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August 2, 2017

VIA ELECTRONIC SUBMISSION

Centers for Medicare & Medicaid Services
Department of Health and Human Services
P.O. Box 8016
Baltimore, MD 21244-8016

Re: Proposed modifications to Kentucky HEALTH demonstration application

Dear Sir/Madam:

The National Health Law Program (NHeLP) is a public interest law firm working to advance access to quality health care and protect the legal rights of low-income and under-served people. We commented on the initial Kentucky HEALTH demonstration application on October 7, 2016. We incorporate that letter here and appreciate the opportunity to provide these additional comments on the proposed modifications to the application.

We support Kentucky's decision to accept federal funds to cover low-income adults through Medicaid. However, as discussed in detail in our previous comments, NHeLP recommends that the Department of Health & Human Services (HHS) not approve the Kentucky HEALTH demonstration. As proposed, Kentucky HEALTH does not comply with the requirements of § 1115 of the Social Security Act and will harm Medicaid enrollees' access to vital health care services. The modifications only exacerbate the problems with the initial application, and as a result, should not be approved.

Work requirements

Kentucky is seeking to impose a work requirement on individuals enrolled in Kentucky HEALTH. In its initial application, Kentucky proposed requiring individuals to participate in specified community engagement or employment activities for: 5 hours per week during months 4 to 6 of enrollment; 10 hours per week during months 6 to 9; 15 hours per week during months 9 to 12; and 20 hours per week thereafter. Now, having determined that it would be too difficult to administer this kind of graduated requirement, Kentucky is requesting permission to impose a more

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onerous, standard requirement of 20 hours per week for all individuals.

Under § 1115 and other relevant law, HHS has no authority to approve any waiver permitting Kentucky to condition Medicaid eligibility on compliance with work activities (and, thus, has never done so). As we set forth in our previous letter, work requirements are an illegal condition of eligibility beyond the Medicaid eligibility criteria clearly enumerated in federal law. Medicaid is a medical assistance program, and although states have flexibility in designing and administering their Medicaid programs, the Medicaid Act requires that they provide medical assistance to all individuals who qualify under federal law. As courts have held, additional eligibility requirements are illegal.[1]

Section 1115 cannot be used to short circuit these Medicaid protections because there is no basis for finding that work search requirements are likely to assist in promoting the objectives of the Medicaid Act.[2] The purpose of Medicaid is to enable states to furnish medical assistance to low-income individuals who cannot afford the costs of medically necessary services and to furnish rehabilitation and other services to help such individuals attain or retain capability for independence or self-care.[3] Conditioning Medicaid eligibility on completion of a work requirement gets it exactly backwards by blocking access to care and services that help individuals attain and retain independence or self-care and, as a result, be able to work. Research confirms that *Medicaid coverage allows individuals to obtain and maintain employment*. For example, more than half of individuals enrolled in the Medicaid expansion in Ohio reported that Medicaid coverage has made it easier to continue working. Among enrollees who did not have a job, three-quarters reported that Medicaid coverage made it easier for them to look for one.[4]

While the application indicates that the work requirement will not apply to "medically frail" individuals, evidence from other programs with similar exemptions shows that, in practice, individuals with disabilities are not exempted as they should be—often due to verification requirements—and are more likely than other individuals to lose benefits.[5] Numerous studies of state Temporary Assistance for Needy Families (TANF) programs have found

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[1] *See, e.g.*, *Camacho v. Texas Workforce Comm'n,* 408 F.3d 229, 235 (5th Cir. 2005) (enjoining Texas regulation that terminated Medicaid coverage of TANF recipients who were substance abusers or whose children were not getting immunizations or check-ups or were missing school because regulation was inconsistent with Medicaid and TANF statutes); *see also Dalton v. Little Rock Family Planning Services*, 516 U.S. 474, 478 (1996) (holding state coverage of abortion services needed to be consistent with federal provisions setting forth the circumstance for that coverage).

[2] By contrast, as far back as the 1970s, states obtained section 1115 waivers to test work requirements in the AFDC program (which, unlike Medicaid, does have work promotion as a purpose of the program). These waivers required states to conduct "rigorous evaluations of the impact," typically requiring the random assignment of one group to a program operating under traditional rules and another to a program using the more restrictive waiver rules. United States Dep't of Health & Human Servs., *State Welfare Waivers: An Overview*, http://aspe.hhs.gov.hsp/isp/waiver2/waivers.htm.

