



June 14, 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 Ohio's Group VIII Work Requirement and Community Engagement Section 1115 Demonstration Waiver 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 the proposed work requirements in the waiver application. These proposals are prohibited by federal law and would have damaging effects on the state's system of services for people with disabilities.

While we fully support the goals of expanding employment and promoting independence and economic self-sufficiency, we urge you to reject the proposal.

1. The Department of Health and Human Services (HHS) does not have the authority to grant Ohio's request.

Although CMS has approved 1115 waivers with work requirement components,¹ we disagree with this interpretation of the law. We believe HHS lacks the authority to approve the proposal to condition Medicaid eligibility for Section 1115 waiver participants on these individuals engaging in 20 hours/week of employment, work-related activities, or community engagement. 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]."² The Ohio work requirement does not meet this standard.

Ohio's proposal does not promote the objectives of Medicaid.

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

¹ See, e.g., *Approved Changes to Medicaid in Kentucky*, KAISER FAMILY FOUNDATION, (Jan. 17 ,2018), <https://www.kff.org/medicaid/issue-brief/approved-changes-to-medicaid-in-kentucky/>; DEPT. OF HEALTH AND HUMAN SERV., CENTERS FOR MEDICARE & MEDICAID SERV., DEAR STATE MEDICAID DIRECTOR, RE: OPPORTUNITIES TO PROMOTE WORK AND COMMUNITY ENGAGEMENT AMONG MEDICAID BENEFICIARIES (Jan. 11, 2018), <https://www.medicaid.gov/federal-policy-guidance/downloads/smd18002.pdf>.

² Centers for Medicare & Medicaid Services, About Section 1115 Demonstrations, <https://www.medicaid.gov/medicaid/section-1115-demo/about-1115/index.html>.

to secure needed medical services, and (2) services to help such individuals and families attain or retain independence and self-care.³

HHS's criteria for determining whether a proposed waiver 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 [. . .]⁴

Ohio's proposed work requirements do not accomplish any of these objectives. In fact, they would have the *opposite* effect of reducing access to needed services, including those that enable people with disabilities to work.

Evidence from other benefits programs demonstrates that work requirements do not increase health and well-being. Ohio's waiver proposal repeatedly references SNAP's ABAWD work requirements, mirroring those eligibility determinations and processes in the name of efficiency.⁵ Yet years of experience with a similar program, TANF, have consistently shown that work requirements do not assist individuals in obtaining full employment or lift them and their families out of poverty. Studies of these requirements have shown that: (1) increases in employment among recipients subject to work requirements were modest and diminished over time, (2) stable employment among recipients subject to work requirements was the exception rather than the norm, (3) most recipients who had significant barriers to employment never found employment, and (4) the vast majority of individuals subject to work requirements remained poor, and some became poorer.⁶ Indeed, within five years, "employment among recipients not subject to work requirements was the same as or higher than employment among recipients subject to work requirements in nearly all of the programs evaluated."⁷

Furthermore, the SNAP ABAWD work requirements have similar issues. A study shows that many SNAP recipients who work face difficulty documenting hours and fear losing their benefits if their hours fall in a given month.⁸ Among SNAP recipients who are not working, there are high rates of disability.⁹

³ 42 U.S.C. 1396-1.

⁴ About Section 1115 Demonstrations, *supra* note 1.

⁵ Ohio's Waiver Proposal, pg. 4.

⁶ See, e.g., LaDonna Pavetti, Center on Budget and Policy Priorities, Work Requirements Don't Cut Poverty, Evidence Shows (June 2016), <https://www.cbpp.org/research/poverty-and-inequality/workrequirements-dont-cut-poverty-evidence-shows>. See also Marybeth Musumeci, Kaiser Family Foundation, Medicaid Enrollees and Work Requirements: Lessons From the TANF Experience (Aug. 18, 2017), <https://www.kff.org/medicaid/issue-brief/medicaid-enrollees-and-work-requirements-lessonsfrom-the-tanf-experience/>.

⁷ Work Requirements Don't Cut Poverty, *supra* note 4.

⁸ Heather Hahn et. al, Urban Institute, Work Requirements in Social Safety Net Programs (December 2017), https://www.urban.org/sites/default/files/publication/95566/work-requirements-social-safety-net-programs_4.pdf, at pg. 10-11.

