

February 22, 2018

The Honorable Alex Azar, Secretary  
U.S. Department of Health and Human Services  
200 Independence Avenue, SW  
Washington, DC 20201

Dear Secretary Azar:

The Bazelon Center for Mental Health Law submits these comments in response to the updated Wisconsin's Section 1115 Demonstration Waiver Amendment application. The Bazelon Center is a national non-profit legal advocacy organization that promotes equal opportunity for individuals with mental disabilities in all aspects of life, including health care, community living, housing, education, employment, voting, and other areas. Our comments focus on what we believe are the most concerning aspects of Wisconsin's waiver application—proposed lifetime limits, work requirements, and mandated drug testing and treatment. These proposals are not permitted by federal law and would have damaging effects on the state's system of services for people with disabilities.

*1. Time Limits on Coverage Waiver*

Wisconsin requests a waiver to impose a 48-month time limit on coverage for childless, adult beneficiaries under the age of 50, with a six-month lockout period for individuals who have reached the maximum period of coverage.<sup>1</sup> CMS has never before allowed a time limit on coverage, and in fact, denied Arizona's previous request in September 2016 as incompatible with the objectives of the Medicaid program.<sup>2</sup> We concur with the legal analysis used by CMS in rejecting Arizona's request for such a time limit. CMS should reject this aspect of Wisconsin's proposal.

*2. Work or Work-Related Requirements for Adult Enrollees Waiver*

Wisconsin requests a waiver to exempt childless, adult beneficiaries under the age of 50 from the time limit discussed above during months when such individuals meet new work requirements.<sup>3</sup> Since such time limits are incompatible with the objectives of Medicaid as discussed above, the proposed work requirements to be imposed on individuals subject to the coverage time limit are effectively a moot issue. In addition, as we have commented repeatedly before, HHS lacks the

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<sup>1</sup> WISCONSIN JANUARY 18, 2018 APPLICATION 8 (Jan. 18, 2018).

<sup>2</sup> DEPT. OF HEALTH AND HUMAN SERVICES, CENTERS FOR MEDICARE AND MEDICAID SERVICES, ARIZONA APPROVAL LETTER (Sept. 30, 2016) <https://ccf.georgetown.edu/wp-content/uploads/pdfs/az-hccc-ca.pdf>.

<sup>3</sup> WISCONSIN JUNE 7, 2017 APPLICATION 10 (Jun. 7, 2017).

authority to approve the proposal to condition Medicaid eligibility for Section 1115 waiver participants on meeting work requirements.<sup>4</sup>

### 3. *Substance Abuse Mandated Treatment Waiver*

Wisconsin requests a waiver in order to condition eligibility on undergoing drug testing and mandated treatment for substance use disorders.<sup>5</sup> The proposal itself acknowledges its flaw: “[e]vidence supports that members are much more likely to complete treatment when they enter it voluntarily rather than as a condition of eligibility, and when they are given multiple opportunities to attempt, fail, and re-enter treatment.”<sup>6</sup> A program that is not supported by evidence is clearly impermissible under the Section 1115 Demonstration authority. As HHS has repeatedly stated, Section 1115 Waivers may only be approved for “any experimental, pilot, or demonstration project which, in the judgment of the Secretary, is likely to assist in promoting the objectives of [the Medicaid program].”<sup>7</sup> Since evidence clearly shows, as Wisconsin admits, that treatment is less successful when such treatment is a condition of eligibility, CMS should reject this waiver as not being a viable experiment, pilot, or demonstration consistent with the Medicaid statute.

In addition, the proposed drug testing and mandated treatment provisions do not promote the objectives of the Medicaid program, as required for approval of a Section 1115 waiver. HHS’s criteria for determining whether a proposed demonstration would promote Medicaid’s objectives include whether the demonstration would:

Improve access to high-quality, person-centered services that produce positive health outcomes for individuals; [ . . . ] Support coordinated strategies to address certain health determinants that promote upward mobility, greater independence, and improved quality of life among individuals; Strengthen beneficiary engagement in their personal healthcare plan, including incentive structures that promote responsible decision-making [ . . . ]<sup>8</sup>

