



DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of the Secretary

Office of the General Counsel
Washington, D.C. 20201

MEMORANDUM

Date: December 15, 2009

To: [REDACTED]
Deputy Assistant Secretary for Children and Families

From: [REDACTED]
Chief of Litigation, Children, Families and Aging Division

Subject: Authority Under Section 1115 of the Social Security Act

This memo responds to your request for a legal opinion regarding the breadth of the Secretary's authorities under section 1115 of the Social Security Act (Act), 42 U.S.C. § 1315, with respect to title IV-A of the Act. Specifically, you are interested in better understanding her ability to waive particular state plan requirements for the Temporary Assistance for Needy Families (TANF) program and to allow states to spend TANF, Healthy Marriage and/or Responsible Fatherhood program funds for certain purposes beyond those specified in sections 403 and 404 of the Act. As explained below, for a proper section 1115 demonstration project, the Secretary may waive compliance with any state plan requirements in section 402 of the Act, as well as any other requirement incorporated therein. The Secretary also may allow a state to use IV-A funds for costs that otherwise would be impermissible under that title. Section 1115 does not provide direct relief from state penalties under section 409 of the Act but may factor into the penalty relief available under section 409 itself. Thus, the Secretary may take most of the actions proposed in your November 17, 2009, e-mail, under section 1115 of the Act.

Section 1115 Authorities

Section 1115(a) of the Act provides the Secretary of Health and Human Services ("the Secretary") with two types of discretionary authority to exempt a State from otherwise-applicable IV-A rules so that it may implement a demonstration project that, in the Secretary's judgment, "is likely to assist in promoting the objectives" of title IV-A. 42 U.S.C. § 1315(a).

First, under section 1115(a)(1) of the Act, the Secretary "may waive compliance with any of the requirements of section ... 402 ... to the extent and for the period [s]he finds necessary to enable [a] State...to carry out" an approved demonstration project. *Id.* § 1315(a)(1). Section 402 of the Act sets forth state plan requirements for title IV-A. *Id.* § 602. "In granting a § 1315(a) waiver,

the Secretary allows the state to deviate from the minimum requirements which Congress has determined are necessary prerequisites to federal funding." *Beno v. Shalala*, 30 F.3d 1057, 1068 (9th Cir. 1994).

Second, under section 1115(a)(2)(B), "costs of [an approved demonstration project] which would not otherwise be a permissible use of funds under part A of title IV ... shall to the extent and for the period prescribed by the Secretary, be regarded as a permissible use of funds under such part." 42 U.S.C. § 1315(a)(2). This authority permits the Secretary to use IV-A funds for expenditures that would not be allowable under, for example, section 404 of the Act, 42 U.S.C. § 604, which prescribes permissible uses of a state's TANF grant.

Prerequisites for Section 1115 Projects

Section 1115 applies to only (1) experimental, pilot, or demonstration projects that (2) in the judgment of the Secretary are likely to assist in promoting the objectives of, in this case, title IV-A of the Act, (3) to the extent and for the period she finds necessary. Thus, while the Secretary has considerable discretion to decide which projects meet these criteria, she must, at a minimum, consider each of these issues.

Because Congress enacted section 1115 to "test out new ideas and ways of dealing with the problems of public welfare recipients," S. Rep. No. 1589, 87th Cong., 2d Sess. 20, *reprinted in* 1962 U.S.C.C.A.N. 1943, 1962, the Secretary must first determine that the project has a research or demonstration value. *See Beno*, 30 F.3d at 1069 ("she must determine that the project is likely to yield useful information or demonstrate a novel approach to program administration").

In addition, the Secretary must determine that the proposed project is likely to further the objectives of title IV-A. These objectives, as identified in section 401 of the Act, 42 U.S.C. § 601, are as follows:

- (1) provide assistance to needy families so that children may 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.