[3] 42 U.S.C. § 1396-1.

[4] Ohio Dep't of Medicaid, *Ohio Medicaid Group VII Assessment: A Report to the Ohio General Assembly*, (2017), http://medicaid.ohio.gov/Portals/0/Resources/Reports/Annual/Group-VIII-Assessment.pdf.

[5] *See, e.g.*, Andrew J. Cherlin et. al., *Operating within the Rules: Welfare Recipients' Experiences with Sanctions and Case Closings*, 76 Soc. Serv. Rev. 387, 398 (finding that individuals in "poor" or "fair" health were more likely to lose TANF benefits than those in "good," "very good," or "excellent health").

that participants with physical and mental health issues are disproportionately likely to be sanctioned for not completing the work requirement.[6]

Evidence from the Supplemental Nutrition Assistance Program (SNAP) is particularly relevant, as the State has indicated that the Kentucky HEALTH work requirement will now "align" with the SNAP work requirement. Researchers have expressed concern that states might incorrectly determine that many of the nearly 20% of all SNAP participants who have a disability, but do not receive disability benefits, are subject to the work requirement.[7] One study from Franklin County, Ohio found that one-third of individuals referred to a SNAP employment and training program in order to keep their benefits reported a physical or mental limitation, and 25% of these individuals indicated that the condition limited their daily activities. Additionally, almost 20% of the individuals had filed for SSI or SSDI within the previous two years.[8]

The work requirement will be particularly counterproductive for the many individuals with chronic conditions that affect their ability work but do not qualify them for disability benefits. A recent study by the Kaiser Family Foundation found that 35% of adult Medicaid enrollees who were not receiving disability benefits and did not have a job reported illness or disability as their primary reason for not working.[9]

Because conditioning Medicaid eligibility on completion of the work requirement will disqualify individuals with chronic and disabling conditions, the requirement implicates the civil rights protections contained in the Americans with Disabilities Act (ADA) and § 504 of the Rehabilitation Act.[10] These laws make it illegal for states to take actions that have a discriminatory impact on people with disabilities, and they cannot be waived under § 1115 or under any other authority of the Secretary.[11]

In addition, extensive research reveals that a mandatory work requirement does not effectively increase self-sufficiency. Studies of cash assistance programs have already established that a work requirement does little to increase stable, long-term employment and does not decrease poverty.[12] In fact, work requirements have had the reverse effect,

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[6] *See, e.g.*, Yeheskel Hasenfeld et al., *The Logic of Sanctioning Welfare Recipients: An Empirical Assessment* (June 2004) (Departmental Paper, University of Pennsylvania School of Social Policy and Practice), http://repository.upenn.edu/cgi/viewcontent.cgi?article=1028&context=spp_papers.

[7] *See* Michael Morris et al., Burton Blatt Inst. at Syracuse Univ., *Impact of the Work Requirement in Supplemental Nutrition Assistance (SNAP) on Low-Income Working-Age People with Disabilities,* 4, 14 (2014).

[8] Ohio Association of Foodbanks, *Comprehensive Report: Able-Bodied Adults Without Dependents* (2015), http://admin.ohiofoodbanks.org/uploads/news/ABAWD_Report_204-2015-v3.pdf.

[9] Rachel Garfield, Kaiser Family Found., *Understanding the Intersection of Medicaid and Work* (2017), http://files.kff.org/attachment/Issue-Brief-Understanding-the-Intersection-of-Medicaid-and-Work.

[10] 42 U.S.C. § 12312; Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (prohibiting recipients of federal funds from discriminating on the basis of disability).

[11] See *Burns-Vidlak v. Chandler*, 939 F. Supp. 765, 772 (D. Haw. 1996).

[12] LaDonna Pavetti, Ctr. on Budget & Pol'y Priorities, *Work Requirements Don't' Cut Poverty, Evidence Shows* (2016); Sandra K. Danziger et al., *From Welfare to a Work-Based Safety Net: An Incomplete Transition*, 35 J. Pol'y Analysis & Management 231, 234 (2016).

leading to an increase in extreme poverty in some areas of the country, as individuals who do not secure employment lose their eligibility for cash assistance.[13]

There is no reason to expect better outcomes in Kentucky HEALTH, particularly given the poor economic conditions in many areas of the State. In fact, recognizing the lack of available employment, the U.S. Department of Agriculture waived the work requirement and time limits for "able-bodied adults without dependent children" enrolled in SNAP in 100 of the 120 counties in Kentucky.

