



## Section 1115 Waivers: Stop the Ten-Year Approvals!

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Section 1115 of the Social Security Act allows the Secretary of Health and Human Services to waive certain Medicaid Act requirements to enable a state to implement “an experimental, pilot, or demonstration project” that is “likely to assist in promoting the objectives” of the Medicaid Act.<sup>1</sup> The Secretary may only grant a waiver “to the extent and for the period . . . necessary” to enable the state to carry out its experiment.<sup>2</sup>

In 2017, the Centers for Medicare & Medicaid Services (CMS) issued an Informational Bulletin announcing its intent to “approve the extension of routine, successful, non-complex” section 1115 waivers for a period of up to 10 years.<sup>3</sup> Thereafter, CMS extended a number of projects for 10 years. Some of the projects met the criteria articulated in the policy, while others did not.<sup>4</sup> In any event, the 2017 policy – and the subsequent 10-year approvals – directly conflict with section 1115.

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<sup>1</sup> 42 U.S.C. § 1315(a).

<sup>2</sup> *Id.* § 1315(a)(1).

<sup>3</sup> Ctr. for Medicaid & CHIP Servs., *CMCS Informational Bulletin, Section 1115 Demonstration Process Improvements 3* (Nov. 6, 2017), <https://www.medicaid.gov/sites/default/files/federal-policy-guidance/downloads/cib110617.pdf>.

<sup>4</sup> In a clear departure from the policy, in January 2021 CMS approved a “new” project in Tennessee for 10 years. See Letter from Seema Verma, Admn’r, CMS, to Stephen Smith, Dir., TennCare 1 (Jan. 8, 2021), <https://www.medicaid.gov/medicaid/section-1115-demonstrations/downloads/tn-tenncare-ii-cms-demo-appvl-01082021.pdf> (noting that approving the project for 10 years reduced “the future administrative burden associated with having to renew the demonstration more frequently”). That approval has been challenged in court on both substantive and procedural grounds. See *McCutcheon v. Becerra*, Case No. 1:21-cv-0112 (D.D.C. filed April 23, 2021). After further review of the project, the Biden administration opened a new comment period on the project as approved. See Medicaid.gov, [https://1115publiccomments.medicaid.gov/jfe/form/SV\\_9zWXfvSDSRtLxAy](https://1115publiccomments.medicaid.gov/jfe/form/SV_9zWXfvSDSRtLxAy) (last visited August 27, 2021). The case is stayed pending the outcome of that review.

## Section 1115 Does Not Permit 10-Year Approvals

The 2017 policy is contrary to section 1115 in several respects. *First*, it violates the requirement that a section 1115 project must be an experiment.<sup>5</sup> In enacting section 1115, Congress made clear that the purpose of the provision is to permit “experimental projects designed to test out new ideas” and expected that proposed projects would be “selectively approved” by the Secretary.<sup>6</sup> According to the Ninth Circuit, the “‘experimental or demonstration project’ language strongly implies that the Secretary must make at least some inquiry into the merits of the experiment – she must determine that the project is likely to yield useful information or demonstrate a novel approach to program administration.”<sup>7</sup> In other words, section 1115 only allows projects that have ongoing research or demonstration value.<sup>8</sup> It does not permit “routine” projects, as contemplated by the 2017 policy. Similarly, it does not permit extending a “successful” project for up to a decade. If a project has proven successful, then it is no longer experimental, and granting an extension of any length would be improper.<sup>9</sup>

*Second*, and relatedly, the policy violates the requirement that section 1115 waivers must be limited to the period necessary to enable the state to conduct the experiment.<sup>10</sup> In other words, Congress intended for projects to be time-limited. As one court found, “it is clear that the Secretary would abuse his discretion . . . by . . . continuing [a project] for an unreasonably long period.”<sup>11</sup> Congress did not enact section 1115 to permit states to make long-term policy changes. But that is exactly what the 2017 policy does. It allows states to continue a project for 10 years without making any showing that the duration is “necessary” to finish a valid experiment.

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<sup>5</sup> 42 U.S.C. § 1315(a).

<sup>6</sup> S. Rep. No. 87-1589, at 19-20 (1962), *as reprinted in* 1962 U.S.C.C.A.N. 1943, 1961-62.

<sup>7</sup> *Beno v. Shalala*, 30 F.3d 1057, 1069 (9th Cir. 1994).

<sup>8</sup> *Id.*

<sup>9</sup> *See Newton Nations v. Betlach*, 660 F.3d 370, 381 (9th Cir. 2011) (questioning whether the Secretary could have determined that a section 1115 project imposing heightened cost-sharing on Medicaid enrollees had any research or demonstration value given that the use of cost sharing had already been heavily studied).

