



U.S. Department of Justice

Office of the Solicitor General

Washington, D.C. 20530

June 11, 2021

Honorable Scott S. Harris
Clerk
Supreme Court of the United States
Washington, D.C. 20543

Re: Xavier Becerra, Secretary of Health and Human Services, et al., v. Charles Gresham, et al., No. 20-37
- and -
State of Arkansas v. Charles Gresham, et al., No. 20-38

Dear Mr. Harris:

On April 5, 2021, this Court issued an order in these cases providing that, “[u]pon consideration of the motion of [the federal petitioners] to vacate the judgments of the court of appeals and remand, to remove the cases from the March 2021 argument calendar, and to hold further briefing in abeyance, these cases are held in abeyance pending further order of the Court.” I write to provide an update to the Court regarding the status of administrative proceedings following the determinations by the Department of Health and Human Services (HHS) to withdraw its approvals of work-related requirements in Arkansas’s and New Hampshire’s demonstration projects that are at issue in these cases.

As the government has explained in its briefing, on March 17, 2021, HHS notified Arkansas and New Hampshire that, following a review of the work-related requirements in each State’s demonstration project, HHS was withdrawing its approval of those requirements based on the agency’s determination that testing the work-related requirements during and in the aftermath of the COVID-19 pandemic is unlikely to promote the statutory objectives of Medicaid. Gov’t Reply Br. 5; see *id.* at 5-9; Letter from Elizabeth Richter, Acting Administrator, Centers for Medicare & Medicaid Servs. (CMS), HHS, to Dawn Stehle, Deputy Director for Health and Medicaid, Arkansas Department of Human Servs. 1-16 (Mar. 17, 2021) (Arkansas Withdrawal Decision), <https://go.usa.gov/xss2r>; Letter from Elizabeth Richter, Acting Administrator, CMS, HHS, to Lori Shibinette, Commissioner, New Hampshire Dep’t of Health & Human Servs. 1-14 (Mar. 17, 2021) (New Hampshire Withdrawal Decision), <https://go.usa.gov/xss2Y>. HHS’s decisions withdrawing approval of the work-related requirements in Arkansas’s and New Hampshire’s projects did not affect other aspects of the States’ projects, including waivers of retroactive-coverage requirements that the private respondents have also challenged in this litigation; HHS explained that it is reviewing those other aspects of the projects separately. See Arkansas Withdrawal Decision 16; New Hampshire Withdrawal Decision 14.

As we have additionally explained, each State was entitled to seek administrative review of HHS's decisions withdrawing approval of the State's work-related requirements. Gov't Reply Br. 10; see Arkansas Withdrawal Decision 16-17; New Hampshire Withdrawal Decision 15. Specifically, each State was entitled to request a hearing, before the withdrawal decision's effective date, by appealing the decision to HHS's Departmental Appeals Board, pursuant to HHS regulations, 45 C.F.R. Pt. 16. Arkansas Withdrawal Decision 16; New Hampshire Withdrawal Decision 15. Each withdrawal decision explained that a State could request a hearing by filing a notice of appeal with the Board within 30 days of receiving the withdrawal decision and that, if a State did not timely file such a notice, the withdrawal decision "shall be the final decision of [HHS]." *Ibid.*

HHS has informed this Office that New Hampshire did not timely file a notice of appeal of HHS's decision withdrawing approval of the work-related requirements in New Hampshire's demonstration project. The New Hampshire withdrawal decision is therefore now final, and its work-related requirements are no longer an approved component of its demonstration project.

HHS has additionally informed this Office that Arkansas did timely file a notice of appeal of HHS's decision withdrawing approval of the work-related requirements in Arkansas's demonstration project. On May 24, 2021, Arkansas filed its opening brief in its administrative appeal before the Board. Further briefing in the administrative appeal remains ongoing pursuant to the regulations governing procedures set forth in HHS's regulations. See 45 C.F.R. 16.8(b) and (c). Following the completion of briefing and completion of the appeal file, the Board will determine whether to hold an informal conference with the parties, a hearing, or both. 45 C.F.R. 16.10-16.11. The regulations do not establish a specific timeline by which the Board must render a disposition of the appeal. The Board has established "goals" of resolving appeals in which it does not hold a hearing within six months from the filing of the appellant's opening submission, and appeals where it does hold a hearing within nine months from the filing of that submission. 45 C.F.R. 16.23. The regulations further state, however, that "[t]he paramount concern of the Board is to take the time needed to review a record fairly and adequately in order to produce a sound decision." *Ibid.* The regulations also note that "many factors are beyond the Board's direct control, such as unforeseen delays due to the parties' negotiations or requests for extensions, how many cases are filed, and Board resources." *Ibid.* The government accordingly does not anticipate that Arkansas's appeal will be resolved during the Court's current Term, and it may not be resolved before HHS's approval of Arkansas's demonstration project expires by its terms on December 31, 2021, see Arkansas Withdrawal Decision 13.

I would appreciate it if you would circulate this letter to the Members of the Court.

Sincerely,

/s/

Elizabeth B. Prelogar
Acting Solicitor General

cc: See Attached Service List

20-0037

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