In it is initial application, Kentucky pointed to a preliminary evaluation of the SNAP work requirement in Maine as evidence of the effectiveness of a mandatory work requirement. However, two recent analyses show that the evaluation was based on flawed and unreliable data, and as a result, reached flawed and misleading conclusions.[14]

A far more productive approach would be to connect Kentucky HEALTH enrollees to properly-resourced voluntary employment programs, an activity that does not need waiver approval from CMS. Studies show that these voluntary employment programs increase employment and income among low-income individuals. For example, a rigorous evaluation of Jobs Plus, a voluntary employment program for public housing residents, found that the program produced substantial and sustained gains in earnings when fully implemented.[15] The State also has the option to offer supportive employment services under § 1915(i) of the Social Security Act.

In summary, the work requirement stands Medicaid's purpose on its head by creating barriers to coverage and the pathway to health that the coverage represents. The end result of this policy will be fewer people with Medicaid coverage and more uninsured people delaying treatment and later seeking uncompensated care in hospitals and federally qualified health centers. There will be more gaps in coverage, meaning more expensive treatment when eligibility is eventually regained. Hospitals and community health centers will suffer financially as they are expected to treat more people with chronic or acute illness with less funding. For these and other reasons, HHS has consistently denied states' requests to impose a work requirement on individuals who are seeking medical assistance through the Medicaid program.

Finally, we note that most individuals who will be subject to the requirement are already working and do not need additional "encouragement" to obtain or maintain employment.[16]

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[13] *Id.*

[14] James Mayall, *Incomplete and Misleading: Analysis of the Maine Office of Policy and Management's "Welfare to Work" Study* (2017) (published by the Maine Center on Economic Policy); Dottie Rosenbaum & Ed Bolen, Ctr. On Budget & Pol'y Priorities, *SNAP Reports Present Misleading Findings on Impact of Three-Month Time Limit* (2016), http://www.cbpp.org/research/food-assistance/snap-reports-present-misleading-findings-on-impact-of-three-month-time.

[15] Howard Bloom et al., MDRC, *Promoting Work in Public Housing: The Effectiveness of Jobs-Plus* (2005), https://www.doleta.gov/research/pdf/jobs_plus_3.pdf; James A. Riccio, MDRC, *Sustained Earnings Gains for Residents in a Public Housing Jobs Program: Seven-Year Findings from the Jobs-Plus Demonstration* (2010), http://files.eric.ed.gov/fulltext/ED514703.pdf.

[16] Rachel Garfield, Kaiser Family Found., *Understanding the Intersection of Medicaid and Work* (2017), http://files.kff.org/attachment/Issue-Brief-Understanding-the-Intersection-of-Medicaid-and-Work (finding that

Lock-Out Penalty for Failure to Report Information

As noted above, the Medicaid Act requires states to provide Medicaid coverage with reasonable promptness to all individuals who meet the eligibility criteria outlined in the statute. States may not impose additional eligibility criteria.[17] Kentucky is now seeking to waive these protections to punish individuals who do not timely report changes in income or employment or misreport their employment hours by prohibiting them from re-enrolling in Medicaid for 6 months.

The lock-out penalty is not approvable under § 1115. States have the ability to ensure that only eligible enrollees receive medical assistance. For example, if Kentucky believes that enrollees are routinely not reporting changes in income that affect their eligibility, it may implement periodic data matching to proactively detect such changes.[18]

Similarly, to the extent that Kentucky is targeting fraudulent conduct, existing federal law gives states ample authority to address fraud among Medicaid enrollees. States must refer cases of suspected fraud to law enforcement officials.[19] Individuals convicted of fraud face substantial fines and imprisonment and may be prohibited from enrolling in Medicaid for up to one year.[20] There is no basis for allowing Kentucky to deny Medicaid coverage to eligible enrollees who have not been convicted of any wrongdoing. In addition, the State's focus on enrollee fraud is misplaced, as estimates suggest that enrollees commit only 10% of all health care fraud.[21]

