December 1, 2017

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

Re: Amendment to New Hampshire's Health Protection Program Premium Assistance Project (#11-W-00298/1)

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 appreciate the opportunity to provide these comments on the proposed amendments to New Hampshire's Health Protection Program Premium Assistance Project.

NHeLP recommends that the Department of Health & Human Services (HHS) not approve the amendment adding work requirements as a condition of eligibility. This amendment does not comply with the requirements of § 1115 of the Social Security Act and will harm Medicaid enrollees' access to vital health care services.

I. HHS authority and § 1115

To be approved pursuant to § 1115, New Hampshire's application must:

- propose an "experiment[], pilot or demonstration,"
- waive compliance only with requirements in 42 U.S.C. § 1396a,
- be likely to promote the objectives of the Medicaid Act, and
- be approved only "to the extent and for the period necessary"

to carry out the experiment.[1]

The purpose of Medicaid is to enable states to furnish medical assistance to individuals whose income is too low 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.[2] New Hampshire's proposal to impose work requirements cannot be approved because it is inconsistent with the provisions of § 1115.

Work Requirements

New Hampshire is seeking to impose a work requirement on individuals newly eligible under the Medicaid expansion.[3] The requirement begins at 20 hours per week upon initial application for benefits and increases based on the number of months an applicant has been enrolled in Medicaid in their lifetime, rising to 25 hours per week after receiving 12 months of benefits and to 30 hours per week after 24 months of benefits.

Under § 1115 and other relevant law, HHS has no authority to approve any waiver permitting New Hampshire to condition Medicaid eligibility on compliance with work activities (and, thus, has never done so). 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.[4]

Section 1115 cannot be used to short circuit these Medicaid protections because there is no basis for finding that work requirements are likely to assist in promoting the objectives of the Medicaid Act.[5] 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.[6] Conditioning Medicaid eligibility on completion of work activities gets it exactly backwards by blocking access to care and services that help individuals be able to work. Research

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[1] 42 U.S.C. § 1315(a).

[2] See 42 U.S.C. § 1396-1.

[3] 42 U.S.C. § 1396a(a)(10(A)(i)(VIII).

[4] *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).

[5] 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.

[6] 42 U.S.C. § 1396-1.

confirms that Medicaid coverage allows individuals to obtain and maintain employment.[7] 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.[8] Imposing work requirements will reverse this progress and cause individuals to lose coverage.[9]

Moreover, the vast majority of individuals enrolled in Medicaid already work or have good reason for not working.[10] A recent study by the Kaiser Family Foundation found that adult Medicaid enrollees who were not receiving disability benefits and did not have a job were not working because they were: going to school (18%); taking care of their home or family (28%); retired (8%); unable to find work (8%); or dealing with illness or disability (35%).[11]

The work requirements will also pose a barrier to coverage even for individuals who are working.[12] Data shows that most low-income workers have jobs with variable and unpredictable schedules, for instance in construction, retail, or food service, which can make it difficult to comply with the state's weekly-hours requirements.[13] Moreover, even individuals who do comply with the

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[7] Renuka Tipirneni et al., Institute for Healthcare Policy and Innovation, University of Michigan, *Medicaid Expansion Helped Enrollees Do Better at Work or in Job Searches*, (2017), available at http://ihpi.umich.edu/news/medicaid-expansion-helped-enrollees-do-better-work-or-job-searches; Louija Hou et al., "Working Paper No. 22170: The Effect of the Patient Protection and Affordable Care Act Medicaid Expansions on Financial Well-Being," National Bureau of Economic Research, (2016), available at http://nber.org/papers/w22170; Nicole Dissault, Maxim Pinkovskiy, and Basit Zafar, *Is Health Insurance Good for Your Financial Health?* Liberty Street Economics Blog, June 6, 2016 online at http://libertystreeteconomics.newyorkfed.org/2016/06/is-health-insurance-good-for-yourfinancial-health.html#.V4lHI6It7VJ.

[8] 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.

