

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' REPLY IN SUPPORT OF BRIEF
IN RESPONSE TO THE COURT'S NOVEMBER 21, 2019 MINUTE ORDER**

INTRODUCTION

Plaintiffs seek to have it both ways. They argue that all of the components of Indiana's Medicaid Section 1115 Healthy Indiana Project that offend them must fall because of HIP's work and community engagement component, while the one component they find appealing should stand because it could have been approved separately. But this inherently contradictory position lacks merit.

The Secretary approved HIP as a single project with several longstanding components whose most recent iteration was "designed to improve member outcomes by targeting tobacco cessation, substance use disorder (SUD), chronic disease management, and community engagement" and to "help prepare beneficiaries for participation in the commercial insurance marketplace." AR 1. Plaintiffs, relying on this Court's prior invalidation of other states' Medicaid demonstration projects as a whole, argued that HIP too should be invalidated *in toto* if its community engagement component is found unlawful. *See generally* Compl., ECF No. 1. However, upon being confronted with the inevitable conclusion of that logic—that other components of the project more palatable to Plaintiffs, like HIP's SUD program, would also fall—Plaintiffs, without asking for leave, amended their

Complaint to only challenge the Secretary's approval of the non-SUD components of HIP. Yet in the same breath, they continue to insist that all of HIP's components that they still challenge should be vacated despite no conclusion by this Court that they are independently unlawful.

Plaintiffs' position is untenable. If the D.C. Circuit in *Gresham v. Azar*, No. 19-5094 (D.C. Cir.) were to issue a straight merits affirmance of this Court's reasoning in evaluating Kentucky's and Arkansas's demonstration projects on the same grounds set forth by this Court, and did not include additional, different, or more limited reasoning, the appropriate remedy is to remand the entire approval to the Secretary for him and the State to decide which project components should continue based on the Court's prior reasoning. In the meantime, non-challenged components like the SUD program would remain in place, as would Indiana's commitment to not implement the suspension provisions of the work and community engagement component as well as lockouts for individuals who fail to complete the Medicaid redetermination process. As the federal defendants previously explained, and as to which Plaintiffs offer no persuasive rebuttal, this outcome accords with the D.C. Circuit's analysis in *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993), and *Heartland Reg'l Med. Ctr. v. Sebelius*, 566 F.3d 193, 197 (D.C. Cir. 2009). That is because most of HIP is not deficient under this Court's prior rulings and because vacating HIP would cause serious disruptions for Indiana's Medicaid beneficiaries covered under HIP, with no corresponding benefit to plaintiffs in light of Indiana's commitment to stay enforcement of HIP's work and community engagement requirement.

ARGUMENT

I. Under this Court’s reasoning in *Stewart* and *Gresham*, this Court must evaluate the Secretary’s approval as a whole.

Plaintiffs’ belated attempt to seek the invalidation of only a portion of the Secretary’s HIP approval is misguided.¹ *See* Pls.’ Resp. Br. at 13 n.4; Am. Compl. ¶ 102, ECF No. 34. Plaintiffs argue that the SUD program could have been separately approved, Pls.’ Resp. Br. at 13–15, ECF No. 33, but that is the case with *any* of HIP’s components. Indeed, components like premiums and the waiver of retroactive eligibility previously have been approved in Indiana without community engagement or a SUD program. Moreover, the Secretary in other states has approved work and community engagement projects as standalone Medicaid demonstrations. *See, e.g.,* Ohio Group VIII Work Requirement and Community Engagement Section 1115 Demonstration, <https://www.medicaid.gov/medicaid/section-1115-demo/demonstration-and-waiver-list/?entry=48084> (last visited February 6, 2020). Here, however, the Secretary considered and approved HIP as a whole because the *entire* project, “in the judgment of the Secretary, is likely to assist in promoting the objectives” of Medicaid. 42 U.S.C. § 1315; *see also* AR 3 (“CMS considers the proposed demonstration as a whole.”); *Stewart v. Azar* (“*Stewart II*”), 366 F. Supp. 3d 125, 136 (D.D.C. 2019) (“[T]he Secretary must determine under § 1115 “whether a project would promote the Act’s objectives, not whether each component, viewed in isolation, would” (quoting *Stewart I*, 313 F.Supp. 3d at 257)). Speculating about what the Secretary may have done if he received separate applications is beside the point.

¹ Because this case has been partially stayed and this round of briefing is limited to whether Indiana’s work and community engagement components materially differ from those at issue in *Stewart* and *Gresham* and, if so, to the appropriate remedy in this case, *see* Minute Order of November 21, 2019, the federal defendants do not unfurl their full merits arguments or respond to Plaintiffs’ attacks on the Secretary’s approval of HIP’s revamped Gateway to Work initiative here. Rather, they reserve those arguments for briefing after the D.C. Circuit’s forthcoming decision in the *Gresham* appeal.

