

COVID-19 & Medicaid Flexibility: § 1135, § 1115, 1915(c) Appx. K, and the FMAP increase

Sarah Somers & Elizabeth Edwards

April 2, 2020



Outline of Training:

- Section 1135
 - Waivers
 - State Plan Amendments
- Section 1115 Waivers
- Section 1915(c) Appendix K
- Section 6008

§ 1135 Is the Right Authority For Emergencies

- § 1135 is for emergencies
 - Triggered by national emergency *and* public health emergency
 - Time-limited
 - Focus on provider conditions of participation
 - HHS approving a wide variety of provisions

The § 1135 Big Picture

Advocates will need to:

1. Recognize that in a pandemic, Medicaid agencies, and maybe even *this* HHS, need and would use power to increase access to care AND
2. Make sure states do not weaken important standards for underserved populations, even if unintentionally

Section 1135 Statute Has Been Read Expansively

- The language of section 1135 may look narrow in that most important provision allows waiver of provider conditions of participation
- But HHS has approved measures that go beyond this limited scope

What types of things would we *like* to see § 1135 do?

- Eligibility expansions
- Service expansions
- Cost-sharing reductions
- Application and enrollment simplifications
- Less redetermination/data matching
- Less prior authorization & utilization management
- Some states have requested these types of things, and so far CMS hasn't been receptive

CMS Activity

- Issued Blanket § 1135 Guidance (“Fact Sheet”)
 - Medicare blanket waivers
 - Medicaid “examples” including PASRR
- Issued § 1135 Waiver Template
- Issued a SPA template

Section 1135 Waiver Template

- PASRR delay
- Prior auth suspension/extension
- Minimum data set extensions/modify deadlines
- Provider COPs
- Fair Hearing modifications:
 - Automatic exhaustion of MCO internal appeal
 - Extends time for request for fair hearing

What have states been doing?

- Waiving many provider conditions of participation
- Allowing reduced prior authorization
- Authorizing services in “alternative settings”
- Altering hearing standards – for better and worse
- PASRR delay
- Allowing for placement in alternative settings

Washington (state) Example

- Approved:
 - Automatic exhaustion of MCO hearing
 - Extension of time to request hearing
 - Suspension of adverse actions

Washington (state) Example: Concerns

- Allows delaying state administrative hearings
- Waiver of screening requirements (site visits, etc.)
- Expedited enrollment in out-of-state facility
- PASRR: waived for 30 days (possibly more)
- Select waiver of tribal notice and consultation

Washington (state) Example

- *WA requested:*
 - Allowing self-attestation;
 - Presumptive eligibility and enhanced eligibility levels;
 - Extension of redetermination timelines;
 - Cost-sharing reduction;
 - Supplemental payments;
 - Lifting 5-year bar; Temporary in-home services to individuals who haven't met functional standard;
 - Enhanced payment to home health providers
 - None in March 2020 approval

Medicaid State Plan Amendments

- State Plan Disaster Relief State Plan Amendments (Mar. 2020)
- Instructions:
 - <https://www.medicaid.gov/state-resource-center/downloads/medicaid-disaster-relief-spa-instructions.pdf>
- Template:
 - <https://www.medicaid.gov/state-resource-center/disaster-response-toolkit/state-plan-flexibilities/index.html>
 - Time limited
 - Embedded section 1135 authority for expedited approval

Medicaid State Plan Amendments

- Change residency requirements
- Expand presumptive eligibility sites
- Alter redetermination requirements
- Expand covered population groups, e.g.
 - § 1396a(a)(10)(A)(ii)(X) – age & disability groups
 - § 1396a(a)(10)(A)(ii)(XX) – Income > 133% FPL
 - § 1396a(a)(10)(A)(ii)(XXIII) – Uninsured for COVID testing (100% FMAP)
 - § 1396a(a)(10)(A)(i)(VIII) – expansion population (90% FMAP)

Medicaid State Plan Amendments

- Expand covered services
 - Add new services
 - Change quantitative limits
 - Change drug coverage limitations
- Suspend premiums and cost sharing
- Reduce use of prior authorization
- Increase provider payment rates
- Modify personal needs allowance

Medicaid State Plan Amendments

- Approved so far: Arizona and Washington
- Arizona (includes):
 - Covers optional uninsured group under 1902(a)(10)(A)(ii)(XXIII)
 - Adopts continuous eligibility for children under age 19
 - Suspends cost sharing and premiums for all beneficiaries
- Washington:
 - Updates fee schedule
 - Pay parity for telephone/online as telemedicine or face-to-face.

Social Security Act § 1115

- § 1115 is for ... experiments
 - Experimental, pilot, or demonstration projects
 - Promote objectives of the Medicaid Act
 - Waive provisions of 42 U.S.C. § 1396a
 - Period necessary for the experiment (e.g., 5 years)
 - Budget neutral
 - State and federal public notice and comment
 - State-level public hearings

CMS's § 1115 Template

- Dear State Medicaid Director letter (Mar. 22, 2020)
 - Expedited approval
 - Public notice and hearings not required
 - Effective 3-1-2020 thru 60 days after emergency ends
 - Budget neutrality not required
 - Experiment design not required
 - Final report re: lessons learned 1 yr. after project ends
 - <https://www.medicaid.gov/medicaid/section-1115-demonstrations/1115-application-process/index.html>

