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Judicial Review of Medicaid Work Requirements Under Section 1115 Demonstrations

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Judicial Review of Medicaid Work Requirements Under Section 1115 Demonstrations

Abstract

Proposals have been introduced in the 115th Congress to reform the Medicaid program, which provides medical assistance to low-income and needy individuals. At least one of these legislative proposals would allow states to impose work requirements on certain categories of individuals as a condition of coverage under the Medicaid program. While such proposals have been included as legislative amendments to the Medicaid statute (such as the American Health Care Act, H.R. 1628), work requirements have also been discussed in the context of waivers granted to states under the existing demonstration authority provided in Section 1115 of the Social Security Act (SSA). Section 1115 authorizes the Secretary of Health and Human Services (HHS) to waive a number of Medicaid requirements to the extent necessary to allow a state to undertake an “experimental, pilot, or demonstration project” that is likely to assist in promoting the objectives of Medicaid. This report examines the scope of authority to grant such waivers under Section 1115, including the degree to which such waivers may be judicially reviewable and the level of scrutiny courts would apply in such cases.

Numerous federal courts have held that the Secretary’s decision to grant a waiver under Section 1115 is reviewable under the Administrative Procedure Act (APA). Such review uses the deferential “arbitrary and capricious” standard to evaluate the permissibility of agency action. In cases where Section 1115 waivers have been challenged, courts have held that the APA does not empower judges to substitute their judgment for that of the agency, but only to consider whether the Secretary’s decision was based on consideration of relevant factors and whether there has been a clear error of judgment. Therefore, a court’s evaluation of a particular Section 1115 waiver will likely turn upon the sufficiency of the actual administrative record relied upon by the HHS Secretary when deciding to grant a waiver.

Keywords

Medicaid, work requirements, waivers, judicial review

Comments

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Judicial Review of Medicaid Work Requirements Under Section 1115 Demonstrations

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Summary

Proposals have been introduced in the 115th Congress to reform the Medicaid program, which provides medical assistance to low-income and needy individuals. At least one of these legislative proposals would allow states to impose work requirements on certain categories of individuals as a condition of coverage under the Medicaid program. While such proposals have been included as legislative amendments to the Medicaid statute (such as the American Health Care Act, H.R. 1628), work requirements have also been discussed in the context of waivers granted to states under the existing demonstration authority provided in Section 1115 of the Social Security Act (SSA). Section 1115 authorizes the Secretary of Health and Human Services (HHS) to waive a number of Medicaid requirements to the extent necessary to allow a state to undertake an “experimental, pilot, or demonstration project” that is likely to assist in promoting the objectives of Medicaid. This report examines the scope of authority to grant such waivers under Section 1115, including the degree to which such waivers may be judicially reviewable and the level of scrutiny courts would apply in such cases.

Numerous federal courts have held that the Secretary’s decision to grant a waiver under Section 1115 is reviewable under the Administrative Procedure Act (APA). Such review uses the deferential “arbitrary and capricious” standard to evaluate the permissibility of agency action. In cases where Section 1115 waivers have been challenged, courts have held that the APA does not empower judges to substitute their judgment for that of the agency, but only to consider whether the Secretary’s decision was based on consideration of relevant factors and whether there has been a clear error of judgment. Therefore, a court’s evaluation of a particular Section 1115 waiver will likely turn upon the sufficiency of the actual administrative record relied upon by the HHS Secretary when deciding to grant a waiver.

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Reforms to the Medicaid program, which provides medical assistance for low-income and medically needy individuals,¹ have been proposed during the 115th Congress. At least one of these proposals includes allowing some form of “work requirements” to be imposed on certain categories of individuals as a condition of coverage under the program.² While such proposals have been included as legislative amendments to the Medicaid statute, work requirements have also been discussed in the context of waivers granted to states under the existing demonstration authority provided in Section 1115 of the Social Security Act (SSA).³ Pursuant to this authority, the Secretary of Health and Human Services (HHS) may waive a number of Medicaid requirements to the extent necessary to allow a state to undertake an “experimental, pilot, or demonstration project” that is likely to assist in promoting the objectives of Medicaid.⁴ This report examines the scope of authority to grant such waivers under that provision, including the degree to which such waivers may be judicially reviewable and the level of scrutiny courts would apply in such cases.