The statutory objectives of the Medicaid program are to furnish (1) “medical assistance” to people with disabilities, seniors, and families with dependent children, whose income and resources are insufficient to secure needed medical services, and (2) services to help such individuals and families attain or retain independence and self-care.<sup>9</sup>

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<sup>4</sup> See, e.g., Bazelon Center for Mental Health Law, *Comments on the Kansas KanCare 2.0 Section 1115 Demonstration Renewal Application* (Jan. 27, 2018) [http://www.bazelon.org/wp-content/uploads/2018/02/Bazelon\\_KS-Comments\\_1-27-18.pdf](http://www.bazelon.org/wp-content/uploads/2018/02/Bazelon_KS-Comments_1-27-18.pdf); Bazelon Center for Mental Health Law, *Comments on the North Carolina Medicaid and NC Health Choice Amended Section 1115 Demonstration Waiver Application* (Jan. 5, 2018) [http://www.bazelon.org/wp-content/uploads/2018/01/Bazelon\\_NC-Comments\\_1-5-17.pdf](http://www.bazelon.org/wp-content/uploads/2018/01/Bazelon_NC-Comments_1-5-17.pdf); Bazelon Center for Mental Health Law, *Comments on the New Hampshire Health Protection Program Premium Assistance Application* (Dec. 2, 2017) [http://www.bazelon.org/wp-content/uploads/2018/01/Final-Comments\\_12-2-17.pdf](http://www.bazelon.org/wp-content/uploads/2018/01/Final-Comments_12-2-17.pdf).

<sup>5</sup> WISCONSIN JUNE 7, 2017 APPLICATION, *supra* note 3, at 11-12.

<sup>6</sup> *Id.* at 12.

<sup>7</sup> Centers for Medicare & Medicaid Services, *About Section 1115 Demonstrations*, <https://www.medicaid.gov/medicaid/section-1115-demo/about-1115/index.html>.

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

<sup>9</sup> 42 U.S.C. 1396-1.

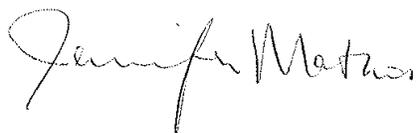
Wisconsin’s proposed substance use disorder treatment mandate would neither promote the goals of furnishing medical assistance and services, nor improve access to high quality services, support strategies to address health determinants promoting upward mobility and independence, or strengthen engagement in individuals’ health care and decision-making. In fact, they would have the *opposite* effect of eliminating access to health care coverage if an individual declines to undergo an invasive screening or attend treatment.

4. *The Wisconsin 1115 Application in whole fails to meet the required standard of “any experimental, pilot, or demonstration project.”*

As mentioned above, HHS’ own requirements for Section 1115 Waivers condition approval on the demonstration providing “any experimental, pilot, or demonstration project which, in the judgment of the Secretary, is likely to assist in promoting the objectives of [the Medicaid program].”<sup>10</sup> Despite the additional six months granted to submit its application,<sup>11</sup> Wisconsin still has not provided a “detailed evaluation design” for CMS and the public to review. The failure to provide such a design raises serious concerns about this 1115 demonstration—especially given the recent report from the Government Accountability Office finding that “evaluations of [1115] demonstrations often had significant limitations that affected their usefulness in informing policy decisions.”<sup>12</sup> CMS should not approve any demonstration application without the full and detailed evaluation design since demonstration projects are not intended to serve as directionless experiments with individuals’ lives. To be approved, applications must contain clearly defined goals, identify a specific problem that is being addressed, provide a reasonable basis to believe that the demonstration is likely to address the problem effectively and without harming individuals, and put measures in place to ensure that individuals are not harmed. Wisconsin cannot even identify how many individuals will be impacted by the waivers requested above, much less meet any of these requirements.

For all of these reasons, Wisconsin’s waiver application should be denied.

Respectfully submitted,



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<sup>10</sup> *About Section 1115 Demonstrations*, supra note 7.

<sup>11</sup> We note that we are commenting on both the original application from June 7, 2017, and the updated application from January 12, 2018.

<sup>12</sup> United States Government Accountability Office, *Medicaid Demonstrations: Evaluations Yielded Limited Results, Underscoring Need for Changes to Federal Policies and Procedures* (January 2018) <https://www.gao.gov/assets/690/689506.pdf>.