CMS's § 1115 Guidance

- Examples of subject matter
 - Extend LTSS to individuals in “alternative settings”
 - Extend HCBS “flexibilities” to beneficiaries receiving state plan services under 1915(i) and 1915(k)
 - Retainer payments to habilitation and personal care providers to maintain capacity
 - Self-attestation (e.g., resources)

(Pending) 1115 Requests, e.g.:

- Expand respite hours (AZ)
- Pay for HCBS by family or legally responsible individuals (AZ)
- Telemedicine (AR, RI, WA)
- Home delivered Rx, meals (AR, IL, WA)
- Temporary housing for homeless (AZ, WA)
- COVID testing, Dx, Tx in jails and prisons (IL)

Appendix K

- Appendix to an existing 1915(c) waiver
- Within the bounds of 1915(c) authority
- May be retroactive
- Used in emergencies
- May be limited geographically

Appendix K – What can a state do?

- Increase cost limits
- Targeting criteria
- Service scope & coverage
- Exceed service limits
- Add services
- Expand service settings
- Out of state services
- Family caregivers as providers
- Provider qualifications & types
- Licensure for settings
- LOC evaluations
- Payment rates
- Person-centered planning
- Incident reporting
- Support services in acute care
- Retainer payments
- Self-direction
- Other changes

Appendix K Under COVID-19

- Administration issued [instructions](#)
 - Made suggestions of flexibilities like rates, settings, family providers
 - Encouraged state to only modify template if there is a “critical need to do so”
- Prepopulated template
 - Main form not filled out
 - COVID Addendum

Appendix K COVID Addendum

- Not comply with HCBS settings requirements re visitors
- Add:
 - Electronic method of service delivery
 - Home-delivered meals
 - Medical supplies, equipment and appliances
 - Assistive technology
- Allow case management to provide other services
- Allow family providers

Appendix K COVID Addendum (cont.)

- Allow non-traditional providers
 - Including for home-delivered meals
- Adjust processes for:
 - Reassessments and reevaluations
 - Person-centered planning
 - Prior authorization
 - Assessment requirements
 - Electronic method of signature

COVID Addendum – What it Doesn't Do

- Rate adjustments
- Retainer payments
- Increase service limits
- Increase waiver capacity
- Add emergency related services

Trends in Appendix K Approvals

- Fourteen states approved as of March 30, 2020:
 - AK, CO, CT, HI, IA, KS, KY, MN, NM, PA, RI, WA, WV, and WY
- All different, very few use template
- Most approved for 1 year
- Clarity issues on covered populations

Trends in Appendix K Approvals

- Many permit exceeding service limits, but few expand cost limits
- Significant changes to service scope
 - Remove limit from respite
 - Add nursing or allow nursing to be provided
 - Remote provision of services
- Add technology services
- Lift settings restrictions
- Modify provider qualifications & type

Trends in Appendix K Approvals

- LOC assessments delayed or telephonic
- Increase in payment rates
 - Set enhanced rates
 - Rate modification limits
- Person-centered planning
 - Due process issue?
- Incident reporting flexibility due to lack of staff

Trends in Appendix K Approvals

- Support in acute settings
- Retainer payments
- Self-direction expansion
- Participants not subject to discharge if they only use one service or less than one service per month

Trends: What is Missing?

- Increased waiver capacity
- Support for remote services
- Increased rates
- Parity between congregate and more individualized services
- Service setting guardrails
- Due process protections
 - Transition plans

Section 6008 of the Families First Coronavirus Response Act

- Increases FMAP by 6.2%
- All states and territories eligible if they meet requirements
- Applies to all expenditures that have the ordinary state rate
- Available for each month during public health emergency

Section 6008

- How do states qualify?
 - Eligibility standards (MOE) no more restrictive than in effect 1/1/20
 - Not increase any premiums from 1/1/20 levels
 - Cover all testing, services, and treatment related to COVID-19 without cost sharing
 - Not terminate any individual enrolled in Medicaid at the beginning of the emergency period (except moving out of state or voluntarily terminating)

COVID-19 Resources

- [NHeLP, Overview on Using Medicaid to Respond to COVID-19](#)
- [NHeLP, Appendix K Trends](#)
- CMS
 - [Expanding Coverage: Disaster Preparedness](#)
 - [Appendix K](#)
 - [1115](#) (includes link to COVID-19 1115 Demonstration Template)
 - [1135 Approvals](#)
- MAC, [Inventory of Medicaid and CHIP Flexibilities and Authorities in the Event of a Disaster](#)
- [Kaiser Family Foundation Emergency Authority Tracker: COVID-19](#)
- [NASDDDS, COVID-19: State and Federal Resources](#)

Questions?

Sarah Somers
NC Office
somers@healthlaw.org

Elizabeth Edwards
NC Office
edwards@healthlaw.org

Connect with National Health Law Program online:



www.healthlaw.org



@NHeLProgram



@NHeLP_org

WASHINGTON, DC OFFICE

1444 I Street NW, Suite 1105
Washington, DC 20005
ph: [\(202\) 289-7661](tel:2022897661)

LOS ANGELES OFFICE

3701 Wilshire Blvd, Suite 750
Los Angeles, CA 90010
ph: [\(310\) 204-6010](tel:3102046010)

NORTH CAROLINA OFFICE

200 N. Greensboro Street, Suite D-13
Carrboro, NC 27510
ph: [\(919\) 968-6308](tel:9199686308)