Background

The Medicaid program, established under Title XIX of the SSA, is a cooperative effort by the federal government and the states to provide medical assistance for low-income and medically needy individuals. To participate in the Medicaid program, a state must have a plan for medical assistance approved by the HHS Secretary and must comply with all applicable conditions.⁵

In general, the Medicaid statute identifies specific categories of individuals, known as “mandatory eligibility groups,” that must be covered under a state plan.⁶ The statute also requires that an individual in a mandatory eligibility group be offered medical assistance that is the same in amount, duration, or scope as assistance made available to any other persons considered to be “categorically needy” under the state plan.⁷ The costs of medical services provided pursuant to a state plan are shared by the state and federal governments. The share of costs paid by the federal government varies for each state and is referred to as the federal medical assistance percentage (FMAP).⁸ Failure to cover a “mandatory eligibility group” under a state plan places all federal Medicaid funds received by the state in jeopardy of being withheld.⁹

¹ For more information on Medicaid, see CRS Report R43357, *Medicaid: An Overview*, coordinated by Alison Mitchell.

² See CRS Report R44785, *H.R. 1628: The American Health Care Act (AHCA)*, coordinated by Annie L. Mach, at Table 2.

³ SSA § 1115; 42 U.S.C. § 1315.

⁴ SSA § 1115(a); 42 U.S.C. § 1315(a).

⁵ “A state is not required to participate in Medicaid, but once it chooses to do so, it must create a plan that conforms to the requirements of the Medicaid statute and the federal Medicaid regulations.” *Cal. Dep’t of Health Servs. v. Sec’y of Health & Human Servs.*, 823 F.2d 323, 325 (9th Cir. 1987). See also *Pharm. Research and Mfrs. of Am. v. Walsh*, 538 U.S. 644, 650 (2003) (noting that a state Medicaid plan must be approved by the HHS Secretary).

⁶ SSA § 1902(a)(10)(A)(i); 42 U.S.C. § 1396a(a)(10)(A)(i) (including, among others, families receiving Aid to Families with Dependent Children (AFDC), pregnant women and children meeting certain income requirements, and blind or disabled individuals receiving Supplemental Security Income (SSI)).

⁷ SSA § 1902(a)(10)(B); 42 U.S.C. § 1396a(a)(10)(B). The “categorically needy” include both mandatory and optional coverage groups. SSA § 1902(a)(10)(A); 42 U.S.C. § 1396a(a)(10)(A).

⁸ SSA § 1905(b); 42 U.S.C. § 1396d(b). For more information on the FMAP formula see CRS Report R43847, *Medicaid’s Federal Medical Assistance Percentage (FMAP)*, by Alison Mitchell.

⁹ SSA § 1904; 42 U.S.C. § 1396c.

Some of the proposals to impose work requirements in Medicaid have focused on a newer category of individuals for whom coverage under Medicaid was added in the ACA. Specifically, Section 2001 of the Affordable Care Act (ACA) amended the Medicaid statute to add a new mandatory eligibility group, effective beginning in 2014.¹⁰ This “ACA Medicaid expansion group” was defined to cover those individuals who were under 65 years of age, not pregnant, not Medicare-eligible, and not otherwise eligible for Medicaid, who also fell below a certain income threshold.¹¹

This ACA Medicaid expansion group is notable for at least two reasons. First, the federal government’s share of the costs of medical services provided to this group is more than the normally applicable FMAP, which ranged between 50% and 74.63% in FY2017.¹² In contrast, the “enhanced FMAP” for the ACA Medicaid expansion group started at 100% through 2016 and will gradually decline until it reaches 90% for 2020 and years thereafter.¹³ Second, although the ACA Medicaid expansion group was designated as a mandatory coverage group by the ACA, the Supreme Court in *National Federation of Independent Businesses (NFIB) v. Sebelius* held that Congress could not constitutionally “withdraw existing Medicaid funds for failure to comply with [the requirement to provide coverage for the ACA Medicaid expansion group].”¹⁴ The “existing Medicaid funds” referred to by the Court are that portion of federal financial assistance provided to states that are attributable to the mandatory eligibility groups that were in existence prior to the ACA and governed by the traditional FMAP. For purposes of this report, this portion of federal assistance is referred to as “pre-ACA dollars.” The holding in *NFIB v. Sebelius* effectively allows states to decline to cover the new ACA Medicaid expansion group without jeopardizing pre-ACA dollars. However, it would appear that *NFIB v. Sebelius* does not preclude the disapproval by CMS of that portion of the hypothetical state plan which provides only partial coverage of the ACA Medicaid expansion group. Assuming that partial coverage of the ACA Medicaid expansion group is not permitted, the Secretary could potentially deny a state any federal assistance under the enhanced FMAP with respect to the costs of medical services provided to those beneficiaries in the partially covered ACA Medicaid expansion group.¹⁵