⁹ *Id.*

These outcomes strongly suggest that many participants will not succeed in meeting Ohio's proposed work requirements and hence will lose critical health care coverage. Ohio itself projects that *half* of the non-exempt population will not meet the work requirements and will lose their Medicaid eligibility as a result.¹⁰ Without Medicaid coverage of needed health services, individuals' employment opportunities will decrease rather than increase. As the Kaiser Family Foundation has observed, "[h]ealth coverage through Medicaid is an important precursor to and support for work."¹¹ The Foundation's health surveys concerning the impact of health coverage on employment of Medicaid beneficiaries are instructive and discuss Ohio specifically:

Without health insurance, individuals may forgo needed services, and their health may deteriorate to a point that interferes with their ability to work. An analysis of Ohio's Medicaid expansion found that over half of enrollees who are working (without being required to do so) reported that having Medicaid made it easier for them to continue working. In addition, most Ohio expansion enrollees who were unemployed but looking for work reported that having Medicaid made it easier for them to seek employment.¹²

Expansion of Medicaid has improved employment opportunities for Ohioans. A work requirement will have a negative impact on these achievements.

Ohio's proposal is not an experiment, pilot, or demonstration of the sort contemplated by the Medicaid statute

1115 Waiver and Demonstration programs are intended to contain clearly defined goals, identify a specific problem that is being addressed, have a reasonable basis to achieve that the demonstration is likely to address the problem effectively and without harm, and put measures in place to ensure that individuals are not harmed. Ohio's justification for this waiver is that it will promote "economic stability and financial independence" and "improve health outcomes via participation in work and community engagement activities."¹³ However, the proposal does not identify a specific problem, have a reasonable basis to achieve the solution to the problem, nor does it indicate any measures to ensure harm will not occur.

Ohio's waiver proposal does not contain any indicators describing the problem at hand. In a short sentence, the proposal mentions a "less than two-percent increase" in employment rates among the Group VIII population (with no indication of from which timeframe or measurement) as the cause for concern.¹⁴ Yet 40% of Ohio Enrollees work full time and 21% of Ohio Enrollees work part time; in total 61% of Ohio Enrollees work either full or part time.¹⁵

¹⁰ Ohio Waiver Proposal, pg. 13.

¹¹ Medicaid Enrollees and Work Requirements, *supra* note 18

¹² *Id* (citing *Ohio Medicaid Group VIII Assessment*, THE OHIO DEPT. OF MEDICAID, (2016), pg. 41, <http://medicaid.ohio.gov/portals/0/resources/reports/annual/group-viii-assessment.pdf>).

¹³ Ohio's Waiver Proposal, pg. 5

¹⁴ Ohio's Waiver Proposal, pg. 3

¹⁵ Rachel Garfield, Robin Rudowitz, and Anthony Damico, Kaiser Family Foundation, Understanding the Intersection of Medicaid and Work (Dec. 7, 2017), *accessible at* <http://files.kff.org/attachment/Issue-BriefUnderstanding-the-Intersection-of-Medicaid-and-Work>.

Moreover, as discussed above, it is unclear how the proposed work requirement will help individuals attain and maintain employment. Work requirements that result in loss of Medicaid also undermine Ohio's goal of encouraging financial independence, as Medicaid has been shown to reduce financial hardship and stress in Ohio's Group VIII population specifically—"group VIII enrollees, a financially distressed population, were nearly twice as likely to report that their finances were improving instead of worsening since obtaining Medicaid."¹⁶

Finally, Ohio's implementation discussion is flimsy at best. The proposal defers several foundational issues to later regulatory action. Most critically, Ohio's proposal has entirely avoided both administrative and substantive direction for exemptions to the requirement. Both the method and definitions for determination of who qualifies for exemption have been deferred to regulation.¹⁷

Thus not only is there no meaningful discussion of the issue at hand nor any useful substantive analysis of how work requirements might solve it, but the proposal lacks crucial details as to how the requirement will even be applied.

While the Bazelon Center strongly supports the goals of increasing employment and encouraging involvement in the community, implementing work requirements that will likely result in massive loss of health care coverage will not achieve these positive outcomes. Losing health care will make it harder, not easier, for people with mental health needs who are unemployed and facing challenges securing work to get and keep a job.

