



## Waiver of Medicaid Requirements – A Quick Review

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The new Secretary of Health and Human Services (HHS) has signaled a willingness to allow states to reshape and limit their Medicaid programs.<sup>1</sup> For this, the Secretary will most certainly rely, at least in part, on section 1115 of the Social Security Act. Section 1115 authorizes the Secretary to waive some requirements of the Medicaid Act so that states can test novel approaches to improving medical assistance for low-income people. This issue brief provides a quick review of section 1115.<sup>2</sup>

### ***Medicaid's ground rules***

Congress created the Medicaid program in 1965 by adding Title XIX to the Social Security Act.<sup>3</sup> States do not have to participate in Medicaid. If a state does participate, however, "it must comply with all provisions of the federal Medicaid statute and its implementing regulations, except insofar as individual requirements may be waived by the federal government."<sup>4</sup>

### ***Section 1115 of the Social Security Act***

In some circumstances, a state can ignore provisions of the Medicaid Act and still receive federal payments. Section 1115 of the Social Security Act provides limited authority to the Secretary of HHS to waive Medicaid provisions To be approved:

- The waiver must implement an "experimental, pilot, or demonstration" project;
- The waiver must be limited to Medicaid provisions in 42 U.S.C. § 1396a;
- The experiment must be likely to promote Medicaid's objectives; and
- The waiver of Medicaid's requirements must be limited to the extent and period needed to carry out the experiment.<sup>1</sup>

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<sup>1</sup> 42 U.S.C. § 1315(a) (codification of section 1115).

*a. The need for an experiment*

The first requirement is for the state to propose an experiment. At the time of its enactment, Congress described section 1115 to test new ideas and address the problems of public welfare recipients. Congress further expressed the expectation that projects would be “selectively approved.”<sup>5</sup> According to Congress, “States can apply to HHS for a waiver of existing law to test a unique approach to the delivery and financing of services to Medicaid beneficiaries ... contingent upon development of a detailed research methodology and comprehensive evaluation for the demonstration.”<sup>6</sup>

*b. Waiving only provisions of 1396a*

Section 1115 only allows the Secretary to waive only provisions contained in one of the over forty-five sections of the Medicaid Act.<sup>7</sup> Congress has also limited the Secretary’s authority to waive some provisions within this section.<sup>8</sup> For example, Medicare cost sharing requirements and spousal impoverishment protections cannot be ignored pursuant to section 1115.<sup>9</sup> It is also important to keep in mind that other laws contain protections that the Secretary cannot waive at all, such as the Constitution’s Due Process Clause, the Rehabilitation Act and the Americans with Disabilities Act.<sup>10</sup>

*c. Promoting objectives of the Medicaid Act*

Section 1115 requires the waiver to be consistent with, and in fact likely to, promote the objectives of the Medicaid Act. In other words, the Secretary has not been given permission to ignore congressional dictates when granting approvals. As stated in the Medicaid Act, the purpose of Medicaid is to furnish medical assistance to individuals whose incomes and resources are insufficient to meet the costs of necessary medical care and to furnish such assistance and services to help these individuals attain or retain the capacity for independence and self-care.<sup>11</sup> A waiver that does not promote the provision of health care would not be permissible.

It is also important to keep in mind that other laws contain protections that the Secretary cannot waive at all, such as the Constitution’s Due Process Clause and the Americans with Disabilities Act. A district court in Hawaii has ruled that the Secretary cannot waive anti-discrimination provisions pursuant to section 1115.<sup>12</sup>

### ***Judicial Review of Section 1115 Approvals***

Courts have determined that section 1115 waivers are subject to judicial review and that the “administrative record” must show that HHS considered the relevant statutory factors when it approved the waiver.<sup>13</sup> Over the years, a number of courts have limited the scope of waivers allowable under section 1115. Among other things, courts have noted that

[section 1115] was not enacted to enable states to save money or to evade federal requirements but to test out new ideas and ways of dealing with the problems of public welfare recipients.... A simple benefits cut, which might save money, but has no research or experimental goal, would not satisfy this requirement.<sup>14</sup>

## Conclusion

Section 1115 of the Social Security Act gives the Secretary of HHS limited authority to approve Medicaid waivers. The waiver must be for an “experimental, demonstration, or pilot” project that is likely to promote the objectives of the Medicaid Act. Only certain Medicaid provisions can be waived, and the waiver can last only for the extent and period necessary. Otherwise, the approval is made without statutory authorization and judicial intervention may be needed.

## ENDNOTES

<sup>1</sup> See Letter from Thomas E. Price, Secretary of Health & Human Services, and Seema Verma, CMS Admin., to Dear Governor (undated 2017).

<sup>2</sup> For a more in-depth review of Section 1115 waivers, see [Background to Medicaid and Section 1115 of the Social Security Act](#).

<sup>3</sup> See 42 U.S.C. §§ 1396-1396w-5.

<sup>4</sup> *J.K. v. Dillenberg*, 836 F. Supp. 694, 696 (D. Ariz. 1993) (citing *Beltran v Myers*, 701 F.2d 91, 92 (9th Cir. 1983)).

<sup>5</sup> S. Rep. No. 87-1589, at 19-20, *reprinted in* 1962 U.S.C.C.A.N. 1943, 1961-62, 1962 WL 4692 (1962). See also Social Security Act Amendments of 1965, Pub. L. No. 80-97 (amending 42 U.S.C. § 1315(a)(1)).

<sup>6</sup> H. R. Rep. No. 3982, pt. 2 at 307-08 (1981).

<sup>7</sup> 42 U.S.C. § 1396a.

<sup>8</sup> See 42 U.S.C. §§ 1396-1396-1 and 1396b-1396w-5. For additional provisions, see Nat'l Health Law Program, *Provisions of the Medicaid Act that Cannot be Waived* (April 2017).

<sup>9</sup> See 42 U.S.C. §§ 1396a(a)(10)(E) (Medicaid for Medicare cost sharing) and 1396d(p)(4) (requiring states with section 1115 waivers to meet 1396a(a)(10)(E)). See 42 U.S.C. §§ 1396a(a)(51) (establishing community spouse protections) and 1396r-5(a)(4)(A) (applying spousal protections in states with section 1115 waivers).

<sup>10</sup> See *Burns-Vidlak v. Chandler*, 939 F. Supp. 765, 772 (D. Haw. 1996) (finding ADA and Rehabilitation Act not included in section 1396a and cannot be waived).

<sup>11</sup> See 42 U.S.C. § 1396.

<sup>12</sup> See *Burns-Vidlak v. Chandler*, 939 F. Supp. 765, 772 (D. Haw. 1996) (finding ADA and Rehabilitation Act not included in section 1396a and cannot be waived).

<sup>13</sup> Regulations require the state to provide a public comment period on a waiver before it is submitted to HHS and to respond to those comments. A public comment period is also provided after a waiver is submitted to HHS. For more discussion, see Nat'l Health Law Prog., *Section 1115 Waiver Requests: Transparency and Opportunity for Public Comment* (April 2017).

<sup>14</sup> *Beno v. Shalala*, 30 F.3d 1057, 1069 (9th Cir. 1994) (citation and quotations omitted).