The Medicaid statute does not appear to expressly address whether a state plan may permissibly impose work requirements as a condition of receiving benefits for most beneficiaries. However, Section 1931 of the SSA authorizes states to terminate Temporary Assistance for Needy Families (TANF) recipients’ eligibility for medical assistance under Medicaid if the individuals’ TANF benefits are denied for failing to comply with work requirements imposed under the TANF program.¹⁶

¹⁰ Patient Protection and Affordable Care Act, P.L. 111-148, § 2001 (2010).

¹¹ SSA § 1902(a)(10)(A)(i)(VIII); 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII). For more information on the expansion of the Medicaid program under the ACA, see CRS In Focus IF10399, *Overview of the ACA Medicaid Expansion*, by Alison Mitchell.

¹² See CRS Report R43847, *Medicaid’s Federal Medical Assistance Percentage (FMAP)*, by Alison Mitchell.

¹³ SSA § 1905(y); 42 U.S.C. § 1396d(y).

¹⁴ This holding was reached by seven of the Supreme Court Justices. See *Nat’l Fed’n Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2607 (2012) (Roberts, C.J., joined by Breyer and Kagan, JJ.) and *id.* at 2666 (Scalia, Kennedy, Thomas, Alito, JJ. dissenting).

¹⁵ *NFIB*, 132 S. Ct. at 2607 (Roberts, C.J.) (“Today’s holding does not affect ... the Secretary’s ability to withdraw funds provided under the Affordable Care Act if a State that has chosen to participate in the expansion fails to comply with the requirements of that Act.”).

¹⁶ SSA § 1931(b)(3)(A); 42 U.S.C. § 1396u-1(b)(3)(A).

Outside of this specific authority, imposing a work requirement on Medicaid beneficiaries could arguably violate the Medicaid program requirement to cover all individuals in an eligibility group.¹⁷ For example, if a state elects to cover the ACA Medicaid expansion, SSA Section 1902(a)(10)(A)(i)(VIII) requires a state plan to provide medical assistance to “all individuals” in the ACA Medicaid expansion (i.e., non-elderly, not pregnant, and non-Medicare eligible).¹⁸ Excluding individuals in this group based on employment status would arguably not cover “all individuals” in the group, assuming some individuals who sought coverage could not satisfy the work requirements.

H.R. 1628, the American Health Care Act (AHCA), would include significant changes to the Medicaid program.¹⁹ As introduced, the bill would phase out the enhanced matching for the ACA Medicaid expansion and convert Medicaid financing for most groups to a per capita cap model, which would subject federal payments to states to aggregate limits measured by the number of enrollees in the states’ plans.²⁰ On March 21, 2017, a manager’s amendment to the AHCA was released which would additionally allow states to impose work requirements on non-disabled, non-elderly, non-pregnant individuals.²¹ Under this proposal, states could elect to require those beneficiaries to engage in work activities as a condition of continued eligibility under Medicaid. Work activities would be defined to be the same as those employment-related requirements imposed on TANF recipients.²² A rule providing for consideration of H.R. 1628 was passed by the House of Representatives on March 24, 2017, but a final vote on passage was postponed.²³

Allowing Work Requirements in Medicaid Under a Section 1115 Waiver

In general, SSA Section 1115 permits states to examine potential innovations in certain state-administered public programs, including Medicaid.²⁴ On March 14, 2017, HHS Secretary Tom Price and CMS Administrator Seema Verma cosigned a letter to state governors affirming the federal and state “partnership in improving Medicaid.”²⁵ Among other things, the letter announced the Administration’s intent to use Section 1115 demonstration authority to “approve

¹⁷ See *T H v. Jones*, 425 F. Supp. 873, 877 (D. Utah 1975), *aff’d sub nom. Jones v. H.*, 425 U.S. 986 (1976) (holding that parental consent requirements imposed on Medicaid family planning services by Utah were incompatible with SSA, because states may not add a condition of eligibility not authorized by Congress). See also *Comacho v. Tex. Workforce Comm’n*, 408 F.3d 229, 235 (5th Cir. 2005) (“Texas cannot add additional requirements for Medicaid eligibility.”).