Finally, the Secretary may issue a waiver "to the extent and for the period [s]he finds necessary," *id.* § 1315(a)(1), and may regard otherwise impermissible expenditures as permissible "to the extent and for the period [she] prescribe[s]," *id.* § 1315(a)(2)(B). Thus, pilot projects are limited in scope and duration, consistent with their experimental nature.

Section 1115 waivers are subject to judicial review under the Administrative Procedure Act. *See Beno*, 30 F.3d at 1067; *G. v. Hawaii*, 2009 U.S. Dist. LEXIS 39851 (D. Haw. May 11, 2009). Courts have recognized that the Secretary has broad authority under section 1115, and her decision to approve a project under section 1115 should be upheld unless it is arbitrary, capricious, or contrary to law. *See Georgia Hospital Ass'n v. Department of Medical Assistance*, 528 F. Supp. 1348 (N.D. Ga. 1982); *Crane v. Mathews*, 417 F. Supp. 532 (N.D. Ga. 1976); *California Welfare Rights Org. v. Richardson*, 348 F. Supp. 491 (N.D. Cal. 1972); *Aguayo v. Richardson*, 352 F. Supp. 462, 469-70 (S.D.N.Y. 1971), *aff'd* 473 F. 2d 1090 (2d Cir. 1973).

Assuming that a state's project satisfies these prerequisites, the Secretary may address the particular IV-A provisions referenced in your e-mail as follows:

Can the Secretary permit a state to operate under a different set of participation rate requirements other than those specified in Section 407, or to be accountable for negotiated outcomes rather than the TANF participation rates?

Yes. Although work participation rates are found in section 407, which may not be waived directly under the terms of section 1115(a)(1), section 402(a)(1)(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." Because this section 402 requirement incorporates section 407, "Mandatory Work Requirements," the Secretary's waiver authority may reasonably extend to section 407, as well.

However, the extent to which section 407 may be incorporated for purposes of section 1115 is unclear. Section 402(a)(1)(iii)'s limitation, "in accordance with section 407," could be read to modify or apply only to section 407(d), because section 402(a)(iii) expressly refers to "work activities" in section 407, which are defined in section 407(d). Thus, a more conservative approach to section 1115(a)(1) would limit a waiver of section 402(a)(1)(iii) to enable a state to define work activities differently than Congress did in section 407(d), but otherwise leave the rest of section 407, including participation rates in section 407(a), intact.

Alternatively, "in accordance with section 407" could be read to modify the entire clause that precedes it, *i.e.*, ensuring that recipients engage in the prescribed work activities. In other words, if section 402(a)(1)(iii) requires not merely that the work activities be those defined in section 407(d) but also that the state have in place section 407's comprehensive scheme to "ensure" that families work, including through the participation rates, then a waiver could reasonably reflect the breadth of the state plan requirement itself. In short, section 402(a)(1)(iii)'s use of "in accordance with section 407" (rather than, for example, "section 407(d)") is sufficiently ambiguous that a broader view of the scope of the potential waiver is a defensible, though perhaps riskier, interpretation.

Can the Secretary permit a state to spend TANF funds for a benefit or service beyond those allowable under Section 404?

Yes. Under section 1115(a)(2), the Secretary may allow a state to use its IV-A funds to pay for costs that would “not otherwise be a permissible use of funds under part A of title IV,” regardless of which section of title IV-A would render the cost impermissible.

Can the Secretary broaden allowable expenditures under healthy marriage and responsible fatherhood promotion grants beyond those specified in Section 403?

Yes. Unlike other titles covered by section 1115(a)(2), title IV-A is referenced in its entirety with respect to the otherwise impermissible costs for which Federal program funds may be used. For example, for title IV-D, section 1115(a)(2)(A) only allows the use of IV-D funds to pay for expenditures that would not be allowed under section 455 of the Act, 42 U.S.C. § 655. Thus, section 1115(a)(2) would not authorize the use of IV-D funds to pay for costs that would not be allowed under section 469B (Grants to States for Access and Visitation), 42 U.S.C. § 669b, even though this latter section is part of title IV-D, too. As stated above, under section 1115(a)(2), the Secretary may allow a state to use its IV-A funds to pay for costs that would “not otherwise be a permissible use of funds under part A of title IV,” regardless of which section of title IV-A would render the cost impermissible. Thus, even though section 404 of the Act generally prescribes a state’s use of its TANF grant, the Secretary may apply section 1115(a)(2) to other funds and costs under title IV-A, including those in section 403.

