

Health Care in Motion

Timely, Substantive Updates on Policy Shifts · Actionable Advocacy to Protect Health Care

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September Roundup: The Mixed Martial Arts of Advocacy

This September roundup of happenings in health care policy is a lesson in the mixed martial arts of advocacy. Although the future is a little bit (more than a little bit?) disconcerting, advocates across the country have been skillfully responding to the relentless cuts, kicks, and blows from policymakers intent on limiting access to health care.

Read on for updates on the undermining of the ACA's Navigator program, Arkansas' implementation of work requirements among its Medicaid expansion population, and the court case challenging the constitutionality of the Affordable Care Act—as well as key defensive maneuvers in play.

CMS Announces Navigator Organizations for Open Enrollment, With Funding Cuts and Extra Strings Attached

Earlier this month, the Centers for Medicare and Medicaid Services (CMS) announced [grant awards to 39 organizations](#) that will serve as Navigators in states with federally-facilitated Marketplaces for the 2019 plan year. The dismal award sizes are alarming.

Navigators—individuals and organizations that provide education, outreach, and enrollment assistance—play an essential role in Open Enrollment. Unfortunately, CMS finalized its deep, dramatic funding cuts to the program, notwithstanding widespread criticism and concern (including from the [Government Accountability Office](#), a legislative agency that provides auditing, evaluating and investigative services for the U.S. Congress). Specifically, \$10 million total was awarded, compared to \$36 million in 2017 and \$63 million in 2016. In addition, this year's grant process gave applicants only one month to apply, and forced organizations through several extra bureaucratic hoops relating to outreach activities and strategies, such as requirements to incorporate information about association health plans and short-term limited duration insurance.

Defensive Maneuver #1: Absorb the Cut

Even in the face of these new obstacles, organizations in all but three of the 34 states with federally-facilitated Marketplaces have demonstrated a commitment to persist and persevere. (There were no applicants from Iowa, Montana, or New Hampshire.) With the cuts finalized and the landscape set, our focus is on strategies to maximize these limited resources. In support, CHLPI has developed an [outreach and enrollment flyer](#). You are welcome to adapt the flyer as you see fit. If you are looking for assistance in doing so, please contact us at: mtomazic@law.harvard.edu.

Arkansas Implements First Phase of its Work Requirements and Announces Harmful Results

We've written [previously](#) about the Trump Administration's approval of harmful Medicaid policies, like work requirements, and the successful [challenge](#) in a federal district court to Kentucky's waiver that authorized them within the state. Even though the fight is ongoing, Arkansas has initiated implementation following permission from the federal government to

Health Care in Motion

waive normal federal Medicaid rules. (New Hampshire and Indiana have also received approvals to pilot work requirements.)

Arkansas's new policy generally requires Medicaid enrollees to complete 80 hours of work or community engagement activities on a monthly basis. An enrollee who does not satisfy the requirement for three consecutive months will be kicked off of Medicaid coverage and prohibited from re-enrolling for the rest of that year.

Arkansas is rolling its policy out in stages, and started in June with adults between the ages of 30-49. September marked the three-month reporting deadline for this first phase of implementation, and [data](#) released by the state's Medicaid agency shows that 4,353 individuals were kicked from the Medicaid rolls. In other words, 4,353 individuals have potentially lost access to the only affordable source of health care. The data also highlights a significant lack of [awareness](#) among affected enrollees, as a majority of those required to either report work hours or otherwise seek an exemption (81%) are taking no action at all.

CMS, the agency that reviews and approves waiver proposals, re-affirmed the Administration's commitment to this policy in a [speech](#) delivered yesterday: "We are committed to this issue and we are moving closer to approving even more state waivers." Regarding Arkansas, Ms. Verma was keen to tout the progress of the new work requirements, citing that "more than 1,000 Arkansas Works enrollees have found jobs since the program began in July," and asks us to "[i]magine the impact that this has had on the lives of those individuals and their families." Ms. Verma conveniently neglected to mention that over four times this number were booted from the program, and seems wholly unconcerned with the impact on their lives and families.

