
June 4, 2021

Graham Bowman
Staff Attorney
Ohio Poverty Law Center
1108 City Park Avenue
Columbus, OH 43206

Dear Mr. Bowman:

The Department of Health and Human Services (“HHS” or “the Department”) received your April 13, 2021 correspondence through the designated mailbox for petitions to review guidance, pursuant to the Good Guidance Practices Regulation, 85 Fed. Reg. 78,770 (Dec. 7, 2020), see also 45 C.F.R. § 1.5. However, upon review of your request, attached as Appendix A, the Centers for Medicare & Medicaid Services (“CMS” or “the Agency”) determined that your concerns are not a petition “to withdraw or modify any particular guidance document.” See 45 C.F.R. § 1.5(a). Instead, we understand you are requesting the Agency to take immediate action to reject Ohio’s request to continue the Ohio Group VIII Work Requirement and Community Engagement 1115 Demonstration because of concerns that Medicaid beneficiaries will lose access to health coverage if the work requirement is permitted to continue. Because your correspondence does not request the withdrawal or modification of any particular Departmental or Agency guidance, we are not treating it as a petition under 45 C.F.R. § 1.5 but will address the concerns raised in your letter in the response below.

CMS understands the challenges beneficiaries and states are facing with addressing the COVID-19 pandemic and its related economic and social effects, and the importance of ensuring Americans have access to health coverage, including through Medicaid for those who are eligible. Under section 1115 of the Social Security Act (the Act) and its implementing regulations, CMS has the authority and responsibility to review, approve, and maintain continued oversight of demonstration projects in order to ensure that they are currently likely to assist in promoting the objectives of Medicaid, and CMS may withdraw waivers or expenditure authorities if it “find[s] that [a] demonstration project is not likely to achieve the statutory purposes.” 42 C.F.R. 431.420(d).

Concerned about testing policies that risk loss of health care coverage or benefits to Medicaid beneficiaries, particularly given the uncertainty of the COVID-19 pandemic and its potential impact on economic opportunities and access to transportation and to affordable child care, which effects may linger long after the end of the declared public health emergency, CMS issued letters to states with section 1115 demonstration authority to implement work and community engagement requirements to provide notice of CMS’s intent to review their currently approved demonstrations. These letters stated that, taking into account the totality of the circumstances, CMS preliminarily had determined that allowing work and other community engagement requirements to take effect, as currently approved in certain demonstration projects, would not promote the objectives of the

Medicaid program as required under section 1115 of the Act.¹ The COVID-19 pandemic has had a significant impact on the health of Medicaid beneficiaries. Uncertainty regarding the current crisis and the pandemic's aftermath, and the potential impact on economic opportunities (including job skills training and other activities used to satisfy community engagement requirements, such as work and other similar activities), and access to transportation and affordable child care, have greatly increased the risk that implementation of the community engagement requirements approved in these demonstrations will result in coverage loss. In addition, the uncertainty regarding the lingering health consequences of COVID-19 infections further exacerbates the harms of coverage loss for Medicaid beneficiaries.

For these reasons, these letters provided notice to the relevant states that CMS was commencing a process of determining whether to withdraw the authorities approved in the state's demonstration that permit the state to require work and other community engagement activities as a condition of eligibility or of receiving certain Medicaid benefits. If a state wished to submit to CMS any additional information that in the state's view may warrant not withdrawing those authorities, we noted that such information should have been submitted to CMS within 30 days. We explained that, if we ultimately determined to withdraw those authorities, we would promptly notify the state in writing of the determination, the reasons for it, and its effective date, and we would afford the state an opportunity to request a hearing to challenge our determination prior to the effective date. As you indicate in your correspondence, Ohio submitted additional information for CMS's consideration on March 11, 2021, which is currently under review.²

Following the above-described notices and the opportunity for the states to submit additional information, CMS has withdrawn authority for work and community engagement requirements previously approved in demonstration projects in Arkansas and New Hampshire on March 17, 2021 and in Michigan and Wisconsin on April 6, 2021. As explained in letters to those states, early implementation of community engagement demonstration initiatives showed that the implementing states experienced or were set to experience rapid beneficiary coverage losses. Coupled with the changed circumstances of the COVID-19 pandemic and its health and economic effects, many of which are likely to persist long after the end of the declared public health emergency, we have serious concerns about testing policies that risk loss of health care coverage and harm to beneficiaries. Accordingly, we determined that, on balance, the authorities that permitted these states to require work and community engagement as a condition of eligibility were not likely to promote the objectives of the Medicaid statute and, therefore, withdrew the relevant authorities from these demonstration projects.³ As indicated in the withdrawal letters, each of these states has the right to appeal this decision by requesting a hearing before the Departmental Appeals Board, following the

¹ The CMS letter regarding the Ohio Group VIII Work Requirement and Community Engagement Section 1115 Demonstration can be accessed here: <https://www.medicaid.gov/medicaid/section-1115-demonstrations/downloads/oh-work-requirement-community-engagement-cms-ltr-state-demo-02122021.pdf>.

