



Elizabeth G. Taylor
Executive Director

Board of Directors

Robert N. Weiner
Chair
Arnold & Porter, LLP

Ann Kappler
Vice Chair
Prudential Financial, Inc.

Miriam Harmatz
Secretary
Florida Health Justice Project

Nick Smirensky, CFA
Treasurer
New York State Health Foundation

L.D. Britt, MD, MPH
Eastern Virginia Medical School

Ian Heath Gershengorn
Jenner & Block

Robert B. Greifinger, MD
John Jay College of
Criminal Justice

John R. Hellow
Hooper, Lundy & Bookman, PC

Michele Johnson
Tennessee Justice Center

Lourdes A. Rivera
Center for Reproductive Rights

William B. Schultz
Zuckerman Spaeder

Donald B. Verrilli, Jr.
Munger, Tolles & Olson

Ronald L. Wisor, Jr.
Hogan Lovells

Senior Advisor to the Board
Rep. Henry A. Waxman
Waxman Strategies

General Counsel
Marc Fleischaker
Arent Fox, LLP

April 23, 2020

Seema Verma, Administrator
Centers for Medicare & Medicaid Services
U.S. Department of Health and Human Services
Hubert H. Humphrey Building, Room 445-G
200 Independence Avenue, S.W.
Washington, D.C. 20201

Also submitted via email: Seema.verma@cms.hhs.gov

RE: Oklahoma SoonerCare 2.0 Section 1115 Application

Dear Administrator Verma:

On April 21, 2020, Oklahoma submitted a Section 1115 demonstration application, titled SoonerCare 2.0, to CMS for federal approval. We ask you not to issue a letter of completeness for this application at this time.

On March 17, 2020, we wrote to you asking that you require the State to postpone the public comment process for this application due to the COVID-19 emergency. That did not occur. Rather, with very little notice, the State cancelled the public hearings scheduled for March 18 and March 24, citing COVID, and held four "virtual" meetings instead. This ad hoc procedure did not satisfy the State's notice obligations under Section 1115 and CMS's implementing regulations.

As proposed, SoonerCare 2.0 targets health coverage for low-income people. Already on an incredibly fast track (the application was made public only a month and a half after CMS publicly encouraged states to submit block grant projects), the State has continued to push forward even as the COVID-19 pandemic has resulted in social distancing and stay-at-home requirements nationwide. In its haste to submit the application, the State cancelled the public hearings that are required by law so as to give the people who would be affected by the project the opportunity to be heard. Instead, the State held virtual events. This last-minute change disproportionately excluded the very people affected by the project from the process. Research has shown that low-income people do not have access to the internet

to the same extent as the non-poor. See, e.g., Camille Ryan & Jamie Lewis, American Community Survey Reports, *Computer and Internet Use in the United States: 2015* at 9 (2017), <https://www.census.gov/content/dam/Census/library/publications/2017/acs/acs-37.pdf>. Internet access is particularly limited in Oklahoma. The State ranks 47th in internet connectivity. See Tyler Cooper, *States with the Best and Worst Internet Coverage 2018*, BroadbandNow (Aug. 14, 2018), <https://broadbandnow.com/report/us-states-internet-coverage-speed-2018/>. Cf. U.S. News & World Report, *U.S. Internet Rankings*, <https://www.usnews.com/news/best-states/rankings/infrastructure/internet-access> (ranking Oklahoma 44th); see also Dale Denwalt, *One Third of Oklahomans lack broadband internet choice, report shows*, *The Oklahoman* (Aug. 9, 2019), <https://oklahoman.com/article/5638192/a-third-of-oklahomans-lack-broadband-internet-choice-report-shows>. It appears that Oklahoma used a rushed and inequitable process so that it could check the public participation box and submit the application to CMS.

CMS's regulations require the State to hold "two public hearings, on separate dates and at separate locations" that "afford[] the public throughout the State the opportunity to provide comment," 42 C.F.R. § 431.408(a)(3). The State's rushed announcement that it would hold only virtual hearings did not provide its citizens with an adequate opportunity to comment.

Also of concern, the proposal is extremely vague on the specifics of the per capita funding transformation that the State desires, including on how the changes will affect stakeholders from enrollees to health care providers. Without more information, we will be unable to submit meaningful comments on significant aspects of the project and believe this will be a problem for others as well. Simply put, it would not be possible for CMS to open this document to a notice and comment process that is "sufficient to ensure a meaningful level of public input," 42 U.S.C. § 1315(d)(2)(C).

Given the State's disregard for the legally required process, CMS cannot issue a letter of completeness to the State, as its own regulation specifies, in mandatory terms, that "[a]pplications for initial approval of a demonstration *will not* be considered complete unless they comply with the public notice process set forth in § 431.408(a) of this subpart[.]" 42 C.F.R. § 431.412(a) (emphasis added). Nor are these public participation requirements a mere formality. As the U.S. Government Accountability Office has stated,

Without a policy with robust transparency requirements for amendment applications with significant impacts, there is the potential that states and CMS will fail to receive meaningful public input on the amendment and thereby lack complete understanding of the impact. As a result, CMS may not be positioned to mitigate any potential risks in the demonstrations being amended or when other states request to test similar policies in the future.

U.S. Government Accountability Office, *Medicaid Demonstrations: Approvals of Major Changes Need Increased Transparency* 24 (April 2019) (GAO 19-315).



The SoonerCare 2.0 application proposes a multi-year, multi-faceted project that would transform its Medicaid program from an entitlement and health coverage program to a capped-funding and work program. With such significant restructuring on the table, inclusive and full public participation was all the more essential to “ensure a meaningful level of public input.” 42 U.S.C. § 1315(d)(2)(C). There was also no reason for Oklahoma to rush the process for public participation in the middle of the current pandemic. Oklahoma seeks to begin the project on July 1, 2021, more than 14 months from now. There would accordingly be more than enough time for the State to prepare an orderly notice and hearing process that affords its citizens an adequate opportunity to express their views on its proposal well in advance of the project’s proposed effective date.

For these reasons, the State’s application does not meet the legal requirements for adequate public participation, and CMS should not consider the application to be complete. Thus, we ask that you not issue a letter of completeness for this project and that you return the application to the State. Thank you for your attention to this issue and consideration of this request.

Sincerely,



Jane Perkins
Legal Director

cc: Judith Cash

