UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Monte A. Rose, Jr., et al., Plaintiffs, v. Alex M. Azar, et al., Defendants.	)	No. 1:19-cv-02848-JEB

UNOPPOSED MOTION OF THE INDIANA FAMILY AND SOCIAL SERVICES ADMINISTRATION TO INTERVENE AS DEFENDANT AND INCORPORATED MEMORANDUM OF POINTS AND AUTHORITIES

Pursuant to Federal Rules of Civil Procedure 24(a) and (b), and LCvR 7(a), the Indiana Family and Social Services Administration (FSSA) moves to intervene as a defendant to defend the approval of its Section 1115 Medicaid Demonstration project, the Healthy Indiana Plan (HIP). The parties do not oppose this motion.

The plaintiffs are four Indiana residents challenging the United States Secretary of Health and Human Services' approval of Indiana's HIP program. FSSA is the single state agency designated to operate Indiana's Medicaid program, and is the entity that received approval to operate the HIP program. FSSA requests leave to intervene in this matter, either as of right or permissibly, in order to defend the HIP program, in which approximately 400,000 of Indiana's 1.4 million Medicaid beneficiaries are enrolled.

This Court has recently allowed the affected State to intervene in actions challenging the federal approval of that state's Section 1115 Medicaid Demonstration Waiver on three prior occasions. *See Philbrick v. Azar*, Civil Docket No. 1:19-CV-00773-JEB (D.D.C. Apr. 25, 2019) (granting New Hampshire's unopposed motion to intervene); *Gresham v. Azar*, Civil Docket No.

1:18-CV-01900-JEB (D.D.C. Sept. 6, 2018) (granting Arkansas' unopposed motion to intervene); *Stewart v. Azar*, Civil Docket No. 1:18-CV-152-JEB (D.D.C. Mar. 30, 2018) (granting Kentucky's unopposed motion to intervene). The same result should apply here.

BACKGROUND

The initial Healthy Indiana Plan was first approved as a demonstration project in 2008 to provide coverage to non-disabled, non-elderly adult Medicaid beneficiaries, as well as a population of adults not otherwise eligible for Medicaid. HIP was the nation's first consumer-directed health care program for Medicaid recipients and included a series of features designed to promote personal wellness and responsibility. These features included pairing a high-deductible consumer-driven health plan with an account similar to a health savings account, called the Personal Wellness and Responsibility (POWER) account. The POWER account contains contributions made by the State as well as any required monthly contributions from the member, based on his or her income.

From the beginning, HIP has included both incentives and requirements associated with POWER account contributions; authority for the State not to provide nonemergency transportation services; co-payments for inappropriate use of emergency room for non-emergency services; and a waiver of so-called "retroactive eligibility," so as to encourage beneficiaries to apply for and maintain coverage in HIP even if they were not sick. Evaluations of these and other features of HIP have indicated that these features do not appear to be barriers to entry for members even while they continue to influence member behavior and improve health outcomes. For example, HIP members making contributions to their POWER accounts are more likely to obtain primary care and preventive care, have better drug adherence, and rely less on the emergency room for treatment compared to those who do not. https://www.in.gov/fssa/hip/files/HIP_2_0_Letter.pdf. Evaluations also indicate that the overwhelming majority of participants are satisfied with the program.

When the Affordable Care Act provided States with the ability to expand Medicaid to adults with incomes up to 133% of the federal poverty level, the Indiana legislature authorized the expansion population to receive coverage through the HIP program. Ind. Code § 12-15-44.5-3. FSSA implemented the expansion through "HIP 2.0," a modified version of the original HIP program. Like the original HIP program, HIP 2.0 included a waiver of retroactive eligibility, required POWER account contributions for certain populations (and a period of disenrollment for failure to make the required contributions), and authority not to provide nonemergency transportation to some HIP members.