² Ohio's March 11, 2021 correspondence to CMS can be accessed here: <https://www.medicaid.gov/medicaid/section-1115-demonstrations/downloads/oh-cms-ltr-from-state-03112021.pdf>.

³ The CMS withdrawal letters for these four states (AR, NH, MI, and WI), respectively, can be accessed here: <https://www.medicaid.gov/medicaid/section-1115-demonstrations/downloads/ar-works-ca2.pdf>, <https://www.medicaid.gov/medicaid/section-1115-demonstrations/downloads/nh-granite-advantage-health-care-program-ca2.pdf>, <https://www.medicaid.gov/medicaid/section-1115-demonstrations/downloads/mi-healthy-michigan-ca2.pdf>, and <https://www.medicaid.gov/medicaid/section-1115-demonstrations/downloads/wi-badgercare-reform-ca2.pdf>.

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procedures set forth in 45 C.F.R. Part 16. We continue to review other currently approved work and community engagement requirements, like Ohio's, and may take further action with respect to demonstration projects in other states upon completion of our individualized review.

We also have withdrawn the previous State Medicaid Director Letter on work and community engagement requirements, entitled, "Opportunities to Promote Work and Community Engagement Among Medicaid Beneficiaries" (SMD: 18-002) from the Good Guidance Portal at www.hhs.gov/guidance and from Medicaid.gov. As specified in the preamble to the final rule on Good Guidance Practices, "the Department can rescind a guidance document by not posting it, *or not maintaining its posting*, on the HHS guidance repository." See 85 Fed. Reg. 78,777 (emphasis added).

CMS is committed to its fiduciary responsibility to ensure that proposed and approved section 1115 demonstrations are likely to further the objectives of the Medicaid program. Pending applications for demonstrations to test work and community engagement requirements will be considered on their individual merits, and CMS will make an independent decision about whether the demonstration satisfies the statutory requirements of section 1115 of the Act before approving any demonstration for which there is a pending application.

We thank you for your advocacy and support of Medicaid beneficiaries in Ohio. Should you have additional questions, please contact Ms. Teresa DeCaro, Acting Director, State Demonstrations Group, Center for Medicaid and CHIP Services, at (410) 786-9686.

Sincerely,

A handwritten signature in black ink that reads "Anne Marie Costello". The signature is written in a cursive, flowing style.

Anne Marie Costello
Acting Deputy Administrator and Director

EXHIBIT A



VIA ELECTRONIC SUBMISSION TO
Good.Guidance@hhs.gov

April 13, 2021

Ms. Elizabeth Richter, Acting Administrator
Department of Health and Human Services
Centers for Medicare and Medicaid Services

7500 Security Boulevard
Baltimore, Maryland 21244-1850

Dear Acting Administrator Richter,

Thousands of Ohioans will lose access to life-saving health care coverage if the Ohio Department of Medicaid's request for permission to move forward with its work requirement program is granted. For this reason, we request that you deny the Department's March 11, 2021 request to continue its Group VIII Work Requirement and Community Engagement 1115 Demonstration Waiver.

The Ohio Poverty Law Center's mission is to reduce poverty and increase justice by protecting and expanding the legal rights of Ohioans living, working, and raising their families in poverty. We work closely with legal aid attorneys throughout the state that represent low-income Ohioans seeking access to health services through the Medicaid program.

The purpose of the Medicaid program is to provide health insurance for low-income people who otherwise would be unable to afford coverage. The fatal flaw behind every state's Medicaid work requirement policy is that it would cause thousands of otherwise eligible Medicaid recipients to lose coverage. The Ohio Department of Medicaid estimates that its own policy would end coverage for at least 18,000 people. Courts have repeatedly found that Medicaid work requirements violate federal law for this reason and that whatever tangential benefits a state may argue that a work requirement policy may offer, those supposed benefits are beyond the scope of the Medicaid program's purpose.

Ohio is not a healthy state. We rank 10th in infant mortality and 4th in opioid-related deaths. At the same time, many regions in Ohio are struggling economically and work opportunities are scarce. The state of Ohio is on the verge of making monumental positive changes to its Medicaid managed care program and is beginning to turn a corner towards suppressing the Covid-19 pandemic. Now is not the time for Ohio to be distracted by harmful work requirement policies

that do not assist individuals exit poverty and instead condemn them to greater illness that limits their ability to fully participate in society.

For these reasons, we ask that you reject the Ohio Department of Medicaid's request to continue its Group VIII Work Requirement and Community Engagement 1115 Demonstration Waiver.

Sincerely,

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