[9] LaDonna Pavetti, Michelle Derr, and Emily Sama Martin, *Assisting TANF Recipients Living with Disabilities to Obtain and Maintain Employment: Conducting In-Depth Assessments*, (2008); Robert Rector, Heritage Foundation, *Work Requirements in Medicaid Won't Work. Here's a Serious Alternative* (2017), available at: http://www.heritage.org/health-care-reform/commentary/work-requirements-medicaid-wont-work-heres-serious-alternative; Hannah Katch, Center on Budget and Policy Priorities, *Medicaid Work Requirements Would Limit Health Care Access Without Significantly Boosting Employment*, (2016), available at: http://www.cbpp.org/research/health/medicaid-work-requirement-would-limit-health-care-access-without-significantly.

[10] 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 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).

[11] *Id*.

[12] *See e.g.*, Julia B. Isaacs, Michael Katz, and David Kassabian, *Changing Policies to Streamline Access to Medicaid, SNAP, and Child Care Assistance*, Urban Institute, March 2016, http://www.urban.org/sites/default/files/publication/78846/2000668-Changing-Policies-to-Streamline-Access-to-Medicaid-SNAP-and-Child-Care-Assistance-Findings-from-the-Work-Support-Strategies-Evaluation.pdf

[13] Susan J. Lambert, Peter J. Fugiel and Julia R. Henly, *Precarious Work Schedules among Early-Career Employees in the US: A National Snapshot*, University of Chicago, (2014) available at https://ssascholars.uchicago.edu/sites/default/files/work-scheduling-study/files/lambert.fugiel.henly_.precarious_work_schedules.august2014_0.pdf; Stephanie Luce, Sasha

weekly-hours requirements will have to verify their hours every month to maintain their eligibility.

We also have concerns that the harms from work requirements will fall disproportionately on individuals with chronic health conditions. While New Hampshire's application indicates that the work requirement will not apply to individuals who are "temporarily unable to participate in the requirements . . . due to illness or incapacity," the State requires certification from a physician, an advanced practice registered nurse, a behavioral health professional, physician assistant or psychologist to qualify for the exemption. Evidence from other programs with similar exemptions shows that, in practice, individuals with disabilities are not exempted as they should be – often due to strenuous verification requirements like those proposed here – and are more likely than other individuals to lose benefits.[14] Numerous studies of state Temporary Assistance for Needy Families (TANF) programs have found that participants with physical and mental health issues are disproportionately likely to be sanctioned for not completing the work requirement.[15]

Evidence from the Supplemental Nutrition Assistance Program (SNAP) demonstrates similar outcomes. 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.[16] 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.[17] In another example, when Georgia reinstated the SNAP work requirement and time limits for "able-bodied adults without dependents" in 2016, the State found that 62% of nearly 12,000 individuals subject to the requirement were disenrolled after only three months.[18] State officials acknowledged that hundreds of enrollees had been wrongly classified as

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Hammad and Darrah Sipe, Retail Action Project, *Short Shifted,* September 2014, http://retailactionproject.org/wp-content/uploads/2014/09/ShortShifted_report_FINAL.pdf; Liz Ben-Ishai, CLASP, *Volatile Job Schedules and Access to Public Benefits*, September 2015, http://www.clasp.org/resources-and-publications/publication-1/2015.09.16-Scheduling-Volatility-and-Benefits-FINAL.pdf

[14] *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"); Vicki Lens, *Welfare and Work Sanctions: Examining Discretion on the Front Lines*, 82 Soc. Serv. Review 199 (2008).

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

[16] *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).

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

[18] *Correction: Benefits Dropped Story*, U.S. News & World Report, (May 26, 2017), https://www.usnews.com/news/best-states/georgia/articles/2017-05-25/work-requirements-drop-thousands-in-georgia-from-food-stamps.

"able-bodied" when they were actually unable to work.[19]

Because conditioning Medicaid eligibility on completion of the work requirement will disproportionately harm 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.[20] 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.[21]

Furthermore, evidence shows that in other public benefits programs, states disproportionately impose sanctions for failure to comply with program rules on African American individuals. In one study based on experimental survey and actual case data, researchers found that African American beneficiaries were more likely to be sanctioned for noncompliance than white beneficiaries,[22] raising concerns that New Hampshire's proposal will increase racial disparities in the state.