The expansion was executed through a new three-year Section 1115 demonstration approval and amendments to state plan, both of which HHS approved in early 2015. *See, e.g.*, ECF 1, Ex. C, at 1 ("Through this demonstration and associated plan amendments, the State will provide coverage to adults in Indiana with incomes through 133% of the federal poverty level . . . beginning February 1, 2015"); *id.* at 12 ("Under HIP 2.0, Indiana is building on and changing its previous HIP program in multiple ways including the creation of new benefit packages and the establishment of a broader incentive structure for encouraging healthy behaviors. Some of those changes . . . are being implemented through the state plan. Other changes are effective through this demonstration[.]"). And by letter dated February 1, 2018, HIP was renewed under a new Section 1115(a) waiver through December 31, 2020. The renewal included a new community-engagement component, beginning January 1, 2019. The structure of Indiana's community-engagement program is unique to Indiana and was structured by FSSA to support and assist HIP enrollees in obtaining and maintaining stable employment, training, education, or community volunteer work. The program began in January 2019 with a zero-hour per week requirement for the first six months; the threshold of required work or work-related hours started at only 5 hours a week in July 2019;

increased to 10 hours a week earlier this month; and will be 15 hours a week on January 1, 2020, and 20 hours per week on July 1, 2020. There are a number of exemptions to the requirement, including exemptions for pregnant women, students, homeless individuals, recently incarcerated individuals, and the medically frail; there are also a wide range of qualifying activities that meet the requirement.

Members receive regular communications regarding their reporting status, hours, and available resources, and their health plans conduct direct outreach to members who have not yet met their reporting requirements. Compliance with community-engagement requirements is measured only once a year, in December. At that time, FSSA will assess whether the enrollee has met the threshold in at least 8 of the previous 12 months. If the enrollee has not done so, eligibility is suspended. Suspension is lifted if the member meets reporting requirements for one month or if the member qualifies for an exemption at any time following suspension.

Indiana intentionally built this timeframe and structure to give enrollees sufficient time to understand the requirement and to accustom themselves to the various means of reporting compliance. There has been extensive public education and outreach at the statewide and local levels, and direct contact with members as to the community-engagement requirements. And FSSA has required the managed care plans that help administer HIP to provide education, coordination, and employment-related training assistance to enrollees, including those who are at risk of falling short of the threshold requirements. FSSA has also put in place extensive monitoring and evaluation protocols in coordination with the Center for Medicaid Services (CMS) to monitor whether this and other HIP initiatives are advancing the health and well-being of Medicaid recipients and former recipients. FSSA has extensive internal monitoring capacity around community engagement and other HIP initiatives, has engaged an independent evaluator to

evaluate the program, and is working with CMS to finalize evaluation plans and monitoring implementation protocols.

In sum, FSSA's implementation of the community-engagement initiative and other features of HIP has been careful and deliberate, and in line with the consumer-engagement approach that has characterized HIP from the outset. FSSA seeks to intervene in order to defend the lawfulness of this program.

ARGUMENT

I. FSSA Is Entitled to Intervene as of Right under Fed. R. Civ. P. 24(a)

Federal Rule of Civil Procedure 24(a) sets forth the circumstances in which a party may intervene as a matter of right. The D.C. Circuit Court of Appeals has "identified four prerequisites to intervene as of right: "the application to intervene must be timely; (2) the applicant must demonstrate a legally protected interest in the action; (3) the action must threaten to impair that interest; and (4) no party to the action can be an adequate representative of the applicant's interests." *Karsner v. Lothin*, 532 F.3d 876, 885 (D.C. Cir. 2008) (quoting *SEC v. Prudential Sec., Inc.*, 136 F.3d 153, 156 (D.C. Cir. 1998)). FSSA's motion meets all of these criteria and should be granted.

A. The motion is timely

There is no set timeframe for determining if a motion to intervene is timely. Rather, courts must "weigh[ ] the factors of time elapsed since the inception of the suit . . . and the probability of prejudice to those already parties in the case." *Id*. at 886 (internal quotation marks omitted) (quoting *United States v. British Am. Tobacco Australia Servs., Ltd.*, 437 F.3d 1235, 1238 (D.C. Cir. 2006)). FSSA is filing this motion approximately three weeks after the plaintiffs filed this action, *see* ECF 1 (filed September 23, 2019), and over six weeks before the defendants' answer

is due. *See* Fed. R. Civ. P. 12(a)(2) (providing that federal defendants have sixty days to answer complaints). No briefing has been set. There is no probability of prejudice and therefore the motion is timely.

