

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

Andrea Young, et al.,)	
)	
Plaintiff,)	No. 1:19-cv-03526-JEB
)	
v.)	
)	
Alex M. Azar, et el.,)	
)	
Defendants.)	

**INTERVENOR’S EXPEDITED MOTION FOR PARTIAL SUMMARY
JUDGMENT**

For the reasons explained in the accompanying memorandum in support of this Motion, Intervenor, the Michigan Department of Health and Human Services (“MDHHS”), hereby moves for partial summary judgment solely on the issue of whether the federal approval of the community engagement requirements in the Healthy Michigan Plan (“HMP”) Section 1115 demonstration project is lawful. The Intervenor does not seek summary judgment on, and requests that the Court refrain from deciding at this stage of the litigation, the legality of the approval of the provisions of the HMP Demonstration that are unrelated to the work and community engagement requirements.

Respectfully submitted,

/s/ Toni L. Harris

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February 25, 2020

CERTIFICATE OF SERVICE

I hereby certify that on February 25, 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.

/s/ Toni L. Harris
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**INTERVENOR’S MEMORANDUM IN SUPPORT OF ITS
EXPEDITED MOTION FOR PARTIAL SUMMARY JUDGMENT**

Intervenor, the Michigan Department of Health and Human Services (“MDHHS”), requests an expedited decision on the issue of whether the Centers for Medicare & Medicaid Services’ (“CMS”) approval of the community engagement requirements included in the Healthy Michigan Plan Section 1115 demonstration project (“HMP Demonstration”) is lawful, in light of the D.C. Circuit’s decision in *Gresham v. Azar*, No. 19-5094.¹

* * * *

¹ Intervenor has consulted with Plaintiffs and the federal Defendants about this motion. Plaintiffs’ counsel stated: “Plaintiffs take no position on the motion. It is Plaintiffs’ position that, under the D.C. Circuit’s decision in *Gresham* and this Court’s decisions in *Stewart*, *Gresham*, and *Philbrick*, the Secretary’s December 21, 2018 approval of the HMP project as a whole must be vacated.” Defendants’ counsel stated: “At this time, the federal Defendants are not prepared to state their position with respect to Michigan’s motion. However, they intend to respond to the motion in their upcoming brief, due by March 3, 2020.”

Summary judgment is appropriate when there is no genuine dispute as to any material fact, and the moving party is plainly entitled to judgment as a matter of law. Fed. R. Civ. P. 56; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

In this case, partial summary judgment is appropriate because there is no dispute that the community engagement requirements do not survive the decision in *Gresham*, absent further judicial review. The federal Defendants have already informed this Court that “the Secretary’s approval of the work and community engagement component of the Healthy Michigan Plan (‘HMP’) is not materially different from the approval of the work and community engagement components challenged in *Stewart* and *Gresham*” and that “if the D.C. Circuit . . . were to issue a straight merits affirmance of this Court’s reasoning in *Stewart* and *Gresham*, . . . the Secretary’s approval of HMP’s work and community engagement requirement would be unlawful under circuit precedent, absent further judicial review.” ECF Doc. 16, at 2. That is what has happened: the D.C. Circuit issued a decision in *Gresham v. Azar* that was an affirmance on the merits of this Court’s decision, and the State’s community engagement requirements are therefore “unlawful under circuit precedent, absent further judicial review.”

Nonetheless, MDHHS is concerned that until this Court issues an order *in this case* consistent with the decision in *Gresham*, MDHHS will be legally required to continue implementation of the community engagement requirements. As set forth in the accompanying Declaration of Robert Gordon, *see* Decl. of Robert Gordon (“Gordon Decl.”), ¶ 5 (attached as Exhibit A), MDHHS has been directed to implement

the community engagement requirements by the Michigan legislature, and may not “withdraw, terminate, or amend” the waiver “without the express approval of the legislature in the form of a bill enacted by law.” Mich. Pub. Act No. 208, § 107b(1), (11) (June 22, 2018). The terms and conditions of the HMP Demonstration likewise provide that “[b]eginning no sooner than January 1, 2020, the state will implement a community engagement requirement as a condition of eligibility for adult beneficiaries in HMP who are not otherwise subject to an exemption.” Healthy Michigan Plan Section 1115 Demonstration, 11-W-00245/5, Special Terms and Conditions, ¶ 28.