Can the Secretary permit a state to extend assistance to a family for which assistance would otherwise be prohibited under Section 408?

Yes. Section 408 of the Act lists additional (*i.e.*, non-state plan) prohibitions and requirements on the use of IV-A funds. To the extent that this section prohibits the use of IV-A funds for certain purposes, the Secretary may use section 1115(a)(2) to regard a state’s expenditures therefor as permissible. For example, section 408(a)(7) prohibits the use of its TANF grant to provide assistance to a family for more than five years. Although this is not a state plan requirement, and thus may not be waived under section 1115(a)(1), the Secretary may allow a state to use its TANF grant to provide assistance beyond this five-year period as part of a demonstration project, using her authority under section 1115(a)(2).

Can the Secretary provide that a penalty otherwise applicable under Section 409 does not apply?

No. Section 1115 does not reference section 409 of the Act, 42 U.S.C. § 609, which provides for penalties against states that violate various provisions of the Act. Section 409 is neither incorporated by section 402 as a state plan requirement that can be waived under section 1115(a)(1) nor reflective of costs that would otherwise be impermissible under title IV-A. However, if the goal is to provide opportunities for a state to avoid a penalty while encouraging experimentation, it may be possible to work within the existing framework of section 409 to find

“reasonable cause,” if a state’s section 1115 project were to cause it to incur the penalty.

Depending on the kind of penalty at issue, section 409(b) prohibits the Secretary from imposing a penalty “if the Secretary determines that the State has reasonable cause for failing to comply with the requirement.” To the extent that a state fails to meet a requirement due to its participation in a section 1115 project, it may be appropriate for the Secretary to find “reasonable cause” for the state’s failure. For example, if a State has a section 1115 project that allows it to spend IV-A funds on assistance beyond the five-year period authorized in section 408(a)(7), it may be possible to justify forgoing a penalty under section 409(a)(9) based on the reasonable cause exception, because the State had permission to use the funds in that manner. This is similar to the approach taken with respect to waivers for penalties attributable to providing federally-recognized good cause domestic violence waivers. *See* 45 C.F.R. § 260.58(a) (state must demonstrate that it met work participation rate requirements except with respect to any individuals who received a federally-recognized good cause domestic violence waiver of work participation requirements). Although section 1115 waivers are not expressly referenced in the IV-A “reasonable cause” regulation, *see* 45 C.F.R. § 262.5, the preamble to the rule clarifies that the list of factors in the rule is not exclusive. *Temporary Assistance for Needy Families Program*, 64 Fed. Reg. 17720, 17805 (Apr. 12, 1999) (“we no longer limit ourselves to considering only these factors. While we do not anticipate routinely determining that a State had reasonable cause based on other factors, we do not want to preclude a State from presenting other circumstances.”).

In addition, section 409(c) of the Act requires that a state have the opportunity to enter into a corrective compliance plan for certain penalties. 42 U.S.C. § 609(c). To the extent that a state’s participation in a section 1115 demonstration project adversely impacts its ability to satisfy requirements covered by section 409, the state may take this into account in the corrective compliance plan.

Conclusion

Most of the proposals identified in your November 17, 2009, e-mail appear to be defensible exercises of the Secretary’s discretion under section 1115 of the Act. However, whether a particular project is legally supportable will depend on the facts and circumstances surrounding that project. We are available to assist you, if you decide to pursue further any of these or other ideas using IV-A funds.

Please contact me at 202-690-8005, if you have any questions.