¹⁸ SSA § 1902(a)(10)(A)(i)(VIII); 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII).

¹⁹ CRS Report R44785, *H.R. 1628: The American Health Care Act (AHCA)*, coordinated by Annie L. Mach.

²⁰ *Id.*

²¹ *Id.*

²² For more information on TANF work requirements, see CRS Report R43400, *Work Requirements, Time Limits, and Work Incentives in TANF, SNAP, and Housing Assistance*, by Gene Falk, Maggie McCarty, and Randy Alison Aussenberg.

²³ Office of the Clerk of the House of Representatives, *Final Vote Results for Roll Call 192* (Mar. 24, 2017) available at <http://clerk.house.gov/evs/2017/roll192.xml>.

²⁴ See Sara Rosenbaum, Sara Schmucker, Sara Rothenberg, and Rachel Gunsalus, *How Will Section 1115 Medicaid Expansion Demonstrations Inform Federal Policy?*, COMMONWEALTH FUND ISSUE BRIEF (May 2016), http://www.commonwealthfund.org/~media/files/publications/issue-brief/2016/may/1877_rosenbaum_section_1115_medicaid_expansions_fed_policy.pdf.

²⁵ Letter from HHS Secretary Tom Price and CMS Administrator Seema Verma to State Governors, (Mar. 14, 2017), available at <https://www.hhs.gov/sites/default/files/sec-price-cms-admin-verma-ltr.pdf>.

meritorious innovations that build on the human dignity that comes with training, employment and independence.”²⁶ Several states, such as Kentucky,²⁷ Pennsylvania,²⁸ and Indiana,²⁹ have also recently sought waivers to impose some type of Medicaid work incentives under Section 1115.

Section 1115 authorizes the HHS Secretary to waive a number of requirements imposed by the SSA, including Medicaid requirements contained in Section 1902, to the extent necessary to allow a state to undertake an “experimental, pilot, or demonstration project which, in the judgment of the Secretary, is likely to assist in promoting the objectives of [Medicaid and other programs authorized by the SSA].”³⁰ Thus, the central limitation provided in the text of this provision is whether, “in the judgment of the Secretary,” the project is “likely to assist in promoting the objectives of [Medicaid and other covered programs]”; namely the provision of medical assistance to those whose income and resources are inadequate to meet the costs of such care.³¹ In the words of one federal court, SSA Section 1115 “vests in the Secretary broad power to authorize projects which do not fit within the permissible statutory guidelines of the standard public assistance programs.”³²

Judicial Review of Section 1115 Waivers

In the event that the Secretary approves a waiver, it is possible that injured parties may sue to enjoin the waiver’s operation. Numerous federal courts have held that the Secretary’s decision to grant a waiver is reviewable under the Administrative Procedure Act (APA).³³ When reviewing the Secretary’s issuance of a waiver, courts are likely to review the Secretary’s action under the deferential standard set forth in APA Section 706(2)(A).³⁴ Under this standard, a reviewing court “shall ... hold unlawful and set aside agency action, findings, and conclusions found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”³⁵ Case law

²⁶ *Id.* at 2.

²⁷ KY. DEP’T OF MEDICAID SERVICES, at 16 (Aug. 24, 2016), available at <https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/ky/ky-health-pa.pdf> (proposing requirement for able-bodied working age adult enrollees participate in community engagement and employment initiative to maintain enrollment).

²⁸ PA. DEP’T OF PUBLIC WELFARE, *HEALTHY PENNSYLVANIA 1115 APPLICATION*, at 12-13 (Feb. 2014), available at <https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/pa/Healthy-Pennsylvania-Private-Coverage-Option-Demonstration/pa-healthy-demonstration-app-022014.pdf> (seeking a waiver to “require adults working less than 20 hours a week to participate in the Encouraging Employment program as a condition of eligibility”).

²⁹ IND. FAMILY AND SOC. SERVS. ADMIN., *HEALTHY INDIANA PLAN (HIP) SECTION 1115 WAIVER EXTENSION APPLICATION*, at 25-26 (Jan. 31, 2017), available at https://www.in.gov/fssa/hip/files/HIP_Extension_Waiver_FINAL1.pdf (requiring managed care entities to develop “member incentive programs specific to promoting employment, including but not limited to rewarding members for successful participation in the HIP Gateway to Work program through the completion of available job training, work search, or educational activities that will assist members in securing gainful employment”).

