



ATTORNEY GENERAL  
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April 16, 2021

Constance B. Tobias  
U.S. Department of Health and Human Services  
Departmental Appeals Board  
Appellate Division, MS6127  
Cohen Building, Room G-644  
330 Independence Ave., SW  
Washington, D.C. 20201

Dear Chair Tobias,

The State of Arkansas (the Arkansas Department of Human Services) hereby appeals to the Departmental Appeals Board the Centers for Medicare and Medicaid Services' March 17, 2021, withdrawal of its approval of the portion of the March 5, 2018 amendment to Arkansas Works—Arkansas's Section 1115 Medicaid demonstration project—that required community engagement for certain Medicaid beneficiaries as a condition of eligibility. The Board has jurisdiction under 42 C.F.R. 430.3(c). There is no dollar amount in dispute.

CMS's withdrawal of its approval of Arkansas's demonstration project—to Arkansas's knowledge, the first mid-project withdrawal of a Section 1115 Medicaid demonstration project's approval in the agency's history—is both procedurally and substantively invalid.

As to procedure, on January 13, 2021, Arkansas entered into an agreement with CMS under which CMS agreed to give Arkansas nine months' notice and a preliminary appeal before withdrawing its approval of Arkansas's demonstration project; Arkansas, in turn, agreed to accept that length of notice and to abide by the preliminary appeal procedure detailed in the

agreement. On February 12, 2021, however, CMS purported to rescind that agreement.

Subsequently, it partially withdrew its approval of Arkansas's demonstration project after only 33 days' notice, and refused to provide Arkansas the preliminary internal appeal it had promised. CMS had no authority to unilaterally rescind its agreement with Arkansas, and its withdrawal of its approval of Arkansas's demonstration project, which ran afoul of the procedures contained in that agreement, is therefore invalid.

As to substance, CMS's withdrawal of its approval of Arkansas's community-engagement requirement was primarily premised on the COVID-19 pandemic's health effects and effects on the job market. However, for precisely that reason, and as CMS's withdrawal noted, the Families First Coronavirus Response Act prohibits States that accept increased federal Medicaid funding during the pandemic—as Arkansas has—from disenrolling any Medicaid beneficiaries during the pandemic. So the pandemic cannot justify CMS's withdrawal. The real reason CMS sought to rapidly withdraw its approval of a demonstration project that currently cannot be implemented is to moot out a Supreme Court case about that project, *Becerra v. Gresham*. Indeed, though CMS made preliminary determinations two months ago that approved community-engagement requirements in 11 States no longer serve the objectives of Medicaid, it has thus far only revoked its approval of four, and until April 14, two days ago, it had only revoked two—the ones at issue in *Gresham*, Arkansas's and New Hampshire's. Whether or not a new administration's desire to moot out a pending suit could ever justify withdrawing an approval of a State's demonstration project, the agency must at least be candid about that motivation in order to withdraw an approval on its basis.

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Sincerely,

*/s/ Asher Steinberg*

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