

MEMORANDUM

September 4, 2012

To: Honorable Sander M. Levin

From: Kathleen S. Swendiman
Legislative Attorney
Ext. 7-9105

Subject: **Authority of the Secretary of HHS to Approve Certain TANF Demonstration Programs Pursuant to Section 1115 of the Social Security Act**

This responds to your request for a legal analysis of the authority of the Secretary of Health and Human Services (HHS) to approve certain Temporary Assistance to Needy Families (TANF) demonstration programs pursuant to Section 1115 of the Social Security Act¹ (Section 1115). Specifically you have inquired whether the Secretary has the authority to waive the requirements of Section 407 of the Social Security Act² relating to work activities, as proposed in the Secretary's July 12th Information Memorandum to the states.³ You have also asked if Section 415 of the Social Security Act⁴ poses a bar to the Secretary's ability to waive the provisions of Section 407.

Section 1115 Demonstration Waiver Authority

Section 1115 of the Social Security Act was originally enacted by Congress in 1962 as an amendment to the Social Security Act of 1935.⁵ President John F. Kennedy urged Congress to amend the Social Security Act to include a waiver provision permitting experimentation with methods of delivering benefits to beneficiaries of programs under the Social Security Act:

No study of the public welfare program can fail to note the difficulty of the problems faced or the need to be imaginative in dealing with them. Accordingly, I recommend that amendments be made to encourage experimental, pilot or demonstration projects that would promote the objectives of the assistance titles and help make our welfare programs more flexible and adaptable to local needs.⁶

¹ 42 U.S.C. § 1315.

² 42 U.S.C. § 607.

³ U.S. Department of Health and Human Services, Administration for Children and Families, Office of Family Assistance, *Guidance Concerning Waiver and Expenditure Authority Under Section 1115*, Information Memorandum, TANF-ACF-IM-2012-03, July 12, 2012, available at <http://www.acf.hhs.gov/programs/ofa/policy/im-ofa/2012/im201203/im201203.html>.

⁴ 42 U.S.C. § 615.

⁵ Social Security Act of 1935, ch. 531, 49 Stat. 620 (1935) (codified as amended at 42 U.S.C. §§ 301 *et seq.*).

⁶ Message from the President of the United States, Public Welfare Program, H.R. Doc. No. 325, 87th Cong., 2d Sess., reprinted in 108 Cong. Rec. 1404, 1405 (1962).

As enacted in 1962,⁷ Section 1115 authorized demonstrations in several programs, originally beginning with the Aid to Families with Dependent Children (AFDC) program,⁸ and the public assistance programs for the aged, blind, and disabled (predecessors of the Supplemental Security Income program).⁹ Later, Congress added the Medicaid program in 1965,¹⁰ and the State Children's Health Insurance Program (CHIP) in 1997.¹¹

Section 1115(a) of the Social Security Act currently reads as follows:

(a) In the case of any experimental, pilot, or demonstration project which, in the judgment of the Secretary, is likely to assist in promoting the objectives of title I, X, XIV, XVI, or XIX, or part A or D of title IV in a State or States --

(1) the Secretary may waive compliance with any of the requirements of section 2, 402, 454, 1002, 1402, 1602, or 1902 as the case may be, to the extent and for the period he finds necessary to enable such State or States to carry out such project, and

(2)(A) costs of such project which would not otherwise be included as expenditures under section 3, 455, 1003, 1403, 1603, or 1903, as the case may be, and which are not included as part of the costs of projects under section 1110, shall, to the extent and for the period prescribed by the Secretary, be regarded as expenditures under the State plan or plans approved under such title, or for administration of such State plan or plans, as may be appropriate, and

(B) costs of such project which would not otherwise be a permissible use of funds under part A of title IV and which are not included as part of the costs of projects under section, shall to the extent and for the period prescribed by the Secretary, be regarded as a permissible use of funds under such part.

While there is little legislative history accompanying this section, what history there is suggests that the Secretary's authority is very broad in approving demonstration projects. The original House and Senate reports contained identical language which read as follows:

The public assistance titles of the Social Security Act contain a number of requirements on the States for the approval of a State plan. These plan requirements, however, often stand in the way of experimental projects designed to test out new ideas and ways of dealing with the problems of public welfare recipients. One such requirement, for example, is that the plan be in effect throughout the State. A demonstration project usually cannot be statewide in operation. For this reason, under the bill the Secretary would be authorized to waive plan requirements to the extent he believes this action is necessary to carry out a demonstration or experimental project, if such project furthers the general objectives of the program. This would mean that the regular Federal participation would be available for such projects whether they involve assistance, service, or administrative expenditure.¹²

Thus, the Secretary can waive the requirements of specific provisions of the health and welfare programs listed in Section 1115(a)(1) of the Social Security Act to permit states to use program funds in ways that

⁷ Public Welfare Amendments of 1962, P.L. 87-543, tit. I, sec. 122, tit. XI, § 1115, 76 Stat. 172, 192 (1962).