As this evidence demonstrates, the inevitable outcome of these work requirements is that large numbers of individuals, including those who are already working, will lose health insurance coverage,[23] an outcome that is directly at odds with the objectives of the Medicaid Act. Furthermore, it is well-documented that gaps in coverage substantially worsen health outcomes.[24]

In addition to the dramatic harms work requirements will cause, extensive research reveals that a mandatory work requirement is also ineffective at increasing 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.[25] In fact, work requirements have

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[19] *Id*.

[20] 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).

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

[22] Sanford F. Schram, Joe Soss, Richard C. Fording and Linda Houser, *Deciding to Discipline: Race, Choice, and Punishment at the Frontlines of Welfare Reform*, 74 Am. Soc. Rev. 398 (2009).

[23] Leighton Ku and Erin Brantley, *Medicaid Work Requirements: Who's At Risk?* Health Affairs Blog, Apr. 12, 2017, http://healthaffairs.org/blog/2017/04/12/medicaid-work-requirements-whos-at-risk/)

[24] Benjamin D. Sommers, Atul A. Gawande, and Katherine Baicker, *Health Insurance Coverage and Health — What the Recent Evidence Tells Us*, 377 New England Journal of Medicine 586 (2017), available at http://www.nejm.org/doi/full/10.1056/NEJMsb1706645; A.G. Hall, J.S. Harman, and J. Zhang, *Lapses in Medicaid coverage: impact on cost and utilization among individuals with diabetes enrolled in Medicaid*, 48 Medical Care 1219 (2008), available at https://www.ncbi.nlm.nih.gov/pubmed/19300311?dopt=Abstract; Andrew Bindman, Amitabha Chattopadhyay, and G. M. Auerback, *Interruptions in Medicaid Coverage and Risk for Hospitalization for Ambulatory Care-Sensitive Conditions*, 149 Annals of Internal Medicine 854 (2008), available at https://www.ncbi.nlm.nih.gov/pubmed/19075204?dopt=Abstract.

[25] 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); Gayle Hamilton et al., *National Evaluation of Welfare-to-Work Strategies: How Effective Are Different Welfare-to- Work Approaches? Five-Year Adult and Child Impacts for Eleven Programs*, Manpower Demonstration Research Corporation (2001).

had the reverse effect, leading to an increase in extreme poverty in some areas of the country, as individuals who do not secure employment also lose their eligibility for cash assistance.[26]

New Hampshire's proposal also runs afoul of other laws, which the Secretary is not authorized to waive. Most notably, New Hampshire proposes to require individuals to engage in public-sector work or "work experience, including work associated with the refurbishing of public publicly [sic] assisted housing, if sufficient private sector employment is not available" to obtain Medicaid benefits.[27] But requiring that beneficiaries work for the state, or other public entities, without paying them the minimum wage violates the Fair Labor Standards Act, its implementing regulations, and Department of Labor guidelines.[28]

A far more productive (and permissible) approach would be to connect enrollees to properly-resourced voluntary employment programs and supports, 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.[29] The State also has the option to offer supportive employment services under § 1915(i) of the Social Security Act.

In summary, work requirements stand 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.

Conclusion

NHeLP strongly objects to any efforts to use § 1115 to skirt essential provisions that

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[26] 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); Dorothy Rosenbaum & Ed Bolen, Ctr. On Budget & Policy Priorities, *SNAP Reports Present Misleading Findings on Impact of Three-Month Time Limit* (2016), https://www.cbpp.org/sites/default/files/atoms/files/12-14-16fa.pdf; Stephen Freedman et al., "National Evaluation of Welfare-to-Work Strategies: Two-year Impacts for Eleven Programs," Manpower Development Research Corporation, June 2000, http://www.mdrc.org/publication/evaluatingalternative-welfare-work-approaches.

[27] Application at 9.

[28] *See* 29 U.S.C. § 206.

[29] 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.

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 above, New Hampshire's proposal to impose punitive work requirements as a condition of eligibility is inconsistent with the standards of § 1115 and with other provisions of law. We appreciate your consideration of our comments. If you have questions about these comments, please contact Sarah Grusin (grusin@healthlaw.org) or me.

Respectfully submitted,

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