³⁰ SSA § 1115(a); 42 U.S.C. § 1315(a).

³¹ SSA § 1901; 42 U.S.C. § 1396-1. *See also* Cal. Welfare Rights Org. v. Richardson, 348 F. Supp. 491, 496 (N.D. Cal. 1972).

³² Crane v. Mathews, 417 F. Supp. 532, 539 (N.D. Ga. 1976).

³³ *See, e.g.,* Beno v. Shalala, 30 F.3d 1057, 1066 (9th Cir. 1994); Aguayo v. Richardson, 473 F.2d 1090 (2d Cir. 1973); Wood v. Betlach, No. CV-12-08098, 2013 U.S. Dist. LEXIS 105027 (D. Ariz. July 26, 2013); Crane, 417 F. Supp. at 539; Cal. Welfare Rights Org., 348 F. Supp. at 494 (noting that SSA § 1902, 42 U.S.C. § 1396-1, provides the “law to apply” in evaluating grant of waiver).

³⁴ 5 U.S.C. § 706(2)(A).

³⁵ *Id.* It should be noted that it may not be possible to bring a suit under the APA to *compel* the HHS Secretary to grant a waiver, as suits to compel agency action must assert a failure by an agency to take an action that it was *required* to (continued...)

interpreting this language has developed what is known as the “arbitrary and capricious” standard which allows reversal of agency action if

the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.³⁶

As such, the ultimate conclusion reached by a reviewing court assessing whether the HHS Secretary’s grant of a waiver under Section 1115 was arbitrary and capricious will likely depend upon the actual administrative record upon which the Secretary made his decision.³⁷ Further, in examining whether there has been an abuse of agency discretion, courts have held that “[t]he APA does not give the court power ‘to substitute its judgment for that of the agency,’ but only to ‘consider whether the decision was based on consideration of the relevant factors and whether there has been a clear error of judgment.’”³⁸

Standard of Review for Section 1115 Waivers

Courts have applied the arbitrary and capricious stand of review in APA-related challenges to cases involving the Secretary’s waiver authority under Section 1115 to permit state plans imposing work requirements on categories of individuals as a condition to their receipt of certain benefits, though not in the context of the Medicaid program. In the case of *Aguayo v. Richardson*, New York had sought a waiver to allow the imposition of work requirements in its Aid to Families with Dependent Children (AFDC) program.³⁹ AFDC recipients contended, among other things, that Section 1115 did not permit the Secretary to waive a requirement that would curtail or deny program assistance.⁴⁰ The U.S. Court of Appeals for the Second Circuit (Second Circuit) examined the administrative record, which, in the court’s view, showed that the Secretary of Health, Education, and Welfare⁴¹ had considered objections to the waiver and attempted to answer those objections.⁴² In its decision, the appeals court examined, among other things, a federal agency memorandum outlining the goals of the waiver program, including “[i]ncreased

(...continued)

take. See *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004) (holding that a claim under § 706(1) of the APA, which authorizes a court to compel agency action under certain circumstances, “can proceed only where a plaintiff asserts that an agency failed to take a discrete agency action that it is *required to take*”). The language of § 1115 provides only that the Secretary “*may* waive compliance,” but does not state that she is required to do so under any circumstances. SSA § 1115(a)(1); 42 U.S.C. § 1315(a)(1).

³⁶ *Beno*, 30 F.3d at 1073 (citing *Motor Vehicle Mfr. Ass’n v. State Farm Ins.*, 463 U.S. 29, 44 (1983)).

³⁷ See also *C.K. v. N.J. Dep’t of Health & Human Servs.*, 92 F.3d 171, 182 (3d Cir. 1996) (observing that when examining whether an agency’s finding is arbitrary or capricious, a court must “confine its review to the full administrative record that was before the Secretary at the time he made his decision, and consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment”) (citations and internal quotation marks omitted).

³⁸ See, e.g., *Beno*, 30 F.3d at 1073 (quoting *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971)).

³⁹ *Aguayo*, 473 F.2d at 1093-95. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 replaced the AFDC program with the Temporary Assistance for Needy Families (TANF) block grant demonstration project, changing the federal welfare program from an open-ended entitlement program to a capped block grant program. See 42 U.S.C. §§ 601 *et seq.* For more information on the TANF program, see CRS In Focus IF10036, *The Temporary Assistance for Needy Families (TANF) Block Grant*, by Gene Falk.

