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Section 1115 Waivers: More than Meets the Eye

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Key Resources

Issue Briefs

- Newton Nations, available here.
- 2010 Public Process Reg comments, available here.
- 2011 NHeLP-WCLP CA 1115 letter, available here.
- 1115-Copayment Waiver Amendment, available here.

Coming in December's Health Advocate:

Our annual litigation roundup

Background

The Medicaid program offers states generous federal funding if states provide health coverage to state residents in accordance with Medicaid requirements. As long as states continue to follow those federal Medicaid rules, they can continue to draw down federal Medicaid funds. Although states must follow the rules, they also have a lot of flexibility with respect to how they structure their Medicaid programs. One special flexibility the Social Security Act offers states, under section 1115, is the possibility of getting an exception to some of the Medicaid requirements. Section 1115 allows states to draw down federal Medicaid funds for experimental programs that do not follow all of the Medicaid rules.

> For example: Under current Medicaid rules, childless women are not generally eligible for Medicaid. About half of the states, however, use section 1115 authority to create a special Medicaid coverage category which provides low-income women with coverage for family planning services. The states are able to receive federal Medicaid funding to provide this coverage which would otherwise be impermissible.

To run a section 1115 program, a state must request permission from the Department of Health and Human Services (HHS). In that request, the state must specifically describe the Medicaid rules it wants to ignore in order to engage in the experimental project (sometimes called a "waiver"). HHS, in turn, will review the request made by the state to see if it meets the criteria for approval in section 1115. The section 1115 criteria include three key requirements:

1. Section 1115 authority is only permissible for an "experimental, pilot, or demonstration project," meaning a state must be using the authority to test some hypothesis.[1] A state cannot, under the law, simply enact a permanent change to its Medicaid program through section 1115 or use section 1115 to save money.
2. Section 1115 projects are only approvable if they are "likely to assist in promoting the objectives of" the Medicaid program.[2] According to the Medicaid Act, the purpose of Medicaid is to enable states to provide medical assistance to vulnerable individuals whose income and resources are insufficient to meet the costs of necessary services and services (such as rehabilitation) to help these individuals live independently.[3]

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[1] 42 U.S.C. § 1315(a).
[2] *Id.*
[3] 42 U.S.C. § 1396-1.

3. Section 1115 also specifically limits waivers for exceptions to a subset of Medicaid rules. For example, section 1115 specifically allows states to request exceptions to the requirements of section 1902 of the Act – which includes many key Medicaid rules, such as the category limits.[4] However, section 1115 does not allow exceptions to rules in section 1916, which describes copay limits. Therefore, under the law, states should be allowed to add a family planning category, but should not be allowed to obtain exceptions to copay limits.

Unfortunately, HHS' recent track record with section 1115 proposals has been problematic. HHS has approved section 1115 demonstrations that run afoul of all of the above rules. HHS has allowed states to make seemingly permanent changes to their Medicaid programs that serve no demonstrative purpose. HHS has allowed section 1115 exceptions which clearly seem to reduce, not support, access to Medicaid coverage. Finally, HHS has provided states with exceptions that are outside the scope of allowed exceptions, often to the detriment of low-income individuals. The cumulative effect of HHS' misuse of section 1115 authority is a climate in which the basic minimum Medicaid requirements – the core federal standards of the Medicaid program – are now up for grabs. States, in turn, propose more and more aggressive section 1115 demonstrations, sensing that HHS may allow all the rules to be broken.

Current Issues

HHS' reading of section 1115 authority has led to a surge of problematic section 1115 proposals and approvals. While it is difficult to generalize, there are at least five broad areas of great concern:

- **Reductions in eligibility**. Through section 1115 authority, states have requested and implemented reductions in eligibility that are clearly contrary to the objectives of the Medicaid program. Recently, Arizona requested section 1115 permission to partially implement the Medicaid Expansion. If approved it would be the first time a state received permission *not* to cover a mandatory coverage category, and it would set an extremely dangerous precedent.[5]
- **Reductions in services**. States have used section 1115 authority to cut services, and most alarmingly, to cut the mandatory services for children (known as EPSDT) which are the backbone of the Medicaid program for children. For example, it is impossible to understand what this could possibly demonstrate or how it could advance the objectives of the Medicaid program.
- **Barriers to care**. States have used section 1115 authority to erect barriers to care designed to save costs by indiscriminately ensuring that individuals cannot use their medical coverage. For example, HHS has allowed a number of states to impose heightened and mandatory copayments on individuals whose incomes are below the federal poverty level, even though Congress has explicitly stated its intent that this population group be subjected to only nominal and non-mandatory copayments. Other states are seeking permission to impose copayments on groups, such as children, that Congress has repeatedly enacted Medicaid laws exempting them from such payments. To make matters worse, copayments have already been heavily studied, and all studies conclude that copayments cause low income people to avoid necessary care.
- **Managed care for vulnerable populations**. The most recent troubling trend in state section 1115 proposals are attempts to save money by forcing vulnerable populations – such as older adults, persons with disabilities, and those who use home and community based services – into new managed care programs.