B. FSSA has a legally protected interest in this action

The plaintiffs have challenged the federal defendants' approval of Indiana's Section 1115 HIP 2.0 Demonstration Project. Among other things, the plaintiffs request that this Court "[p]reliminarily and permanently enjoin Defendants from implementing the practices purportedly authorized by . . . the approval of the Indiana HIP 2.0 extension application." ECF 1 at 53–54. FSSA—not the federal defendants—"implement[s] the practices" authorized by the HIP extension approval. In order for the plaintiffs to obtain the relief they seek, FSSA therefore must be joined as a party. *See* Fed. R. Civ. P. 19(a)(1)(A) (stating a person is required to be joined as a party if "in that person's absence, the court cannot accord complete relief among existing parties.").

Even if FSSA's participation in this matter were not necessary to grant the plaintiffs the relief they seek, FSSA still has sufficient legally protected interest to justify intervention as of right. The action threatens key attributes of the HIP program, some of which have been in place since its inception more than ten years ago. The state legislature had mandated that non-disabled, non-elderly adults receive Medicaid benefits through HIP, and over 400,000 Medicaid recipients are so enrolled. FSSA has been thoughtful and deliberate in establishing and obtaining federal approval for a program it believes will best serve the interests of Hoosiers. FSSA's interest in defending the validity of that program gives it a legally protected interest sufficient to justify intervention as of right.

In similar actions brought against HHS related to approvals of other Section 1115 demonstration projects, this Court has granted motions to intervene by the affected States. This

Court has recently allowed the state to intervene in actions challenging the federal approval of that state's Section 1115 Medicaid Demonstration Waiver on three prior occasions. *Philbrick v. Azar*, Civil Docket No. 1:19-CV-00773-JEB (D.D.C. Apr. 25, 2019) (granting New Hampshire's unopposed motion to intervene); *Gresham v. Azar*, Civil Docket No. 1:18-CV-01900-JEB (D.D.C. Sept. 6, 2018) (granting Arkansas' unopposed motion to intervene); *Stewart v. Azar*, Civil Docket No. 1:18-CV-152-JEB (D.D.C. Mar. 30, 2018) (granting Kentucky's unopposed motion to intervene). Similar to these other cases, FSSA designed HIP and is responsible for its implementation. It applied for and received the federal approval that is being challenged. Accordingly, FSSA has a legally protected interest in this action and should be allowed to intervene.

C. The action threatens to impair FSSA's interests

FSSA has a legally protected interest in continuing to operate the HIP program as it has been designed and approved. Plaintiffs contend that the Secretary's approval of the "HIP 2.0 Project as a whole" is in violation of the APA, ECF 1 at 45, and FSSA has a critical interest in assuring that this major program can continue to operate as intended. Plaintiffs also challenge and seek to enjoin and invalidate various features of HIP that have been part of the program's design for years and under ongoing longitudinal evaluation, including the requirements for contributions to the POWER account (which plaintiffs refer to as premiums), limited benefits or a period of disenrollment for failure to make such contributions, the waiver of retroactive eligibility, and the authority not to provide nonemergency transportation for certain enrollees. FSSA has an interest in ensuring that these features of HIP remain in place and continue to operate as intended. Finally, Plaintiffs challenge and seek to enjoin and invalidate the community-engagement requirements that have been in place since January of this year. FSSA has an interest in ensuring continued

implementation of this program that it has sought to implement in a careful and deliberate manner designed to assist and encourage work, education, training, and community-service activities. For these reasons, FSSA therefore should be permitted to intervene.

D. FSSA's interests are not adequately represented by the parties

To intervene as of right, the intervenor must show that the existing parties do not adequately represent its interests. *See Karsner*, 532 F.3d at 885. This requirement is satisfied "if the applicant shows that representation of his interest may be inadequate; and the burden of making that showing should be treated as minimal." *Fund for Animals*, 322 F.3d at 735 (internal quotation omitted); *see also Crossroads Grassroots Policy Strategies v. Fed. Election Comm'n*, 788 F.3d 312, 321 (D.C. Cir. 2015) ("A movant 'ordinarily should be allowed to intervene unless it is clear that the party will provide adequate representation'.") A movant need only show representation of its interest "may be" inadequate. *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n. 10 (1972).