⁸ Title IV of the Social Security Act, 42 U.S.C. §§ 601 *et seq.*

⁹ Title XVI of the Social Security Act, 42 U.S.C. §§ 1381 *et seq.*

¹⁰ Title XIX of the Social Security Act, 42 U.S.C. §§ 1396 *et seq.*

¹¹ Title XXI of the Social Security Act, 42 U.S.C. §§ 1397aa *et seq.*

¹² S. Rep. 1589, 87th Cong., 2d Sess. 19-20, reprinted in 1962 U.S.C.C.A.N. 1943, 1961-2 (1962); H.R. Rep. No. 1414, 87th Cong. 2d Sess. 24-25 (1962).

are not otherwise allowed under federal law, as long as the Secretary determines that the initiative is an “experimental, pilot, or demonstration project” that “is likely to assist in promoting the objectives” of the program.¹³ Demonstration projects are generally approved through a series of negotiations between a state and HHS. Although not required by statute or regulation, requirements such as budget neutrality have been administratively imposed upon Section 1115 waiver projects.¹⁴

Judicial Precedents Regarding the Secretary’s Authority To Approve Section 1115 Waivers

The Secretary’s discretion to approve demonstration projects pursuant to Section 1115 is broad, and the courts have been reluctant to circumscribe the Secretary’s authority under this provision. In the seminal case of *Aguayo v. Richardson*,¹⁵ the Second Circuit Court of Appeals upheld a waiver allowing the creation of a mandatory “workfare” demonstration project for Aid to Families With Dependent Children recipients in New York, holding that section 1115 waiver decisions by the Secretary were valid so long as the Secretary had a “rational basis for determining that the programs were ‘likely to assist in promoting the objectives’ of [the Social Security Act].”¹⁶ Subsequent court decisions have reiterated that Congress has entrusted the judgment of whether a particular project is likely to assist in promoting the objectives of the program under the Social Security Act to the Secretary, and not to the courts:

Thus, once a project has been approved by the Secretary, it is the function of the courts only to determine whether his discretion was arbitrary and capricious and lacking in rational basis. ... Given the large degree of judgment vested in the Secretary with respect to the approval of section 1115 projects, it is not for the courts to deny the Secretary the right to approve a project merely because the Court might in certain situations disagree with his judgment. That judgment is committed to the Secretary and must be sustained as long as he exercises it within the confines of the statute. And, as the case law shows, the only prerequisite to the exercise of that authority is that in the Secretary’s judgment the demonstration or experiment furthers the objectives of the appropriate title of the Act.¹⁷

¹³ See, e.g., Samantha Artiga, “The Role of Section 1115 Waivers in Medicaid and CHIP: Looking Back and Looking Forward,” Kaiser Commission on Medicaid and the Uninsured, March 2009.

¹⁴ Through the years, the Secretary has issued and changed various administrative approval and review criteria for Section 1115 demonstration projects. For example, the budget neutrality requirement initially adopted during President Carter’s administration for Medicaid Section 1115 waiver projects required a state to establish that its Medicaid program’s service costs would be no greater with a Section 1115 waiver project than without it. In 1994, HHS refined its requirement for budget neutrality of demonstration projects, indicating that it would assess budget neutrality over a proposed project’s entire life, rather than over each year of the project as it had previously. See 59 Fed. Reg. 49250 (September 27, 1994). The test for budget neutrality has been modified since then, and was eliminated in the case of certain Medicaid Section 1115 waiver projects relating to Hurricane Katrina.

¹⁵ 352 F. Supp. 462 (S.D. N.Y. 1972), *aff’d*, 473 F.2d 1090 (2d Cir. 1973), *cert. den.*, 414 U.S. 1146 (1974).

¹⁶ *Id.* at 1105.

¹⁷ *Crane v. Matthews*, 417 F. Supp. 532, 539 (N.D. Ga. 1976). See also *Georgia Hospital Ass’n v. Dept. of Medical Assistance*, 528 F. Supp. 1348, 1355 (N.D. Ga. 1982), wherein the court stated that section 1115 “does not require the Court to find whether this project in fact will promote the objectives of the program, but rather, whether the Secretary, as stated in *Aguayo*, had a rational basis for his determination.”

Judicial deference to the Secretary's broad authority to grant Section 1115 waivers is not without limits.¹⁸ Reviewing courts have cited the Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(A), as affording judicial authority to invalidate waivers found to be "arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law." Section 1115 itself furnishes a "judicially manageable standard" by which the Secretary's decision to approve a particular waiver may be evaluated.¹⁹ While the courts have held that the decisions of the Secretary regarding section 1115 waivers are subject to review under the APA, the courts have generally held that the 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."²⁰ Thus, a court's review of whether or not an agency's decision was "arbitrary or capricious" under the APA is generally "highly deferential" and carries the presumption that the agency's decision is valid.²¹

Waivable and Non-waivable Provisions Under The Section 1115(a)(1)

Section 1115(a)(1) provides that compliance with certain, specific statutory provisions may be waived by the Secretary when the Secretary approves an "experimental, pilot, or demonstration project" under the health and welfare programs listed in Section 1115. For example, under the current TANF block grant, and, formerly, the Aid to Families With Dependent Children (AFDC) program, the state plan requirements listed in Section 402 may be waived by the Secretary; under Medicaid, the requirements listed in Section 1902, which generally comprise the provisions states must include in their Medicaid state plans, may be waived by the Secretary.²² The Secretary's authority to waive state plan requirements does not extend to provisions not listed in Section 1115(a)(1). In addition, Section 1115(a)(2) provides that costs associated with a waiver demonstration project that are otherwise not matchable under a state program may be paid.²³ Congress has provided for limitations on the Secretary's Section 1115 waiver authority, both within the listed waivable state plan requirements provisions, and in other parts of the Social Security Act.