Equally importantly, the lock-out policy does not promote the objectives of the Medicaid Act and lacks any experimental value. The State's modification request described the lock-out penalty as a "learning tool" that will "further prepare enrollees for commercial market insurance policies." The lock-out penalty cannot possibly serve this purpose, as commercial plans do not have similar reporting requirements or penalty periods. Even if they did, familiarizing enrollees with private insurance plans is not one of the objectives of the Medicaid program, particularly when doing so means eliminating individuals' Medicaid coverage. There is no question that the lock-out penalty will reduce access to coverage for Kentucky HEALTH enrollees. Low-income individuals face a variety of circumstances, ranging from shifting monthly income to frequent household moves, that make it very difficult to meet onerous reporting requirements. The good cause exemptions included in the State's modification request capture only a handful of these circumstances.

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almost 80% of adults who are enrolled in Medicaid, but do not receive SSI, live in families with at least one worker, and almost 60% are working themselves).

[17] *See supra,* note 1.

[18] *See, e.g.*, Ctrs. For Medicare & Medicaid Servs., Notice of Opportunity for Hearing on Compliance of Alabama State Plan Provisions Concerning Provision of Terminating Coverage and Denying Reenrollment to Otherwise Eligible Individuals Based on a Determination of Fraud or Abuse With Titles XI and XIX (Medicaid) of the Social Security Act, 82 Fed. Reg. 11034, 11036 (Feb. 17,. 2017).

[19] 42 C.F.R. §§ 455.15.

[20] 42 U.S.C. § 1320a-7b(a).

[21] Sara Rosenbaum et al., George Washington Univ. Dep't of Health Policy, *Health Care Fraud*: *An Overview* 2 (2009), https://publichealth.gwu.edu/departments/healthpolicy/DHP_Publications/pub_uploads/dhpPublication_EFDAD1BC-5056-9D20-3D3D36632A4F2163.pdf.

In essence, the State has realized that it will be expensive and difficult to gather the information needed to administer the monthly premium and employment requirements. In response, Kentucky is now seeking to shift this administrative burden onto Kentucky HEALTH enrollees and to penalize those who understandably fail to navigate the overly complex system that it has created.

No Expansion of Presumptive Eligibility Sites

In its initial application, Kentucky indicated that it intended to expand presumptive eligibility sites as a way to minimize the harmful consequences of waiving retroactive eligibility. The State is now rescinding its pledge, claiming that increasing presumptive eligibility sites would be difficult for both providers and enrollees and is not necessary to ensure that individuals have timely access to coverage.

As noted in our earlier comments, which we have incorporated here, the State's request to waive retroactive eligibility is not approvable under § 1115, as it has no experimental value and does not promote the objectives of the Medicaid Act. Waiving retroactive eligibility will reduce access to coverage, increase medical debt among low-income individuals, and increase financial losses among providers. Limited access to presumptive eligibility will, as the State conceded in its initial application, only exacerbate these problems.

Kentucky is now contending that its "Fast Track" process, which will allow individuals who pre-pay their monthly premium to have coverage effective the first day of the month during which they submit an application, will be a sufficient substitute for increasing presumptive eligibility sites. This is certainly not the case, as many applicants will not be able to pre-pay their monthly premium for a variety of reasons. Moreover, as discussed in detail in our previous comments, the premium requirement itself cannot be approved under § 1115.

Conclusion

In summary, while NHeLP supports the use of § 1115 to implement experiments that the provision authorizes, we strongly object to any efforts to use § 1115 to skirt essential provisions that Congress has placed in the Medicaid Act to protect Medicaid beneficiaries and ensure that the program operates in the best interests of the population groups described in the Act. As demonstrated in our prior comments and the comments above, the Kentucky HEALTH application contains numerous provisions that are inconsistent with the standards of § 1115 and other provisions of law and will reduce access to Medicaid coverage.[22] We appreciate your consideration of our comments. If you have questions about these comments, please contact Catherine McKee (mckee@healthlaw.org) or Jane Perkins (perkins@healthlaw.org).

[22] In its initial application, Kentucky estimated that over 55,000 adults will lose coverage if Kentucky HEALTH is approved. While the State did not provide an updated estimate that accounts for the modifications to the application, the updated budget neutrality model confirms that the State expects enrollment in Kentucky HEALTH to decrease even further as a result of the modifications.

Respectfully submitted,

Jane Perkins
Legal Director