Although the federal defendants and FSSA have shared interests, only FSSA can adequately represent Indiana's interests in this action. Unlike the federal defendants, FSSA's interest in this action is in defending Indiana's unique program, not the federal defendants' policies and practices regarding Medicaid demonstration projects overall. While the federal government may have a uniform process that it has applied in suggesting Section 1115 demonstration projects to States, each state program has unique features, and therefore the interests of the federal government and Indiana may diverge. *Atl. Sea Island Grp. LLC v. Connaughton*, 592 F. Supp. 2d 1, 7 (D.D.C. 2008).

Moreover, only FSSA can defend and advocate the state-specific interests that shaped the Healthy Indiana Plan, speak to its implementation in Indiana, and explain how the project interconnects with other aspects of Indiana's Medicaid program. Indiana may distinguish its

program from those of other states, while the federal government may choose to defend its policies with respect to all states. Accordingly, FSSA's interests may not be adequately represented by the federal defendants. Therefore, the Court should grant FSSA's motion to intervene as of right.

II. Alternatively, FSSA should be permitted to intervene under Fed. R. Civ. P. 24(b)(2)

Under Federal Rule of Civil Procedure 24(b)(2), "[o]n timely motion, the court may permit a federal or state governmental officer or agency to intervene if a party's claim or defense is based on: (A) a statute or executive order administered by the officer or agency; or (B) any regulation, order, requirement, or agreement issues or made under the statute or executive order."

Intervention is permitted under this rule because FSSA is a state agency, and the plaintiffs are challenging its implementation of HIP, which is established and mandated by state statute, Ind. Code § 12-15-44.5-3. As noted above, the motion is timely and will not "unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). Therefore, the Court should grant the motion for intervention even if it concludes that FSSA may not intervene as of right.

III. FSSA requests relief from Federal Rule of Civil Procedure 24(c) at this time

Under the Federal Rules of Civil Procedure, and this Court's Local Rules, a motion to intervene must "be accompanied by a pleading that sets out the claim or defense for which intervention is sought." Fed. R. Civ. P. 24(c); LCvR 7(j). With regard to the inclusion of a pleading, this Court has stated that "it may permit a degree of flexibility with technical requirements when the position of the movant is apparent from other filings." *Ying Qing Lu v. Lezell*, 11-1815, 2012 WL 1929904, at *1 (D.D.C. May 29, 2012); *see also Massachusetts v. Microsoft Corp*., 373 F.3d 1199, 1236 n.19 (D.C. Cir. 2004) (regarding non-inclusion of a pleading

under Rule 24(c), stating that the Court "find[s] no reason to bar intervention based solely upon this technical defect, if defect it be.").

FSSA's position and interest in the litigation is evident from the complaint, this motion and incorporated memorandum, and similar lawsuits brought to enjoin similar programs in other states. *See Philbrick v. Azar*, No. 1:19-CV-00773-JEB; *Gresham v. Azar*, No. 1:18-CV-01900-JEB; *Stewart v. Azar*, No. 1:18-CV-152-JEB; *see also Hughes v. Abell*, 09-220, 2014 WL 12787807, at *7 (D.D.C. Feb. 10, 2014) ("[B]ecause the requirement is designed to help determine whether the movant has a claim or defense that shares a common question of fact, courts have approved intervention motions without a pleading where the court was otherwise apprised of the grounds for a motion." (internal quotation marks omitted)). Thus, at this stage in the proceedings, the purpose of Rule 24(c) has been satisfied, *Ying Qing Lu*, 2012 WL 1929904, at *1, and FSSA therefore proposes to file a dispositive motion or other appropriate pleading according to the schedule set forth in the federal rules or whatever schedule the Court may establish.

Because this case has only recently begun, there will be no delay in the proceeding and no prejudice to any party by allowing FSSA to intervene and answer the complaint on the same schedule and under the same circumstances as the federal defendants. *Cf. Providence Baptist Church v. Hillandale Committee, Ltd.*, 425 F.3d 309, 314–15 (6th Cir. 2005) (noting that some circuit courts have permitted strict enforcement of Rule 24(c) where there is some prejudice to the parties). Therefore, FSSA asks that this Court excuse it from submitting an answer with its intervention motion and instead order FSSA to abide by the same schedule and timeframe for filing an answer as the federal defendants in this matter.

CONCLUSION

For the foregoing reasons, the Court should grant FSSA's unopposed motion to intervene as a defendant.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 11, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which shall send notification of such filing to any CM/ECF participants.

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