<sup>10</sup> 42 U.S.C. § 1315(a)(1).

<sup>11</sup> *Cal. Welf. Rts. Org. v. Richardson*, 348 Fed. Supp. 491, 498 (N.D. Cal. 1972).

Finally, the policy runs counter to the requirements in section 1115 governing the extension of state-wide comprehensive demonstration projects, which limit the project to two extensions.<sup>12</sup> Section 1115(e) establishes the requirements for the initial extension of such a project.<sup>13</sup> It limits the first extension to a period of up to three years, or in the case of a waiver involving individuals eligible for both Medicare and Medicaid (“dual eligibles”), five years.<sup>14</sup> Section 1115(f) then establishes the requirements for a subsequent extension of that project.<sup>15</sup> The provision authorizes a subsequent extension for “a period not to exceed three years (five years, in the case of a waiver [involving dual eligibles]).”<sup>16</sup> The statute does not permit the extension of a project operating under subsection (f), meaning the Secretary does not have the authority to extend a state-wide comprehensive project for a third time.

By permitting the Secretary to extend a state-wide comprehensive project for more than three years (or five years), the 2017 policy violates section 1115 on its face.<sup>17</sup> The policy does not directly address whether the Secretary may extend state-wide comprehensive projects for a third, fourth, or fifth time. But, CMS has regularly (and improperly) granted such extensions.<sup>18</sup> And, after announcing the policy, CMS granted two such extensions for a period of 10 years.<sup>19</sup>

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<sup>12</sup> 42 U.S.C. § 1315(e), (f).

<sup>13</sup> *Id.* § 1315(e)(1) (“The provisions of this subsection shall apply to the extension of any State-wide comprehensive demonstration project . . . for which a waiver of compliance with requirements of subchapter XIX is granted under subsection (a)).

<sup>14</sup> *Id.* § 1315(e)(2).

<sup>15</sup> *Id.* § 1315(f) (“An application . . . for an extension of a waiver project the State is operating under an extension under subsection (e)...shall be submitted and approved or disapproved in accordance with the following....”).

<sup>16</sup> *Id.* § 1315(f)(6).

<sup>17</sup> Nothing in the policy indicates that it does not apply to state-wide, comprehensive demonstration projects.

<sup>18</sup> For example, Arizona has operated most of its Medicaid program as a state-wide comprehensive section 1115 project since 1982. See AHCCCS, *Ariz. Demonstration Renewal Proposal 2021-2026*, at 3 (2020), <https://www.medicaid.gov/medicaid/section-1115-demonstrations/downloads/az-hccc-pa8.pdf>.

<sup>19</sup> See Letter from to Seema Verma, Admn’r, CMS, to Stephanie Stephens, State Medicaid Dir., Tex. Health & Human Servs. Comm’n (Jan. 15, 2021), <https://www.medicaid.gov/medicaid/section-1115-demonstrations/downloads/tx-healthcare-transformation-cms-approval-01152021.pdf>; Letter from Anne Marie Costello, Acting Deputy Admn’r & Dir., CMCS, to Allison Taylor, Medicaid Dir., Ind. Family & Social Servs. Admin. (Oct. 26, 2020), <https://www.medicaid.gov/medicaid/section-1115-demonstrations/downloads/in-healthy-indiana-plan-support-20-ca-01012021.pdf>. In April 2021, CMS rescinded the Texas approval, citing procedural deficiencies. See Letter from Elizabeth Richter, Acting Admn’r,

## Next Steps

The Biden administration should immediately rescind the 2017 policy and reconsider any 10-year approvals that are not already under review.

In addition, as CMS develops and refines its section 1115 policy, it should commit to adhering to the text of the statute. With respect to the length of an approval and the cumulative duration of a project, that would mean:

- Only granting an approval, including an extension, when a project has ongoing research or experimental value;
- Limiting the length of any approval to only the period needed for the state to carry out its experiment;
- Extending a state-wide comprehensive project no more than twice, and for no more than 3 years (or 5 years) each time; and
- Developing a process for taking the results of successful experiments to Congress so that Congress can decide whether and how to amend the Medicaid Act to incorporate them.

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CMCS, to Stephanie Stephens, State Medicaid Dir., Tex. Health & Human Servs. Comm'n (April 16, 2021), <https://www.medicaid.gov/medicaid/section-1115-demonstrations/downloads/tx-healthcare-transformation-cms-ltr-st.pdf>. Texas filed suit, and the district court issued a preliminary injunction preventing CMS from implementing the withdrawal. *Texas v. Brooks-LaSure*, 2021 WL 5154219 (E.D. Tex. 2021). The case is ongoing.