

UNITED STATES DISTRICT COURT
DISTRICT OF THE DISTRICT OF COLUMBIA

MONTE A. ROSE, JR., <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	
v.)	
)	No. 1:19-cv-02848-JEB
ALEX M. AZAR II, <i>et al.</i> ,)	
)	
Defendants.)	

**REPLY BRIEF OF INTERVENOR-DEFENDANT
INDIANA FAMILY AND SOCIAL SERVICES ADMINISTRATION**

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SUMMARY OF THE ARGUMENT

Plaintiffs ask the Court to invalidate the entire Healthy Indiana Plan (HIP), which for years has provided Medicaid coverage to hundreds of thousands of Hoosiers, on the basis of an alleged flaw in the approval of HIP’s newly added community-engagement requirements. The community-engagement requirement, however, is but a single component of HIP, applies only to a small fraction of HIP members, and has been suspended by the Indiana Family and Social Services Administration (FSSA) for the pendency of this litigation. Invalidating all of HIP would disrupt the well-established reliance interests of *all* HIP members in response to the complaints of a handful of individuals—and would turn equitable principles on their head. As FSSA explained in its opening brief, if the Court invalidates the community-engagement requirement, two independently sufficient grounds justify rejecting Plaintiffs’ boundless remedial request: The community-engagement requirements are severable from the rest of HIP, and the immense consequences of invalidating HIP make remand without vacatur the only appropriate remedy.

In response, Plaintiffs have filed a brief that goes far beyond the Court’s November 21, 2019 order—which directed the parties to file briefs addressing (1) whether “the approval of Indiana’s work requirements is materially different” from the approvals the Court invalidated in *Stewart v. Azar* and *Gresham v. Azar*, and (2) whether, “even if it is not, other challenged components of HIP should not be struck down in the event the D.C. Circuit affirms this Court’s rulings” in *Stewart* and *Gresham*. Rather than focus on the community-engagement requirements as the Court directed, Plaintiffs spend much of their brief discussing the *other* components of HIP. Plaintiffs’ argument for why the Court need not address the merits of the other components, and should rely solely on the (hypothesized) invalidity of community-engagement requirements to vacate the entire HIP waiver, is entirely circular. They contend that vacatur of the entire approval is necessary

because the *other* challenged components of the demonstration are deficient on their own. In short, Plaintiffs ask the Court to engage in exactly the type of merits-based analysis they argue is not required if the Court's decisions in *Stewart* and *Gresham* are affirmed.

In its Memorandum filed in response to the Court's November 21, 2019 order, FSSA explained why HIP is qualitatively different from the waiver programs at issue in the *Stewart* and *Gresham*, such that even if the D.C. Circuit upholds the Court's decisions on community engagement, HIP as a whole should not be vacated. In particular, the Centers for Medicare & Medicaid Services (CMS) has long (and repeatedly) approved the other challenged components of HIP, leaving little doubt that it would have issued a waiver reauthorizing HIP even without the Gateway to Work program. *See* ECF 30 at 23–27. Moreover, HIP is distinct from the rest of the State's Medicaid program and, under the terms of the waiver and state law, is the vehicle for Medicaid expansion in Indiana; vacating the entire waiver would therefore threaten the health coverage of 400,000 Hoosiers, nearly one quarter of Indiana's entire Medicaid population. *See id.* at 27–34. For these reasons, even if the *Stewart* and *Gresham* decisions are affirmed, the Court should sever approval of Indiana's community-engagement requirements from the rest of HIP or, in the alternative, should remand to CMS the waiver approval as a whole without vacatur.

Plaintiffs have failed to offer a persuasive response to these arguments and have even allowed some of FSSA's arguments go entirely un rebutted. Accordingly, even if the Court identifies flaws in the approval of the HIP community-engagements, it should decline Plaintiffs' request for wholesale invalidation of HIP.

ARGUMENT

I. Plaintiffs Have Failed To Respond to the State’s Severability Argument, Which Provides an Independently Sufficient Reason Not to Invalidate All of HIP

First, Plaintiffs have completely failed to respond to any of FSSA’s arguments in favor of severing the community engagement requirement (in the event it is invalidated) from the remainder of HIP. This failure is particularly remarkable in light of Plaintiffs’ explicit *support* of the Court’s authority to sever portions of the waiver approval to preserve the parts of the waiver they like. *See* ECF 33 at 12–15 (contending that portion of waiver addressing substance use disorder services should be severed and preserved). Under well-settled law in this district, the Court should “treat the plaintiff’s failure to oppose the defendant[s’] . . . arguments [in favor of severability] as a decision to concede those arguments.” *TJGEM LLC v. Republic of Ghana*, 26 F. Supp.3d 1, 12 (D.D.C. 2013) (quoting *Nat’l Sec. Counselors v. CIA*, 898 F.Supp.2d 233, 268 (D.D.C.2012)); *see also* *Buggs v. Powell*, 293 F.Supp.2d 135, 141 (D.D.C.2003) (citing *FDIC v. Bender*, 127 F.3d 58, 67–68 (D.C.Cir.1997)); *accord* D.D.C. Civ. R. 7(b) (party’s failure to oppose a motion may be treated as conceded by the Court).

