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Cindy Mann
Deputy Administrator and Director
Center for Medicaid, CHIP, and Survey and Certification
U.S. Department of Health and Human Services
200 Independence Avenue, S.W.
Washington, D.C. 20201

Dear Cindy:

We understand that CMS is considering whether to allow states to implement a partial Medicaid Expansion up to less than the full 138% required by the ACA. We write to share our legal assessment that partial Medicaid Expansions are not permissible under the law. The National Health Law Program (NHeLP) protects and advances the health rights of low income and underserved individuals. The oldest non-profit of its kind, NHeLP advocates, litigates and educates at the federal and state levels.

The *NFIB* decision does impact the Medicaid Expansion by prohibiting the Secretary of HHS from applying 42 U.S.C. § 1396c to withdraw existing Medicaid funds from a state that fails to comply with the requirements of the Medicaid Expansion. But *NFIB* does nothing more to alter the Medicaid Act and expressly left the remainder of the ACA intact. See 132 S.Ct. at 2607. The Medicaid Expansion category established at 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII) remains a mandatory category within the structure of the statute, and *NFIB* does not otherwise change the Medicaid program structure in any way for mandatory categories.

More specifically, 42 U.S.C. § 1396a(a)(10)(A)(i) requires coverage of “all individuals” in a mandatory category. It would violate the statute to allow a state to cover only *some* individuals in a mandatory category. We note further that allowing such a policy would set a dangerous precedent that could undermine the structure of the Medicaid Act. Allowing partial Medicaid Expansion would open the door to states requesting to cover children up to only 25%, pregnant women up to 50%, etc. The integrity of Medicaid’s mandatory/optional structure could be irreparably damaged.

We recognize that a state that does not implement the Medicaid Expansion could request approval of a § 1115 experimental project to cover less than the full mandated population of section VIII adults. However, such a request would be subject to CMS approval and would need to meet § 1115’s requirement to actually “demonstrate” something (while maintaining budget neutrality). It is difficult to see what could be demonstrated by a state extending Medicaid to only part of a mandatory coverage

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group established by Congress and made eligible in all other states across the country in 2014, particularly where 18 states already obtained permission through § 1115 to cover this same population prior to 2014. Such a proposal would also need to avoid the charge, sure to be made, that the waiver is being sought for budgetary—not pilot, demonstration or experimental—reasons. Even if an experimental purpose is devised, neither § 1115 nor the Medicaid Act would appear to allow the demonstration project to receive the generous federal funding of the ACA.

For the above reasons, we recommend that CMS not allow states to implement partial Medicaid Expansions or receive enhanced matching funds for covering only a part of the section VIII population. We urge CMS to adopt a clear policy on this point for the sake of the integrity of the Medicaid program and to avoid legal complications. Please do not hesitate to contact us if you have any questions or would like to discuss the matter further.

Sincerely,

/s/Jane Perkins
Legal Director