Defensive Maneuver #2: Redirect the Kick & Stumble your Opponent

Paralleling the principles of [Judo](#), advocates are responding to redirect this kick to Medicaid and its beneficiaries. Lawyers from the [National Health Law Program](#), [Legal Aid of Arkansas](#), and the [Southern Poverty Law Center](#) have brought a [lawsuit](#) challenging the approval of Arkansas's waiver. The case sets out a similar theory to the successful [Kentucky lawsuit](#): by law, waivers must promote the objective of Medicaid, which is to furnish medical assistance. Given that Arkansas's waiver will reduce access to coverage rather than furnish it, it must be set aside. In the Kentucky litigation, the court paid much attention to the fact that 95,000 individuals were *projected* to lose coverage over the course of the demonstration project; the new data from Arkansas showing an *actual* loss of coverage is likely to feature heavily in the new case. If you also want to employ these teachings of Judo, check out our [past issue](#) discussing how to respond if your state is proposing work requirements.

Decision on Preliminary Injunction Pending in Case Challenging the ACA

Lastly, the ACA remains under existential threat in *Texas v. U.S.*, a lawsuit that leverages changes to the individual mandate to challenge the constitutionality of the Act. (More background to the case is available in this recent [Health Care in Motion](#).) The case has drawn close public scrutiny, particularly in states with [attorney general](#) elections this November. The case also draws public interest given the potential for widespread impact on the availability and accessibility of health care. If, ultimately, the plaintiffs are successful, millions of people who rely on the Marketplace or on expanded Medicaid programs for health care may find themselves uninsured.

On September 5th, *Texas v. U.S.* progressed to [oral arguments](#) in front of U.S. District Court Judge Reed O'Connor. Judge O'Connor sits in the Northern District of Texas and is [no stranger](#) to ACA-related cases. In fact, Judge O'Connor issued a

Health Care in Motion

nationwide preliminary injunction in *Franciscan Alliance v. Price*, blocking implementation of the ACA's protections against discrimination on the basis of gender identity and termination of pregnancy. (*Franciscan Alliance* has since been stayed given the Administration's pending proposed changes to relevant regulations.)

Defensive Maneuver #3: Block the Blow

Here, Judge O'Connor heard oral arguments for and against enjoining some or all of the ACA for the duration of the litigation. Discussions focused primarily on standing, congressional intent, and severability. (A transcript of the arguments can be found [here](#).) Of note, Judge O'Connor asked questions about whether he should consider the intent of the 2010 Congress—which passed the ACA (and included [congressional findings](#) that the individual mandate was “essential to creating effective health insurance markets”)—or that of the 2017 Congress—which changed a particular provision of the ACA while consistently rejecting attempts to repeal the law.

Intent on blocking the potential blow in its entirety, the intervenor states primarily focused on arguments that there has been no change that would affect the ACA's constitutionality. Continuing its unique approach to participating in the suit, the Department of Justice (DOJ) asked the court to deny the plaintiffs' motion for preliminary injunction. “We're about to embark on open enrollment season And we don't want to be in a situation where there is confusion about what health insurance products are available, and we certainly don't want to be in a position where individuals lose their health insurance going into next year.” The DOJ suggested that the court delay issuance of any decision on a preliminary injunction until after Open Enrollment (i.e., mid-December) and to delay a decision about the constitutionality of the ACA until 2019. Despite the request, Judge O'Connor simply ended the hearing with a note that he'd “try to get [a decision] out just as quickly as [he] can.”

What could result? A [judge or justice's questions during oral arguments aren't always the best predictors of judicial decisions](#) and so we won't try to predict how Judge O'Connor is likely to rule. However, a range of options were presented by various parties. On one end, the judge could issue a preliminary injunction of the entire ACA, including provisions that do not directly affect the Marketplace or private insurance market. The judge could also enjoin one or some provisions, such as the individual mandate, guaranteed issue, and community rating provisions, or he could decide not to issue an injunction at all. If the judge decides that a preliminary injunction is necessary to avoid irreparable harm, he also faces the decision whether such injunction should apply nationwide or be restricted to the plaintiff states. Regardless of the outcome, Judge O'Connor's decision will most certainly be appealed immediately.

Congratulations! You have now earned a white belt in the mixed martial arts of advocacy. The cuts and the kicks, the redirection, the blows, and the blocks. While the range and scope of techniques to limit access to health care are broad, so are the defensive maneuvers determined to hold the line (or even strengthen and improve access): persistence in community outreach and education, in regulatory advocacy, and in the courts.

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