

Section 1115 Demonstration Authority: Medicaid Act Provisions That Prohibit a Waiver

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Section 1115 of the Social Security Act (SSA) provides the Secretary of Health and Human Services (HHS) with limited authority to waive requirements of the Medicaid Act. Section 1115 states, in relevant part:

- (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 subchapter . . . XIX of this chapter [*i.e.*, Medicaid], . . . in a State or States -

(1) the Secretary **may waive compliance with any of the requirements of section . . . 1396a** of this title, . . . 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 . . . 1396b of this title, . . . shall, to the extent and for the period prescribed by the Secretary, be regarded as expenditures under the State plan

SSA, § 1115, 42 U.S.C. § 1315a (emphasis added). This issue brief addresses requirements that appear in 1396a, but nevertheless cannot be waived by the Secretary.¹

By its terms, § 1115(a)(1) authorizes the Secretary to waive only those Medicaid requirements contained in 42 U.S.C. § 1396a. Section 1396a describes the mandatory and optional components of the state Medicaid plan and, as such, is a pivotal Medicaid provision. That said, the Medicaid Act is a complex and lengthy statute that begins with § 1396 (Medicaid and CHIP payment and access commission) and § 1396-1 (appropriations and purpose) and goes through § 1396w-5 (addressing health disparities). Many of these provisions impose important requirements on states. For an example of a provision found outside of § 1396a, see 42 U.S.C. § 1396d(a)(29), which prohibits Medicaid payments for any individual under 65 years old who is

¹ With the exception of § 1115, this memo refers to provisions as they appear in the United States Code (U.S.C.), as opposed to the Social Security Act.

a patient in an institution for mental diseases (facilities with more than 16 beds primarily serving persons with mental diseases).

All told, there are 52 provisions outside of § 1396a. The requirements appearing in these provisions cannot be waived unless they are clearly incorporated by reference into § 1396a. Notably, even when referred to in § 1396a, some requirements cannot be waived according to their own terms or the terms of a separate Medicaid Act provision. The chart below lists such requirements. The chart will be updated as additional provisions are identified.

Medicaid Act Requirements That Cannot Be Waived Under 42 U.S.C. § 1315	
Subsection of § 1396a	Provision that Prohibits its Waiver
(a)(10)(E) – Medicare cost sharing for qualified Medicare beneficiaries as defined in § 1396d(p)	§ 1396d(p)(4) – requires state operating under § 1115 waiver to meet requirement of a(a)(10)(E) as if it were operating under a state plan rather than a waiver
(a)(14) – enrollment fee, premium, copayment, and cost sharing limits only as provided in § 1396o.	<p>Regarding enrollment fees, premiums: § 1396o-1 – independently requires the state plan to contain its mandatory provisions and is not mentioned in § 1396a</p> <p>Regarding copayments, similar charges: § 1396o(f) – “Under any waiver authority,” no deduction, copayment or similar charge may be imposed unless the demonstration project meets five tightly circumscribed criteria (maintained under § 1396o-1(a)).</p>
(a)(28) – requires Medicaid nursing homes to comply with §§ 1396r(b)-(d), 1396r(f)(7), and the state to comply with requirements of § 1396r(e), 1396r(g), 1396r(h)(2)(B), 1396r(h)(2)(D)	§ 1396r – Nursing Home Reform Act: Establishes comprehensive requirements for nursing homes, states, and Secretary of HHS to improve and maintain quality of nursing home care and resident rights, including instances where provisions can be waived and the circumstances for granting those waivers
(a)(34) – retroactive coverage	§ 1396d(a) – independently requires medical assistance to include care and services if provided in or after the third month before the month of application
(a)(42) – requirements for state auditing for improper payments & recoupments	§ 1396a(42)(B) – applies under any waiver of the state plan

(a)(46)(B) – verification of citizenship & nationality for eligibility purposes (including reasonable opportunity)	§ 1396a note (Pub. L. No. 111-3, 123 Stat. 8, CHIPRA Reauth. Act): Notwithstanding § 1115, the Secretary may not waive requirements of § (a)(46)(B).
(a)(51) – community spouse protection requirements of § 1396r-5	§ 1396r-5(a)(4)(A) requires states operating under § 1115 waiver to comply with the requirements of the section in the same manner as would be required if the state were operating under a state plan.
(a)(52) – Transitional Medical Assistance requirements of § 1396r-6	§ 1396r-6(a)(1) – provides that the state must provide for TMA “notwithstanding any other provision of this subchapter” & specifies the circumstances for a waiver
(a)(63) - eligibility for those deemed eligible because they meet 1996-AFDC eligibility standards based on § 1396u-1	§ 1396u-1(g) - provides that “[t]he provisions of this section shall apply notwithstanding any other provision of this chapter.”
(a)(69) – Medicaid program integrity requirements established under § 1396u-6	§ 1396u-6(b)(1) –requires state operating § 1115 waiver to review actions of providers for fraud, waste, and abuse
(a)(74) – maintenance of effort under ACA in accordance with § 1396a(gg)	§ 1396a(gg)(2) – requires continuation of eligibility standards, methodologies, and procedures for children under age 19 through Sept. 30, 2019, MOE under any waiver of the plan
(a)(e)(14) [2d] – required use of modified adjusted gross income (MAGI), no disregards, and no asset test for determining eligibility of most population groups	§ 1396a(e)(14)(A), (B), (C) – requires MAGI, no disregards, and no asset test “under any waiver”
(a)(l) – coverage for children, infants, & pregnant women based on income according to federal poverty level	§ 1396a(l)(4)(A) – in the case of any state with § 1115 waiver, the Secretary must require the state to provide medical assistance to these groups of children, infants, and pregnant women “in the same manner” as under a state plan

NOTE: In addition to the § 1396a limit, § 1115 places other restrictions on the Secretary’s authority. For example, the project must be an experiment that is likely to promote the objectives of the Medicaid Act. Also, the Secretary cannot waive the U.S. Constitution or other statutes, such as the Americans with Disabilities Act and Section 504 of the Rehabilitation Act.