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[4] 42 U.S.C. § 1315(a)(1).

[5] Arizona 1115 demonstration amendment request *available at* http://www.azahcccs.gov/reporting/downloads/1115waiver/ChildlessAdultContinuationWaiver_DRAFT_09172012.pdf. For analysis of the legality of partial expansions, see NHeLP's letter to HHS, *available at* http://healthlaw.org/images/stories/NHeLP_Partial_Medicaid_Expandion_letter_to_CMS.pdf.

With over half of the states considering such programs, almost always on a statewide basis, it is difficult to imagine what is actually demonstrated in any state proposal.

- **Medicaid spending caps**. Perhaps the most dangerous section 1115 demonstrations are those that attempt to limit Medicaid growth through spending caps. These proposals typically provide states with increased flexibility but create a maximum limit on federal Medicaid funding. This can be disastrous for states and individuals since, once the state hits the maximum spending limit, no more federal funding is available, regardless of how much health spending is needed. These proposals undermine the most basic objective of the Medicaid program: to create *shared* responsibility for on-going health care costs between the states and the federal government.

HHS' willingness to approve the above types of section 1115 demonstration requests not only violates the legal requirements of section 1115, but also leads to bad policies. For example, managed care has little experience with the vulnerable populations described above and there are dozens of transition problems with the section 1115 programs. Using section 1115 to actually test small scale managed care demonstrations could be beneficial. Unfortunately, HHS seems poised to skip the demonstration step that section 1115 is intended for and use it to replace the Congressionally enacted Medicaid rules on a statewide basis. In addition, spending caps will ultimately lead to less federal financing for state Medicaid programs, and state budgets will be overwhelmed. NHeLP is working to support state advocates who are working to stop problematic section 1115 proposals that are illegal and bad policy. In light of the Supreme Court's decision on health reform, we believe that there will be even greater pressure from the states on HHS to use the section 1115 waiver authority and this will present additional problems for advocates to deal with.

Silver Lining

While there have been recent problems with the use of section 1115 authority, there is a silver lining. On April 27, 2012, new HHS regulations went into effect implementing specific transparency requirements for the process by which states request and are approved for section 1115 demonstrations.[6] Previously state requests/approvals for section 1115 demonstrations were often vague, unavailable to the public, and devoid of consumer stakeholder input. The new section 1115 regulations mark an important step forward, requiring among other things:

- Specific content which must be included in all section 1115 proposals, including a specific listing of exceptions requested;
- Public web posting of all proposals prior to filing with HHS;
- Two state hearings offering stakeholders a chance to provide feedback on the proposal;
- 30-day comment period for stakeholders to submit feedback to the state on the proposal, after which the state may file the proposal with HHS;
- Summary of state stakeholder comments, including an explanation of why suggestions were not adopted, upon filing with HHS;
- Federal 30-day comment period after a state files with HHS, offering state stakeholders a chance to address whether their comments were included in the state comment period and reiterate concerns;
- Public web posting of application, approval, and other documents by HHS;

[6] Medicaid Program; Review and Approval Process for Section 1115 Demonstrations, 77 Fed. Reg. 11,678 (February 27, 2012).

- State consumer stakeholder forum conducted within 6 months of section 1115 demonstration implementation, allowing stakeholders a chance to address concerns with the demonstration, with additional forums to be conducted yearly thereafter; and
- Evaluation component to identify the effectiveness and impact of a demonstration.

Taken together, these requirements represent a real opportunity for section 1115 proposals to be designed with input from the impacted communities and to promote public transparency and accountability in connection with the process. It should come as no surprise that some states, for example California, are already developing proposals to avoid the sunshine requirements.[7] Thus, it remains to be seen whether states will simply go through the motions without meaningfully addressing consumer stakeholder concerns and how vigorously HHS will ultimately enforce these requirements.

Conclusion

Section 1115 authority was created to allow states to find innovative ways to *help* Medicaid beneficiaries when the Medicaid rules interfered. Instead, the authority is being used more and more to *harm* beneficiaries as states evade the rules to cut costs. This is a serious threat to the integrity of the Medicaid program, which is premised on firm federal requirements upon which states have flexibility to build additional coverage. Section 1115 authority should not – and cannot legally – be a way to shift to a state-centered Medicaid program with shapeless federal standards.

[7] California has requested section 1115 authority to transition children from the Children's Health Insurance Program to Medicaid IN PHASES THAT REQUIRE A WAIVER OF COMPARABILITY. However, California did not SEEK A NEW WAIVER OR provide the 30-day comment period required by the new 1115 regulations for this section 1115 request. Instead, California has attempted to characterize the new proposal for transitioning children as an amendment to an existing section 1115 program that allows for an early expansion of Medicaid for adults in preparation for 2014. California is attempting to avoid the 30-day comment period REQUIRED for THE new section 1115 WAIVER program by claiming the new proposal for children is merely a change to an unrelated program for adults.

About Us

The National Health Law Program protects and advances the health rights of low income and underserved individuals. The oldest non-profit of its kind, NHeLP advocates, educates and litigates at the federal and state level.

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