Over the past 50 years, hundreds of demonstration programs have been approved by the Secretary under the authority of Section 1115 of the Social Security Act.²⁴ Most of the waiver programs have been

¹⁸ See *Portland Adventist Med. Ctr. v. Thompson*, 399 F. 3d 1091 (9th Cir. 2005), wherein the court rejected the Secretary's argument that the language of Section 1115 provided authority for excluding certain Medicaid expansion populations receiving Medicaid services from the calculation of Disproportionate Share Hospital (DSH) payments under Medicare. See also, *Beno v. Shalala*, 30 F.3d 1057, 1073 (9th Cir. 1994), quoting *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971).

¹⁹ *C.K. v. Shalala*, 883 F. Supp. 991, 1003 (D. N.J. 1995), affirmed, *C.K. v. New Jersey Dept. of Health and Human Services*, 92 F.3d 171 (3rd Cir. 1996).

²⁰ *Id.* at 1004.

²¹ *Irvine Medical Center v. Thompson*, 275 F.3d 823, 830-831 (9th Cir. 2002).

²² It is noted that there are some provisions in Section 1902 that appear to be waivable, but specific statutory language either within 1902 or elsewhere in the Medicaid statute, provides that they may not be waived. For example, Section 1902(l)(4)(A), requires states with Section 1115 waivers to continue to provide medical assistance to pregnant women and children less than 19 years of age as required under the state's Medicaid plan.

²³ This memorandum does not address any legal issues related to the Secretary's authority under Section 1115(a)(2).

²⁴ For example, as of the date of this memorandum, CMS' website shows 61 active Medicaid and CHIP Section 1115 Medicaid demonstration waivers in 29 states and the District of Columbia. The website lists certain waivers as "pending," but in cases where the waiver documents show them as operating under a "temporary extension," or as operating under a "phase out" status as in the case of the Texas Family Planning waiver they may be considered as "active." See <http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/Waivers.html?filterBy=1115#wavers>. As of July 1, 2008, there were 94 operational Medicaid and Children's Health Insurance Program (CHIP) Section 1115 demonstration waivers in 43 states and the (continued...)

established under the AFDC and Medicaid programs. Since waiver demonstration programs under both of these programs derive from the same statutory authority, examples and judicial precedents from both programs relevant to this analysis are provided herein, particularly as pertains to the Secretary's interpretation of state plan requirements that reference provisions outside of the specific provisions listed as waivable under Section 1115(a)(1).

The Secretary's Interpretation of the Waivability of Provisions Incorporated By Reference Under Section 1115

Over the years, it appears that the Secretary has consistently interpreted Section 1115 to include the ability to waive statutory provisions referenced in the provisions listed in Section 1115(a)(1) as waivable when approving "experimental, pilot, or demonstration projects." Based on this interpretation, the Secretary has waived compliance with provisions outside of Section 402 of the AFDC program that are referenced within Section 402; in like manner, the Secretary has waived provisions outside of Section 1902 of the Medicaid program that are referenced within that section. The Secretary recently summarized this position in the context of the authority under Section 1115(a)(1) to waive compliance with the current requirements of Section 402 of the Social Security Act, which contain state plan requirements for the TANF block grant, as follows:

Section 1115(a)(1) allows the Secretary to "waive compliance with any of the requirements of section ... 402 [of the Act] ... to the extent and for the period [s]he finds necessary to enable [a] State ... to carry out" an approved experimental, pilot, or demonstration project that will assist in promoting the objectives of the TANF program. ... Section 402 sets forth state plan requirements for the TANF program, including the requirement that a plan "[e]nsure that parents and caretakers receiving assistance under the program engage in work activities in accordance with section 407. ... By authorizing the Secretary to "waive compliance with any of the requirements of section ... 402," therefore, section 1115 permits the Secretary to waive the requirements of section 407 when she determines that a waiver would promote the objectives of the TANF program and satisfy the other prerequisites for a waiver. ... [T]he plain text of section 402 incorporates the requirements of section 407 by reference.²⁵

The Secretary has not used the authority of Section 1115 to approve any new demonstrations for the TANF program since the demonstration programs in effect or approved before the TANF legislation went into effect ended.²⁶ The Information Memorandum issued on July 12, 2012, which informed states and other interested parties that the Secretary will consider state waiver requests that meet certain requirements under TANF, would constitute the first use of that demonstration authority in the context of the TANF program. The Secretary's interpretation of her current authority under Section 1115 with regard to waivable TANF provisions under Section 402 appears consistent with the Secretary's practice under the

(...continued)

District of Columbia. CRS Report RS21054, Medicaid and SCHIP Section 1115 Research and Demonstration Waivers, by Evelyne P. Baumrucker. Between 1987 and 1996, well over a hundred AFDC Section 1115 demonstration waivers were established during the Reagan, Bush and Clinton administrations. See Carol Harvey et al., "Evaluating Welfare Reform Waivers Under Section 1115," 14 J. of Economic Perspectives 165 (Fall, 2000).