There are significant costs, both to MDHHS and the people it serves, of continuing to implement the community engagement requirements pending a decision by this Court. MDHHS is currently deploying substantial human and financial resources to implement the community engagement requirements. *See* Gordon Decl, ¶¶ 8-12. For example, MDHHS operates an ongoing reminder campaign with regular text messaging and outbound calls to beneficiaries, and operates a call center with full time customer service representatives to assist individuals in complying with the community engagement requirements. *Id.*, ¶ 12. On March 10, 2020, MDHHS will send a notice to more than 80,000 individuals² who did not comply with the community engagement reporting requirements for January, explaining that they will lose their Medicaid coverage if they do not report community engagement requirements for February and March, Gordon Decl. ¶ 10, although

² This number is based on current data, subject to revision. Gordon Decl. ¶ 10.

coverage would not be terminated until May 31, 2020. State law requires MDHHS to send this notice to beneficiaries who have failed to comply with the requirements for a single month,³ but the result would be pointless confusion and even fear for those individuals receiving the notice. Accordingly, it is important to the Intervenor and those enrolled in the Healthy Michigan Plan to know whether the community engagement requirements are unlawful as soon as possible. For this reason, Intervenor requests an expedited ruling on its Motion for Partial Summary Judgment.

However, the parties still must brief questions relating to the impact of *Gresham* on the many provisions of the HMP Demonstration that are *not* related to the community engagement requirements, and it may take this Court weeks or months to analyze and decide those complex issues after briefing is complete. Accordingly, MDHHS is seeking an expedited ruling *solely* as to implementation of the community engagement requirements. It intends to address the other aspects of Plaintiffs' Complaint, and the implications of invalidation of the community engagement requirements for the rest of the HMP Demonstration, in the briefing requested by this Court's order of January 14, ECF Doc. 14, under the amended schedule set forth in its order of February 21, 2020, ECF Doc. 22.

Respectfully submitted,

/s/ Toni L. Harris

³ Mich. Comp. Laws Ann. § 400.107b(2)(b) (“The department shall notify the recipient after each time a noncompliance month is used.”).

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EXHIBIT A

**IN THE UNITED STATES DISTRICT COURT
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**DECLARATION OF ROBERT GORDON IN SUPPORT OF THE INTERVENOR’S
EXPEDITED MOTION FOR PARTIAL SUMMARY JUDGMENT**

1. My name is Robert Gordon. I am the Director of the Michigan Department of Health and Human Services (“MDHHS” or “the Department”). I am filing this declaration in support of the Intervenor’s Expedited Motion for Partial Summary Judgment on the issue of whether MDHHS is authorized to continue implementation of the community engagement requirements included in the Healthy Michigan Section 1115 demonstration project, in light of the D.C. Circuit’s decision in *Gresham v. Azar*, No. 19-5094.

2. The Healthy Michigan Plan (“HMP”) is a demonstration project approved under Section 1115 of the Social Security Act. It was first approved on December 30, 2013. On December 21, 2018, the Centers for Medicare & Medicaid Services (“CMS”) approved a five-year extension of HMP, for the period from January 1, 2019 to December 31, 2023.

3. The Plaintiffs in this action are challenging several features of the HMP, some of which were approved as part of the 2018 extension, and some of which have been part of HMP since its inception.

4. One challenged feature is the “community engagement requirements,” described in paragraphs 28-34 of the Special Terms and Conditions (“STCs”) for the HMP Extension.

