *See, e.g., Defs. of Wildlife v. Jackson*, 791 F.Supp.2d 96, 119 (D.D.C. 2011) (remanding deficient agency action without vacating it because the action “at issue is in effect” and “vacatur would cause significant disruption”). Likewise, losing the SUD program, even just temporarily, could have severe consequences for beneficiaries in light of the opioid crisis. *See* HIP 2018 Approval at 4.

Further, this Court’s prior rulings in *Stewart I* and *II*, *Gresham*, and *Philbrick*—which in addition to remanding the challenged approvals also vacated them—do not counsel vacating the approval here. In those cases, disenrollments due to the work and community engagement requirements either had already occurred (*Gresham*) or were set to occur shortly (*Stewart I* and *II* and *Philbrick*). Here, by contrast, such disenrollments have been paused through the pendency of this lawsuit, including any remand. As a result, remanding the Secretary’s approval of HIP without vacatur would cause no disruption for beneficiaries. Just the opposite, remanding without vacatur would preserve the status quo by maintaining longstanding demonstration components and the SUD program while the Secretary considers whether to re-approve the demonstration without community engagement.

Finally, in the event this Court nevertheless concludes that vacatur is the correct remedy, the federal defendants’ alternative arguments regarding the appropriate scope of any relief apply with fuller force here. This Court should not vacate portions of a demonstration not shown to injure plaintiffs and any vacatur should be with respect to the plaintiffs only. *Gill v. Whitford*, 138 S. Ct. 1916, 1933, 1934 (2018); *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017); *see also Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). These arguments hold particular force here because Indiana’s beneficiaries risk losing both SUD services and longstanding components in the event of a full vacatur of the Secretary’s approval of the HIP project.

#### IV. CONCLUSION

For the reasons set forth herein, in the event the D.C. Circuit issues a straight merits affirmance of this Court's reasoning in *Stewart* and *Gresham*, the proper remedy in this case would be to remand the Secretary's approval without vacatur. The federal defendants request to file a brief after the D.C. Circuit issues its opinion in the *Stewart* and *Gresham* appeals to explain whether the opinion affects the federal defendants' position or requires different or additional analysis.

Dated: January 6, 2020

Respectfully submitted,

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