²⁵ Letter from Kathleen Sebelius, Secretary of HHS, to Orrin G. Hatch, Ranking Member, Senate Finance Committee (July 18, 2012), available at <http://www.washingtonpost.com/blogs/ezra-klein/files/2012/07/Sen-Hatch-TANF-7-18-.pdf>. See also Letter from Kathleen Sebelius, Secretary of HHS, to Dave Camp, Chairman, House Committee on Ways and Means, (July 18, 2012), available at <http://online.wsj.com/public/resources/documents/HHSLetterCamp.pdf>.

²⁶ For more information on waivers under the TANF program see CRS Report R42627, *Temporary Assistance for Needy Families: Welfare Waivers*, by Gene Falk.

same provision as it existed under the AFDC program. Below are several examples of HHS waivers of provisions incorporated by reference in Section 402 for AFDC and section 454 for the Child Support Enforcement program (Part IV-D of the Social Security Act) waivers over the years:

AFDC two-parent eligibility rules: Thirty-seven states received waivers in the 1990s of federal rules related to AFDC eligibility for two-parent families. Those rules were in the former section 407, not section 402, but were incorporated by reference into the state plan in section 402(a)(41).

Job search limitation: Eighteen states received AFDC waivers that permitted the state to require longer periods of job search than permitted under standard federal rules. The job search limitation was in section 482(g), not in section 402, but was incorporated by reference into the state plan in section 402(a)(19)(A).

Child support pass-through: In the 1990s, Connecticut, Vermont, and Wisconsin received waivers to pass through all monthly child support payments collected on behalf of a family receiving cash assistance directly to the family. The pass-through and distribution rules are in section 457, but included by reference into the state plan in section 454(11).

Sanction procedures: In 1995, Wisconsin began to operate its “Work Not Welfare” demonstration project in two counties. As part of this project, Wisconsin received a number of waivers including a waiver to change certain sanction procedures. These procedures were contained in section 482(h), not in section 402, but were incorporated into the state plan by reference in section 402(a)(19)(A).²⁷

Section 1115 demonstration projects under Medicaid provide additional examples of the Secretary’s interpretation of the Section 1115 authority through the years. Under Section 1115(a)(1), the Secretary may waive only the Medicaid state plan requirements set forth in Section 1902 of the Social Security Act. Provisions outside of Section 1902 that impose requirements on state Medicaid programs are not waivable. However, the Secretary has consistently interpreted provisions within Section 1902 that refer to provisions in other parts of Title XIX as waivable with regard to the referenced provisions. The Secretary’s interpretation and practice continues to the present day. For example, on the current HHS Medicaid program website, there are a number of operational Medicaid Section 1115 waiver demonstration programs that list sections of the Social Security Act outside of Section 1902 that have been waived in the Special Terms and Conditions (STCs) for these waiver programs. A sampling of some of these “incorporated by reference” provisions, that are currently being waived, are described below.

(1) Under the state’s *QUEST Expanded* waiver program, Hawaii has CMS approval to waive the cost sharing requirements in Section 1916 because that section is referenced in Section 1902(a)(14). Hawaii also has approval to restrict the freedom of choice of providers requirement to groups that could not otherwise be mandated into managed care under section 1932 because that section is referenced in Section 1902(a)(23). See <http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/hi/hi-quest-expanded-ca.pdf>.

(2) Under the state’s *MaineCare Childless Adults* waiver program, Maine has CMS approval to waive certain disproportionate share hospital payment requirements in Section 1923(c)(1) because Section 1902(a)(13)(A) references Section 1923. See <http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/me/me-childless-adults-ca.pdf>.

²⁷ These examples from HHS were provided to us by your office.

(3) Under the state's *HealthChoice* waiver program, Maryland has CMS approval to waive the cost sharing and denial of service requirements of Section 1916(e) because those requirements are referenced in Section 1902(a)(14). See <http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/md/md-healthchoice-ca.pdf>.

(4) Under the state's *MassHealth* waiver program, Massachusetts has CMS approval to waive the cost sharing requirements in Section 1916 because that section is referenced in Section 1902(a)(14). CMS has also granted authority for the state to waive all mandatory services to individuals enrolled in the demonstration program under Section 1905(a) because that section is incorporated by reference in Section 1902(a)(10)(A). See <http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/ma/ma-masshealth-ca.pdf>.

In summary, the Secretary has consistently interpreted Section 1115 to permit waiving provisions that are incorporated by reference into state plan provisions listed in Section 1115(a)(1) when approving state proposals for demonstration programs. We are not aware of any judicial challenges of this interpretation of the Secretary's Section 1115 authority.