⁴⁰ *Aguayo*, 473 F.2d at 1105.

⁴¹ The Department of Health, Education, and Welfare is the previous name for the Department of HHS.

⁴² *Aguayo*, 473 F.2d at 1105-06.

self-support or self-care of recipients” and “[i]ncreased community participation.”⁴³ Based on these parts of the administrative record, the Second Circuit concluded that it was “impossible to deny that attainment of these goals, or even of some of them, would meet the test of [Section 1115].”⁴⁴ On these facts, the court held that the Section 1115 waiver decision by the Secretary was valid, and that the decision to grant a waiver to that state was supported by the administrative record before him.⁴⁵

The imposition of “work incentives” in the AFDC program pursuant to a Section 1115 waiver were also discussed by the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) in *Beno v. Shalala*.⁴⁶ In that case, beneficiary groups had raised objections alleging deficiencies in the design of the project during the HHS Secretary’s consideration of a waiver sought by California. Among other things, the plaintiffs had argued that the waiver would have cut benefits to almost all AFDC recipients, even though data from the project was only being collected on a fraction of beneficiaries.⁴⁷ The plaintiffs also objected that the proposal included the imposition of a “work-incentive” cut on individuals whose disabilities preclude work.⁴⁸ In its decision, the Ninth Circuit addressed what determinations the Secretary must make before approving a waiver under Section 1115. The court noted that pursuant to the language of this section, the Secretary is compelled to determine, among other things, that a state’s project was “an experimental, demonstration, or pilot” project, and thus, such a project must have research or demonstration value.⁴⁹ The court stated that “[a] simple benefits cut, which might save money, but has no research or experimental goal, would not satisfy this requirement.”⁵⁰

The court in *Beno* further noted that Section 1115 directs the Secretary to ascertain whether a proposed project is “likely to further the objectives” of the program.⁵¹ As part of this inquiry, the court stated that the Secretary must examine the impact that the project would have on program beneficiaries and the scope of the project.⁵² This inquiry should also include the potential to harm incurred by individuals and the plaintiff’s objections to the project.⁵³ Taking these and other considerations into account, the court reviewed the administrative record before the Secretary and found that it “contain[ed] a rather stunning lack of evidence that the Secretary gave plaintiffs’ objections any such consideration.”⁵⁴ The court further observed that the record contained no indication that the Secretary considered factors such as the risk that the benefits cut would have on program recipients; the need for cutting benefits for work-incentive purposes; or the merits of

⁴³ *Id.* at 1106.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Beno*, 30 F.3d at 1062. The state’s waiver application in *Beno* aimed to encourage program recipients to find work by decreasing benefits. *Id.* at 1061. The state alleged that any application benefits cut would promote the objectives of the program through the creation of a “work-incentive” experiment to “encourage able-bodied adults” to find work, and that the project would assist in evaluating whether such incentives could be effective in other states. *Id.* at 1062.

⁴⁷ *Id.* at 1072-73.

⁴⁸ *Id.*

⁴⁹ *Id.* at 1069 (quoting SSA § 1115(a); 42 U.S.C. § 1315(a)).

⁵⁰ *Id.*

⁵¹ *Id.* at 1069-71.

⁵² *Id.* at 1070 (citing *Cal. Welfare Rights Org.*, 348 F. Supp. at 498, where the district court stated that “it is clear that the Secretary would abuse his discretion if he were to approve a project which went beyond that point by either subjecting an unreasonably large population to the experiment or continuing it for an unreasonably long period”).

⁵³ *Id.*

⁵⁴ *Id.* at 1074.

imposing such a cut on vulnerable individuals.⁵⁵ Consequently, the court held that the Secretary's decision in this case could not be sustained, even under the deferential review of the APA.⁵⁶

While these cases demonstrate the extent that judicial review may rely upon an examination of the administrative record when assessing the legality of a waiver under Section 1115, both *Beno* and *Aguayo* dealt with work incentives in the context of AFDC, which is a distinct program from Medicaid, and one which was created to achieve different ends. While Medicaid was created for the provision of medical assistance to individuals whose income and resources are inadequate to meet the costs of such care,⁵⁷ the stated purposes of AFDC are