5. MDHHS was required to seek a waiver to implement the community engagement requirements by state law. Mich. Pub. Act No. 208, § 107b (June 22, 2018). The law is specific as to the number of hours of activity to be required, the reporting deadlines, the exemptions, and qualifying activities. *Id.* § 107b(1)(a)-(f). State law also requires MDHHS to “implement” the community engagement requirements “after the waiver is approved” but “no later than January 1, 2020.” § 107b(2). Finally, the law provides that “[t]he department shall not withdraw, terminate, or amend any waiver submitted under this section without the express approval of the legislature in the form of a bill enacted by law.” § 107b(11).

6. As set forth in paragraph 24 of the STCs for the HMP extension, “[b]eginning no sooner than January 1, 2020, the state will implement a community engagement requirement as a condition of eligibility for adult beneficiaries in HMP who are not otherwise subject to an exemption[.]”

7. As further described in STCs, the community engagement program requires certain adult enrollees, not otherwise exempt, to demonstrate that they have been employed or otherwise engaged in specified community activities for 80 hours for at least 9 out of 12 months. STC ¶ 31 and 32.

8. The program went into effect on January 1, 2020, which means that individuals who do not meet the 80-hour requirement in January, February, or March of this year will be subject to disenrollment and must serve a penalty period of at least one month.

9. Non-exempt individuals must report qualifying activities by the last day of the following month. Thus, by April 30, 2020, MDHHS will be aware of those enrollees who have

not demonstrated compliance with the 80-hour monthly requirement for three months, and will need to take steps to notify them that they will be disenrolled. Disenrollment will be as of the end of May 2020.

10. On March 10, 2020, MDHHS plans to send a new notice to all individuals who did not comply by the end of February with the reporting requirements for January. The notice will state that these individuals will lose their Medicaid coverage if they do not report for February and March. The notices are designed to cause alarm and motivate action. Based on current data, subject to revision, more than 80,000 people will receive these notices solely for noncompliance in the month of January.

11. Despite our ongoing efforts to communicate with beneficiaries, and based on experience with similar requirements in Arkansas, MDHHS estimates that more than 100,000 individuals will lose Medicaid coverage for at least one month in 2020 for failure to comply with the community engagement requirements.

12. MDHHS is currently spending substantial time, effort, and money so that Medicaid beneficiaries report their work hours and do not lose coverage. For example, MDHHS has initiated an ongoing reminder campaign with regular text messaging and outbound calls to beneficiaries; has initiated repeated mailings to hundreds of thousands of beneficiaries; and continues to operate a call center with full time customer service representatives whose sole responsibility is to assist individuals in complying with the community engagement requirements and meeting their reporting requirements. MDHHS is also maintaining an online reporting portal, with system enhancements that are continually developed and deployed. The Department is also engaged in ongoing efforts to secure rapid feedback on communications from beneficiaries and community

partners. These efforts significantly constrain the Department's ability to address other needs of the Medicaid program and its beneficiaries.

13. MDHHS will abide by any decision of this Court with respect to whether the Secretary's approval of the community engagement requirements was valid and will not proceed with implementation of community engagements if approval of that feature was invalid, unless such a decision is later overturned.

14. MDHHS does not believe invalidation of the Secretary's approval of the community engagement requirements should affect health coverage under the HMP, and is concerned that invalidation of the approval of the extension as a whole threatens the coverage mechanism for over 650,000 Michigan Medicaid enrollees.

I make this declaration under penalty of perjury.



Robert Gordon, Director
Michigan Department of Health and Human Services

February 24, 2020

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PROPOSED ORDER

Upon consideration of the Expedited Motion for Partial Summary Judgment filed by Michigan Department of Health and Human Services (“MDHHS”), the Court **ORDERS** that:

1. Intervenor’s Expedited Motion for Partial Summary Judgment is **GRANTED**; and
2. The Secretary’s December 21, 2018 approval of the work and community engagement requirements in the Healthy Michigan Plan Amended Demonstration Extension Application is contrary to 42 U.S.C. § 1315 and invalid. This ORDER does not apply to any part of the December 21, 2018 approval other than the approval of the work and community engagement requirements.

IT IS SO ORDERED.

JAMES E. BOASBERG
United States District Judge

Date: _____