Congressional Limitations on The Secretary's Waiver of Provisions Referenced in State Plan Provisions

Congress has not specifically amended Section 1115 to prohibit the Secretary from waiving compliance with provisions outside of the provisions listed in Section 1115(a)(1), but referenced therein, in programs such as AFDC, Child Support Enforcement, Medicaid and CHIP. Congress has, however, limited the Secretary's ability to waive provisions incorporated by reference in the relevant state plan requirement provisions in several cases.

Congress has limited the Secretary's ability to waive provisions incorporated by reference in the waivable state plan provisions in Medicaid. For example, Section 1924 of the Social Security Act sets forth certain state plan requirements for the treatment of income and resources in determining the eligibility for medical assistance of an institutionalized spouse. Section 1924 is not a waivable section under Section 1115(a)(1) for purposes of demonstration projects because it is outside of Section 1902. However, this section is referenced in Section 1902(a)(51) which provides that a state Medicaid plan must "meet the requirements of section 1924 (relating to protection of assets and income of a community spouses when the other spouse is in a nursing home)." Therefore, under the Secretary's practice of waiving provisions incorporated by reference in Section 1902, the Secretary would consider that Section 1115 provides the authority to waive the requirements of Section 1924 because it is referenced in Section 1902(a)(51). Congress has provided in Section 1924(a)(4)(A), however, that the Secretary may NOT waive this provision "under a waiver granted under section 1115." It would appear that Congress was aware that the Secretary would consider that waiving Section 1924 was within the Section 1115 authority, and that this section might be waived pursuant to the Secretary's discretion.

Congress has taken the same legislative action with regard to the extension of eligibility for medical assistance under the transitional medical assistance requirements in Section 1925. This section, which is not a waivable section under Section 1115, provides that states must provide certain transitional or extended benefits for families who lose Medicaid eligibility due to increased earnings. Section 1925 is referenced in Section 1902(a)(52) which states that a state plan for medical assistance must "meet the requirements of section 1925 (relating to extension of eligibility for medical assistance). Again, Congress did not rely on the fact that Section 1925 is outside of Section 1902, but rather specifically provided in

Section 1925(c)(1) that the Secretary would not be permitted to waive this provision for a Section 1115 demonstration program.

As a final example, Congress specifically provided, in Section 1916, which is referenced in Section 1902(a)(14), for the limited circumstances under which the Secretary may waive the requirements of Section 1916 relating to the imposition of co-payment and other cost sharing requirements for a Medicaid enrollee under a waiver demonstration project. Section 1916(f) states that “[n]o deduction, cost sharing, or similar charge may be imposed under any waiver authority of the Secretary, ... unless such waiver is for a demonstration project which the Secretary finds after public notice and opportunity for comment” meets certain specifications. Congress thus pro-actively prohibited the Secretary from waiving the cost sharing provisions of Section 1916, referenced in Section 1902(a)(14), except under limited circumstances.

The foregoing examples show that when Congress enacted these provisions Congress was aware of the Secretary’s interpretation and practice of waiving statutory provisions referenced in waivable state plan provisions. In several cases where Congress did not want the Secretary to exercise that authority under Section 1115, Congress specifically provided that the Secretary may not do so.²⁸ With regard to the cost-sharing requirements in Section 1916, in particular, Congress legislatively affirmed that the Secretary may waive the provisions of this section as incorporated by reference in section 1902, so long as the Secretary meets certain requirements in setting up the waiver demonstration project.

The Secretary’s Authority To Waive Provisions of Section 407 Under a Section 1115 TANF Demonstration

The Secretary’s current and longstanding interpretation of the authority of Section 1115, that provisions incorporated by reference within provisions listed in Section 1115(a)(1) are waivable, is based on an interpretation of the text of that statute. Thus, for example, in the case where Section 402(a)(41) of the former AFDC program stated that a state plan must provide aid for “dependent children of unemployed parents in accordance with section 407,” the Secretary’s position was that the requirements of Section 407 were waivable because they were specifically incorporated into Section 402. If the Secretary could not waive the requirements listed in Section 407, then there would be nothing to waive with regard to Section 402(a)(41); such an interpretation would render Section 402(a)(41) non-waivable. Given the express statutory language of Section 1115(a)(1) that “the Secretary may waive compliance with any of the requirements of section...402,” arguably the Secretary may waive the requirements of section 407 to the extent such requirements are incorporated into Section 402. As noted above, the Secretary implemented this particular interpretation of the Section 1115 waiver authority for 37 AFDC demonstration projects that included waivers of the former Section 407 in the 1990s.

²⁸ Recently, Congress enacted additional statutory requirements relating to the process the Secretary and states must use for Medicaid and CHIP Section 1115 waivers that impact beneficiary eligibility in order to promote increased transparency and public input for Section 1115 demonstration programs. While the Secretary has administratively provided for public comment as part of the waiver approval process, Congress, in Section 10201 of P.L. 111-148, required the Secretary to impose more stringent and detailed requirements for public notice and comment for the Section 1115 waiver approval process. For further information see CRS Report R41210, *Medicaid and the State Children’s Health Insurance Program (CHIP) Provisions in ACA: Summary and Timeline*, by Evelyn P. Baumrucker et al.