Encouraging the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance and rehabilitation and other services ... to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life and [helping] such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection.⁵⁸

While Medicaid and AFDC both focus on recipients' financial need, the AFDC language also references the attainment of self-support and personal independence for beneficiaries as important goals of the program.⁵⁹ To the extent that similar language describing Medicaid's purpose is lacking, the AFDC cases supporting work incentives above may not necessarily be dispositive of whether work incentives are consistent with the objectives of Medicaid. Similarly, as the Supreme Court has noted the difference in character between the objectives of the pre-ACA Medicaid program and the ACA Medicaid expansion, it is possible that a court may find this disparity to be relevant in evaluating a Section 1115 waiver imposing work requirements in either category.⁶⁰

Other courts have used similar principles to review Section 1115 waivers specifically for the Medicaid program, but not in the context of work requirements. For example, in *Newton-Nations v. Betlach*, the Ninth Circuit reviewed a waiver authorizing Arizona to impose increased co-payments on Medicaid beneficiaries.⁶¹ Similarly to the situation in *Beno*, the court examined the administrative record and found that it lacked the requisite findings regarding the waiver's research value and potential harm to beneficiaries to support the Secretary's decision approving the waiver.⁶² In particular, the court suggested that justifying the waiver's "research or demonstration value" would require more than a cursory discussion, as the plaintiffs' public health expert had testified that co-payments had already been heavily studied over the past 35

⁵⁵ *Id.*

⁵⁶ *Id.* at 1076. *Cf.* *C.K. v. N.J. Dep't of Health & Human Servs.*, 92 F.3d 171 (3d Cir. 1996) (relying upon reasoning in *Beno* but finding that the administrative record supported the Secretary's decision to grant a §1115 waiver request and concluding that the arbitrary and capricious standard did not require a specific refutation or discussion of every objection raised by private groups).

⁵⁷ *Cal. Welfare Rights Org.*, 348 F. Supp. at 496.

⁵⁸ SSA § 401; 42 U.S.C. § 601 (1994).

⁵⁹ *Id.*

⁶⁰ *See NFIB*, 132 S. Ct. at 2606 (Roberts, C.J.) ("[Post-ACA Medicaid] is no longer a program to care for the neediest among us, but rather an element of a comprehensive national plan to provide universal health insurance coverage.")

⁶¹ *Newton-Nations v. Betlach*, 660 F.3d 370, 381 (9th Cir. 2011).

⁶² *Id.*

years.⁶³ Citing *Beno*, the court concluded that the waiver could not be justified on the basis of cost-savings without an identifiable research or demonstration value.⁶⁴

Potential Use of Section 1115 Waivers to Allow Work Requirements in Medicaid

Assuming, for purposes of this discussion, that implementation of a work requirement on Medicaid recipients would otherwise violate the provisions of SSA Section 1902, the Secretary's authority to waive those provisions as part of an "experimental, pilot, or demonstration project" under Section 1115 may be examined. As discussed above, SSA Section 1115 explicitly authorizes the Secretary to "waive compliance with any of the requirements of § 1902," upon a determination that it "is likely to assist in promoting the objectives of [Medicaid]."⁶⁵ While most states implementing the ACA Medicaid expansion have done so through an expansion of their existing Medicaid programs, six states operate their expansions through Section 1115 waivers, in some cases using plans purchased through the private health insurance market rather than providing coverage under Medicaid for certain individuals.⁶⁶ While the Secretary has rejected waiver proposals to link Medicaid benefits to certain work requirements for the ACA expansion group,⁶⁷ Pennsylvania requested a waiver to conduct a demonstration project that involved *voluntary* work incentives, and a waiver for that plan was granted in August 2014.⁶⁸

Whether a reviewing court would conclude that the HHS Secretary could permissibly issue a Section 1115 waiver to allow a state to impose a work requirement on beneficiaries in the ACA Medicaid expansion group may depend on the specifics regarding a particular proposal. For example, the precise parameters of the work requirement, and their relationship to the hypotheses to be tested by the project, would likely be relevant.⁶⁹ Additionally, the particular administrative record, which could include objections raised by commenters in opposition to the project, may inform a reviewing court's evaluation of whether the Secretary had considered all relevant factors.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ SSA § 1115(a); 42 U.S.C. § 1315(a).