Importantly, severability is an independently sufficient ground to reject the wholesale invalidation of HIP Plaintiffs seek. Even if the Court were to conclude that the approval of the community-engagement requirements was defective, it should sever that component of HIP and allow the remainder of the approval to continue in force.

II. Plaintiffs’ Response Underscores Why the Consequences of Invalidating HIP Make Remand Without Vacatur the Only Appropriate Remedy

Instead of addressing FSSA’s severability analysis, Plaintiffs focus their response solely on FSSA’s alternative argument that the Court should remand without vacatur. But their arguments for why the Court should not “deviate from the presumed remedy of vacating an unlawful agency

action,” ECF 33 at 5, would require the Court to engage in exactly the type of analysis of the merits of HIP’s other components that Plaintiffs contend is unnecessary.

As FSSA explained in its opening brief, vacatur of the entire HIP waiver is inappropriate because the disruptions vacatur would cause would far outweigh any harm caused by a defect in the approval of the community-engagement requirements. *See Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm’n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993). Vacating the entire HIP waiver would throw into chaos the healthcare coverage of hundreds of thousands of HIP members who have “relied on it in good faith” for nearly five years. *A.L. Pharma, Inc. v. Shalala*, 62 F.3d 1484, 1492 (D.C. Cir. 1995). There is a substantial question under state law whether, if HIP were invalidated, FSSA could continue to provide Medicaid coverage to the expansion population, ECF 30 at 30–31, and Plaintiffs’ contrary suggestion that federal law would *require* Indiana to provide such coverage is utterly without support and directly contradicted by the federal government’s own guidance on the issue, *see CMS, Frequently Asked Questions on Exchanges, Market Reforms and Medicaid* (Dec. 10, 2012), <https://www.cms.gov/CCIIO/Resources/Files/Downloads/exchanges-faqs-12-10-2012.pdf> (“A state may choose whether and when to expand, and, if a state covers the expansion group, it may decide later to drop the coverage.”). And even if state law permits FSSA to provide coverage to current HIP members, there can be no doubt that any shift from HIP to something else would prove enormously disruptive.

On the other side ledger, there is—nothing. Because FSSA has already announced that it has suspended the community-engagement requirements for the pendency of this litigation, “nothing in the record suggests that significant harm would result from allowing the approval to remain in effect pending the agency’s further explanation.” *A.L. Pharma*, 62 F.3d at 1492.

In arguing that the *Allied-Signal* factors for remand without vacatur have not been met, Plaintiffs rely entirely on the harms they claim they will suffer from the *other* components of HIP. See ECF 33 at 11–12. Plaintiffs thus essentially ask the Court to prejudge the merits of the Secretary’s approval of HIP’s premium structure, coverage start-date, and waiver of non-emergency transportation, *id.* at 6–7, 11–12; address whether the Secretary has the statutory authority to allow Indiana to impose premiums, *id.* at 8 n.2; consider whether a Section 1115 “demonstration” is time-limited in its components, *id.* at 8; decide whether federal law permits Indiana to terminate its Medicaid expansion, *id.* at 10; and wrestle with complex questions of state law regarding FSSA’s ability to provide coverage to the Medicaid expansion in the absence of a HIP waiver, *id.* at 10. These are all questions pertaining to the merits of Plaintiffs’ challenges to other components of HIP—questions which Defendants have not yet had the opportunity to address and that plainly lie outside the scope of the Court’s briefing order.

To the extent the Court’s order was meant to determine whether the Court needs to address the merits of Plaintiffs’ challenges even if the D.C. Circuit affirms in *Stewart* and *Gresham*, Plaintiffs’ response confirms that the answer is a resounding “yes.” Accordingly, even if the D.C. Circuit affirms the Court’s decisions in these cases, the Court should reject Plaintiffs’ request to issue an automatic vacatur of the entire HIP waiver and should instead set the case for briefing on the merits.

CONCLUSION

Even if the D.C. Circuit affirms this Court's decisions in *Stewart* and *Azar*, this Court should deny Plaintiffs' request to vacate the HIP waiver approval in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 10, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which shall send notification of such filing to any CM/ECF participants.

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