Guidance to States for Section 1115 TANF Waiver Demonstrations

The program Information Memorandum issued by the Administration for Children and Families' Office of Family Assistance on July 12, 2012²⁹ informed the states that HHS will consider waiver proposals under Section 1115 "to allow states to test alternative and innovative strategies, policies, and procedures that are designed to improve employment outcomes for needy families" under the TANF program.³⁰ The guidance states as follows:

While the TANF work participation requirements are contained in section 407, section 402(a)(1)(A)(iii) requires that the state plan "[e]nsure that parents and caretakers receiving assistance under the program engage in work activities in accordance with section 407." Thus, HHS has authority to waive compliance with this section 402 requirement and authorize a state to test approaches and methods other than those set forth in section 407, including definitions of work activities and engagement, specified limitations, verification procedures, and the calculation of participation rates.

In 1996, when Congress enacted P.L. 104-193, the Personal Responsibility and Work Opportunities Reconciliation Act (PRWORA), Congress ended the former AFDC program and replaced it with the TANF block grant, changing the program financing to provide capped or limited funding rather than an open-end entitlement to the states for a share of their expenditures. Congress also limited the time for which federal assistance would be available, and revised work requirements that apply to cash assistance recipients.³¹ In Section 401 of the Social Security Act,³² Congress set forth the purposes of the TANF program:

The purpose of this part is to increase the flexibility of States in operating a program designed to--

- (1) provide assistance to needy families so that children can be cared for in their own homes or in the homes of relatives;
- (2) end the dependence of needy parents on government benefits by promoting job preparation, work, and marriage;
- (3) prevent and reduce the incidence of out-of-wedlock pregnancies and establish annual numerical goals for preventing and reducing the incidence of these pregnancies; and
- (4) encourage the formation and maintenance of two-parent families.

²⁹ U.S. Department of Health and Human Services, Administration for Children and Families, Office of Family Assistance, *Guidance Concerning Waiver and Expenditure Authority Under Section 1115*, Information Memorandum, TANF-ACF-IM-2012-03, July 12, 2012, available at <http://www.acf.hhs.gov/programs/ofa/policy/im-ofa/2012/im201203/im201203.html>.

³⁰ The Information Memorandum states that HHS will require both a federally approved evaluation plan and interim performance targets for the states that seek TANF waiver demonstrations. In letters to both Senator Orrin G. Hatch and Representative Dave Camp, Kathleen Sebelius, Secretary of HHS, indicated that "[t]he Department is providing a very limited waiver opportunity for states that develop a plan to measurably increase the number of beneficiaries who find and hold down a job. Specifically, Governors must commit that their proposals will move at least 20% more people from welfare to work compared to the state's past performance." Letters available at <http://www.washingtonpost.com/blogs/ezra-klein/files/2012/07/Sen-Hatch-TANF-7-18-.pdf> and <http://online.wsj.com/public/resources/documents/HHSLetterCamp.pdf>.

³¹ For more information on the TANF block grant program, see CRS Report RL32748, *The Temporary Assistance for Needy Families (TANF) Block Grant: A Primer on TANF Financing and Federal Requirements*, by Gene Falk.

³² 42 U.S.C. § 601.

The TANF state plan requirements of Section 402 may be waived by the Secretary when she approves an “experimental, pilot, or demonstration project which, in her judgment, is likely to assist in promoting the objectives of the TANF program. In the Information Memorandum issued July 12th, the Secretary has indicated her willingness to waive certain requirements of Section 407. Section 407 is referenced in Section 402(a)(1)(A)(iii), which states that, in order to be eligible for TANF funds, a state must “submit to the Secretary a plan that the Secretary has found includes” a written document that outlines how the States intends to “[e]nsure that parents and caretakers receiving assistance under the program engage in work activities in accordance with section 407.” Section 407 sets forth minimum work participation requirements states must meet, as well as certain work requirements applicable to individuals.

Judicial Review By the Courts of the Secretary’s Interpretation

If a Section 1115 demonstration project that includes the waiver of any work requirements listed in Section 407 were approved by the Secretary, the Secretary’s decision to establish that waiver project could be challenged in court as a final agency action.³³ With regard to the standards of judicial review of agency action that a court would likely use to evaluate whether the agency’s action is valid, the APA states:

The reviewing court shall ... hold unlawful and set aside agency action, findings, and conclusions found to be –

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;³⁴

Thus, a court would likely assess whether the Secretary’s decision to waive compliance with Section 407 requirements, as referenced in Section 402(a)(1), may be found to be “arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law.”³⁵ As noted, above, in the discussion of judicial precedents regarding the Secretary’s authority to approve Section 1115 waivers, the courts have accorded considerable deference to the Secretary’s establishment of experimental, pilot, or demonstration projects that, in the Secretary’s judgment, are “likely to assist in promoting the objectives” of the particular program.³⁶ However, the courts have not always upheld the Secretary’s interpretation of this demonstration authority.³⁷ The scope of particular Section 1115 demonstration projects and the Secretary’s interpretation of the underlying text of the statute are reviewable, though the courts’ standard of review is “highly deferential.”³⁸

³³ 5 U.S.C. §§ 702.