⁶⁶ MEDICAID AND CHIP PAYMENT AND ACCESS COMM'N, EXPANDING MEDICAID TO THE NEW ADULT GROUP THROUGH SECTION 1115 WAIVERS 4-5 (Jan. 2017), <https://www.macpac.gov/publication/expanding-medicare-to-the-new-adult-group-through-section-1115-waivers/>. Arizona, Arkansas, Iowa, Indiana, Michigan, Montana, and New Hampshire are currently providing Medicaid benefits to the ACA expansion population through § 1115 waivers. *Id.* at 4. Pennsylvania also provided Medicaid benefits to these individuals through a § 1115 waiver from January 1, 2015, through August 31, 2015, but then transitioned to a traditional expansion effective September 1, 2015. *Id.* at n.2.

⁶⁷ See ROBERT WOOD JOHNSON FOUNDATION, MEDICAID EXPANSION, THE PRIVATE OPTION, AND PERSONAL RESPONSIBILITY REQUIREMENTS: THE USE OF SECTION 1115 WAIVERS TO IMPLEMENT MEDICAID EXPANSION UNDER THE ACA 5 (May 2015), <http://www.rwjf.org/en/library/research/2015/05/medicaid-expansion—the-private-option—and-personal-responsibil.html> (discussing proposals from Pennsylvania and Indiana).

⁶⁸ Letter from CMS Administrator Marilyn Tavenner to Pennsylvania Public Welfare Secretary Beverly Mackereth (Aug. 28, 2014), <http://www.medicare.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/pa/pa-healthy-ca.pdf>. Pennsylvania subsequently transitioned to a traditional expansion that does not require a waiver, and the voluntary work incentives are no longer in effect. See MEDICAID AND CHIP PAYMENT AND ACCESS COMM'N, *supra* note 65, at 1.

⁶⁹ For example, the approved waiver from Pennsylvania permitting voluntary work incentives was intended to test the hypotheses that "being employed results in improved physical and mental health," and that the program would "help individuals move out of poverty." PA. DEPT. OF PUBLIC WELFARE, *supra* note 28, at 13-14.

Nevertheless, it is possible to describe a general framework under which a legal analysis would likely follow once all the facts had been established. A central aspect of this framework is the Secretary's determination concerning whether a proposed demonstration project promotes the objectives of Medicaid.⁷⁰ As discussed above, courts evaluating whether the Secretary properly approved a Section 1115 waiver have focused on the Secretary's consideration of a waiver. In particular, courts have looked at whether the Secretary evaluated factors such as the waiver's research or experimental goals, the potential impact on program beneficiaries, and objections raised concerning the proposal.⁷¹

Thus, a reviewing court would likely evaluate a hypothetical Section 1115 waiver related to work requirements similarly, basing its analysis on the Secretary's determination that the waiver promotes the objectives of the Medicaid program (e.g., the provision of medical care for low-income individuals), and the sufficiency of the evidence in the administrative record supporting such a determination. If the Secretary's approval of a Section 1115 waiver is later subject to a legal challenge, a reviewing court would likely examine whether his determination was arbitrary or capricious in light of the administrative record, and the Secretary's decision will likely be afforded deference, to the extent it is not a clear error of judgment.⁷²

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⁷⁰ It was stated by the dissenting justices in *NFIB v. Sebelius* that “[t]he purpose of Medicaid is to enable States to furnish ... medical assistance on behalf of [certain persons] whose income and resources are insufficient to meet the costs of necessary medical services ... By bringing health care within the reach of a larger population of Americans unable to afford it, the Medicaid expansion is an extension of that basic aim.” 132 S. Ct. 2566, 2635 (2010) (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (citations and internal quotation marks omitted).

⁷¹ It may be noted that § 10201(i) of ACA amended § 1115 of the SSA to require the Secretary to issue regulations that are generally intended to ensure that interested parties have opportunity to provide input into the development of state demonstration projects, as well as to provide transparency in the review and approval of state demonstration applications and renewals. *See* 42 U.S.C. § 1315(d). The Secretary issued a final rule regarding § 1115 waivers in 2012. *See* 77 Fed. Reg. 11678 (Feb. 27, 2012); 42 C.F.R. §§ 431.400 *et seq.* It would seem that information provided pursuant to the regulations would be considered by a reviewing court as part of the administrative record. A CRS search of the LEXIS database for instances in which these regulations were addressed in a case involving a § 1115 waiver yielded no results.

⁷² *See, e.g.,* *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971).