Plaintiffs also argue that the SUD program has a different purpose and evaluation design than other HIP components. Pls.' Resp. Br. at 14. But the Secretary concluded that multiple components of HIP, including the SUD program, were designed to and are likely to improve beneficiaries' health outcomes, *see* AR 3–4, and the post-approval decision of how to monitor various components' ultimate success is immaterial to the question of whether the Secretary considered, and the Court should evaluate, the project as a whole.

Finally, Plaintiffs argue that this Court's decision to sever the Kentucky HEALTH program from the Secretary's approval of KY HEALTH, *see Stewart I*, 313 F. Supp. at 273–74, allows this Court to consider the Secretary's approval of the non-SUD components of HIP as separate from the SUD program. But the court's rationale in *Stewart I* does not support the same result here. In *Stewart I*, the court concluded that the Secretary had “effectively treated” the approved demonstration as two separate projects, including by separately listing the waivers and expenditure authorities needed for each in the approval documents. *See Stewart I*, 313 F. Supp. 3d at 246–48, 257–59. The agency disagrees with the Court's decision to bifurcate the demonstration, but regardless, the Secretary did not separately list waiver and expenditure authorities for the HIP demonstration's SUD component and its other components. *See* AR 13. And again, the Secretary “consider[ed] the proposed demonstration as a whole” in approving HIP's extension and amendment together. AR 1–10. To the extent Plaintiffs' amendment of their Complaint was timely or proper, Plaintiffs' now-partial challenge to the Secretary's approval cannot dictate the appropriate remedy here. Put simply, the Court's review of the SUD program must proceed in the same manner as its review of HIP's longstanding components such as premiums and the waiver of retroactive eligibility.

II. Under the law of this Circuit, the appropriate remedy is remand without vacatur.

Assuming the D.C. Circuit were to issue a straight merits affirmance of this Court's reasoning in *Stewart* and *Gresham*, on the same grounds set forth by this Court, and did not include additional,

different, or more limited reasoning, the facts in this case and the controlling law counsel in favor of remand without vacatur. Plaintiffs argue that vacatur is warranted because the Secretary's reasons for approving HIP's work and community engagement component "infected his rationale for approving the project as a whole." Pls.' Resp. Br. at 6–9. But Plaintiffs seek to prove too much at this stage of the proceedings, which is confined to the similarities in Indiana's, Arkansas's and Kentucky's work and community engagement components and the appropriate remedy in light of those similarities. The federal defendants have not had the opportunity to brief the merits of the other components that comprise HIP, and Plaintiffs cannot help themselves to the full remedy they seek on the presumption that they would succeed on their challenges to those components.

Plaintiffs also argue that the Secretary's approval "cannot be rehabilitated." Pls.' Resp. Br. at 9. But that is untrue. On remand, the Secretary can consider whether to put forth any additional explanation in support of his approval of the work and community engagement component or whether to approve a different version of the project, such as one that did not include that component. "[S]uch a deficiency in these circumstances does not rise to the level of a 'fundamental flaw' in which [the agency] would have 'little or no prospect' of curing the defect" *Heartland*, 566 F.3d at 197 (quoting *Ill. Pub. Telecomms. Ass'n v. FCC*, 123 F.3d 693, 693-94 (D.C. Cir. 1997)). This is particularly true in light of HIP's overall scope; any deficiency in the work and community engagement component is mitigated by the presence of several other project components, such as the POWER account, the SUD program, and a tobacco surcharge. *See* AR 3937–39.

Plaintiffs also contend that despite Indiana's commitment to stay implementation of HIP's community engagement suspensions and redetermination lockouts, and despite the fact that most of HIP's components have been in place since 2007, the extent of disruption from HIP's full vacatur should be ignored because Plaintiffs believe that certain other HIP components, like the premium requirements and a waiver of retroactive eligibility, are harmful to them. Pls.' Resp. Br. at 11–12. But

as the federal defendants explained in their prior brief, Plaintiffs cannot leverage their challenge to the work and community engagement component to pull down the whole project (except the one component they find acceptable) when these other components have been in place for years and Plaintiffs did not challenge them until now. At the very least, Plaintiffs would need to demonstrate that these longstanding components are independently unlawful before this Court should consider any vacatur. By the same token, Indiana has halted suspensions for failure to comply with the work and community engagement requirements, so it makes little sense to disrupt the status quo and these longstanding elements of the project when a remand would work no harm from the sole component at issue on the merits in this briefing.

Finally, if this Court declines to remand the whole demonstration without vacating it, at a minimum it should vacate only parts of the demonstration found to be deficient in the event of a straight merits affirmance—such as work and community engagement—and should permit additional components to remain in effect during any remand.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the federal defendants' initial brief, if the D.C. Circuit were to issue a straight merits affirmance of this Court's reasoning in *Stewart* and *Gresham*, on the same grounds set forth by this Court, and did not include additional, different, or more limited reasoning, this Court should remand HIP back to the Secretary without vacating the project.

Dated: February 6, 2020

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