³⁴ 5 U.S.C. § 706(2)(A).

³⁵ 5 U.S.C. §§ 702 and 706(2)(A). *See* C.K. v. New Jersey Dept. of Health & Human Servs., 92 F.3d 171 (3d Cir. 1996).

³⁶ *Aguayo v. Richardson*, 352 F. Supp. 462 (S.D. N.Y. 1972), *aff’d*, 473 F.2d 1090 (2d Cir. 1973), *cert. den.*, 414 U.S. 1146 (1974).

³⁷ *See* *Portland Adventist Med. Ctr. v. Thompson*, 399 F. 3d 1091 (9th Cir. 2005), wherein the court rejected the Secretary’s argument that the language of Section 1115 provided authority to exclude certain Medicaid expansion populations receiving Medicaid services from the calculation of DSH payments under Medicare. *See also* *Newton-Nations v. Betlach*, 660 F. 3d 370 (9th Cir. 2011). At various times, the Government Accountability Office, and some commentators, have raised questions about whether the waiver of program requirements under particular Section 1115 demonstration projects exceeded the Secretary’s legal authority under that statute. *See* Government Accountability Office, “Medicaid Demonstration Projects in Florida and Vermont Approved Under Section 1115 of the Social Security Act” July 24, 2007, B-309734 and General Accounting Office, GAO-02-817, “Recent HHS Approvals of Demonstration Waiver Projects Raise Concerns” (July 2002). *See also* Jonathan R. Bolton “The Case of the Disappearing Statute: A Legal and Policy Critique of the Use of Section 1115 Waivers to Restructure the Medicaid Program,” 37 *Colum. J.L. & Soc. Probs.* 91, 145-152 (Fall, 2003).

³⁸ *Irvine Medical Center v. Thompson*, 275 F.3d 823, 830-831 (9th Cir. 2002).

In reviewing a Section 1115 demonstration project that waives Section 407 work requirements, a court would likely examine the structure of the TANF statute and the text of Section 402(a)(1). A court would also likely take note of the Secretary's consistent and longstanding interpretation of provisions referenced in waivable state plan requirements under programs eligible for Section 1115 demonstration projects. A court would also likely note that, in some instances, Congress has specifically provided that the Secretary may not waive certain provisions referenced in a waivable state plan provision when approving a Section 1115 demonstration project. A court might view this post-enactment awareness, and arguably affirmation, of the Secretary's interpretation that provisions incorporated by reference in state plan requirements provisions are waivable, as providing further support for the Secretary's position.³⁹

In assessing the validity of the Secretary's position that she has the authority to waive the TANF work requirements in Section 407 in so far as they are incorporated into Section 402, a court might consider the argument that Congress has materially changed some of the requirements listed in TANF from mandatory state plan requirements to mandatory reporting requirements. Section 402(a)(1) now requires that the Secretary find that an eligible state has submitted a plan that includes a "written document that outlines how the state intends to do" certain things. This language is arguably not as rigorous as the language in the former AFDC state plan provisions. A court might assess whether the current language of Section 402(a)(1), incorporating Section 407, should be viewed as an administrative requirement that a state plan include a document outlining the state's TANF program. In other words, does the Secretary only have the authority to waive the requirement that a state submit a "written document that outlines how the state intends to" ensure that certain requirements are met, or, does the requirement that the document outline how the state intends to "ensure" that recipients "engage in work activities in accordance with section 407" substantively incorporate those requirements into Section 402?⁴⁰

If a court determines that the requirements of Section 402(a)(1) are not merely waivable reporting requirements, then a court is likely to find the Secretary's interpretation that she may waive provisions of Section 402, in so far as they incorporate requirements in Section 407 of the TANF statute, to be a reasonable interpretation of the text of the statute that is not "arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law."⁴¹ As such, a court would be likely to defer to the Secretary's interpretation that the requirements of Section 407, as incorporated by reference into Section 402, may be waived as part of a Section 1115 demonstration project.⁴²

³⁹ See *Udall v. Tallman*, 380 U.S. 1, 12 (1965), quoting *United States v. Midwest Oil Co.*, 236 U.S. 459, 472-473: "It may be argued that while these facts and rulings prove a usage they do not establish its validity. But government is a practical affair intended for practical men. Both officers, law-makers and citizens naturally adjust themselves to any long-continued action of the Executive Department -- on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle but the basis of a wise and quieting rule that in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself -- even when the validity of the practice is the subject of investigation."

⁴⁰ A court might employ the Supreme Court's two step *Chevron* analysis of the agency's interpretation of Section 402(a)(1). If, using "traditional tools of statutory construction," the text and intent of Congress is clear on the "precise question at issue," that law and intention must be given effect. However, if the statute is silent or ambiguous with respect to the specific issue at hand, the question for the court is whether the agency's interpretation is based on a permissible construction of the statute. "A court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 844 (1984). See also the Court's less deferential analysis in *United States v. Mead Corp.*, 533 U.S. 218 (2001), which the Court has used in cases of informal agency actions such as policy statements and guidelines not deserving of *Chevron* deference.

⁴¹ 5 U.S.C. § 706(2)(A). See *C.K. v. Shalala*, 883 F. Supp. 991 (D. N.J. 1995) at 1006.

⁴² Approval by the Secretary of a Section 1115 demonstration project that completely eliminates the work requirements of Section 407 of the TANF block grant program would not likely be upheld, even under the deferential arbitrary and capricious standard of review. Any demonstration project must further the objectives of the program, which, for the TANF program includes (continued...)

Effect of Section 415 on the Secretary's Authority Under Section 1115 to Waive TANF Work Requirements

PRWORA created a new Section 415 of the Social Security Act that relates to both waivers that were in effect as of August 22, 1996, the date PRWORA was signed into law, and to waivers that were pending as of that date, but approved on or before July 1, 1997, the date PRWORA went into effect.⁴³ Under this provision, states had the authority to operate waiver demonstration projects under the pre-1996 AFDC law, subject to certain exceptions, until their scheduled expiration.⁴⁴

The structure of this section appears clear. Section 415(a) is entitled "Continuation of Waivers." Each subsection of Section 415 states that it applies to waivers of "a State plan under this part (as in effect on September 30, 1996)," which was the former AFDC program. Subsection 415(a)(1)(A) sets forth the rules for Section 1115 waivers approved and operational on the date PRWORA was signed into law, August 22, 1996. Subsection 415(a)(2)(B) sets forth the rules for Section 1115 waivers "granted subsequently," i.e., submitted to the Secretary for approval before August 22, 1996, but approved on or before July 1, 1997, the date PRWORA went into effect. Subsection 415(a)(2)(B) also provides that waivers "granted subsequently" must comply with the work requirements of Section 407 of the new TANF program.

A court would be likely to find that Section 415 is a transitional provision for AFDC waivers either in effect as of the date TANF statute was enacted, or approved by the Secretary by the date the TANF statute went into effect. As such, this section would not appear to apply to any waivers other than those "grandfathered" waivers carried over from the former AFDC program. Thus, the requirements of Section 415 do not appear to pose a bar to the Secretary's current exercise of authority under Section 1115 to approve an experimental, pilot, or demonstration project which, in her judgment, is likely to assist in promoting the objectives of the TANF program.

Conclusion

Section 1115 of the Social Security Act provides broad authority for the Secretary to consider and approve experimental, pilot, or demonstration projects which, in the Secretary's judgment, are likely to assist in promoting the objectives of the TANF program. Section 1115 permits the Secretary to waive compliance with Section 402 of the Social Security Act, to the extent and for the period necessary, to enable a state to carry out an approved TANF demonstration project. The Secretary's proposal, in the Information Memorandum dated July 12, 2012, to waive certain work-related requirements in Section 407, as incorporated by reference in Section 402, appears consistent with the Secretary's longstanding position

(...continued)

ending "the dependence of needy parents on government benefits by promoting job preparation, work, and marriage." While a court does not generally have the power to substitute its judgment for that of the agency's determination that a Section 1115 project "promotes the objectives" of the Act, a court may "consider whether the decision was based on consideration of the relevant factors and whether there has been a clear error of judgment." A Section 1115 demonstration project that waived all work requirements would likely be considered beyond the scope of the Secretary's Section 1115 waiver authority.

⁴³ Section 116(b) of PRWORA also provided states the option to accelerate the effective date of their TANF program under certain circumstances. For more information on the dates state TANF plans were received by HHS and became effective under PRWORA, see <http://www.acf.hhs.gov/programs/ofa/data-reports/congress/tanft91a.htm>.

⁴⁴ The last such waiver expired in 2007. See CRS Report R42627, *Temporary Assistance for Needy Families: Welfare Waivers*, by Gene Falk, at 9.

that she may waive provisions incorporated by reference in state plan provisions listed in Section 1115(a)(1).

If a Section 1115 demonstration project that includes the waiver of any work requirements listed in Section 407 were approved by the Secretary, the Secretary's decision to establish that demonstration project could be challenged in court as a final agency action. A court would likely assess whether the Secretary's decision to waive compliance with Section 407 requirements, as referenced in Section 402(a)(1), is "arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law" under the APA. An argument may be made that, in establishing the TANF block grant program, Congress has materially changed some of the state plan requirements listed in Section 402(a)(1) from mandatory state plan requirements to mandatory reporting requirements. If a court were asked to review a Section 1115 TANF demonstration project that includes the waiver of Section 407 work requirements, and the court determines that the requirements of Section 402(a)(1) are not merely waivable reporting requirements, there would appear to be a sound basis for the reviewing court to uphold the Secretary's interpretation that the provisions of Section 402, in so far as they incorporate the requirements in Section 407, are waivable under a TANF waiver demonstration project.