2. Ohio's proposal will be particularly harmful to people with disabilities

Governor Kasich, when implementing the Group VIII expansion, recognized the importance of providing coverage for persons with mental and psychiatric disabilities.¹⁸ Yet this is the exact population that the waiver proposal will most clearly harm. The overwhelming majority of people with disabilities want to and can work, but many are not working as a result of attitudinal barriers among employers, the need for reasonable accommodations that have not been provided, or the need for supported employment services that are scarcely available.

Consequently, the employment rate of people with disabilities has remained far lower than that of any other group tracked by the Bureau of Labor Statistics. Among working age adults, the employment rate of people with disabilities is less than half of that for people without disabilities.¹⁹ For people with serious mental illness, the employment rate is even lower; it has been estimated over time at about 22%, with approximately 12% working full-time.²⁰ As of May 2016, more than 702,000 Ohioans were

¹⁶ *Ohio Medicaid Group VIII Assessment*, THE OHIO DEPT. OF MEDICAID, (2016), pg. 39, <http://medicaid.ohio.gov/portals/0/resources/reports/annual/group-viii-assessment.pdf>.

¹⁷ Ohio's Waiver Proposal, pgs. 17 and 18.

¹⁸ Governor Kasich State of the State 2013, pg.

<http://www.governor.ohio.gov/Portals/0/2013%20State%20of%20the%20State%20Transcript.pdf>

¹⁹ U.S. Department of Labor, Bureau of Labor Statistics, *Persons with a Disability: Labor Force Characteristics Summary* (June 21, 2017) (among persons age 16 to 64, the employment-population ratio in 2016 for people with disabilities was 27.7 percent, in contrast to 72.8 percent for people without disabilities), <https://www.bls.gov/news.release/disabl.nr0.htm>.

²⁰ U.S. Department of Health and Human Services, Office of the Assistant Secretary for Planning and Evaluation, Office of Disability, Aging and Long-Term Care Policy, *Federal Financing of Supported Employment and Customized*

enrolled in Medicaid Group VIII.²¹ As with other populations, for Group VIII enrollees mental health conditions are a barrier to employment, with many enrollees reporting that a mental health condition kept them from work or other similar activities for 7 or more days in the last month.²²

Additionally, many people with disabilities who are working may be working part-time schedules of fewer than 20 hours/week as an accommodation, or may have seasonal, temporary, or contractor work, which would potentially lead to loss of coverage between work opportunities or even while working. In other programs that have implemented work requirements, participants with physical and mental health issues were more likely to be sanctioned for not completing the work requirement.²³ Even when there is an explicit exemption for individuals unable to comply due to health conditions, in practice, those exemption processes have failed, leaving individuals with disabilities more likely than other individuals to lose benefits.²⁴

Ohio's Solutions for People with Disabilities are Inadequate

Ohio's own inadequate solutions for persons with disabilities indicate the acknowledgement that the work requirement will have a disproportionate negative impact on this group.

First, the waiver proposal utilizes exemptions for adults who are “physically or mentally unfit for employment” or “participating in drug or alcohol treatment.”²⁵ However, as discussed above, Ohio does not discuss how it will define or administer these categories and points the reader to the rulemaking process. With an initiation date of July 1, 2018, there will not be time before implementation for public comment and rulemaking to address the complex issues of categorization and eligibility for waiver of the requirement based on disability. It is foreseeable that some people with disabilities will not be eligible for exemption, yet will still have trouble finding work within the bounds required under the proposal, such as the 30 day limit for job-search or job-readiness programs, or the 20 hours/week requirement.²⁶

Additionally, while the proposal recognizes the critical importance of providing support services to ensure that Ohioans subject to work requirements have meaningful opportunities to work, the proposal seeks to cover those services through the Medicaid program, with federal reimbursement—something

Employment for People with Mental Illness: Final Report vii (Feb., 2011),
<http://aspe.hhs.gov/daltcp/reports/2011/supempFR.pdf>.

²¹ *Ohio Medicaid Group VIII Assessment*, THE OHIO DEPT. OF MEDICAID, (2016), pg. 15,

<http://medicaid.ohio.gov/portals/0/resources/reports/annual/group-viii-assessment.pdf>.

²² *Id.* at pg. 35

²³ See, e.g., Andrew J. Cherlin et. al., *Operating within the Rules: Welfare Recipients' Experiences with Sanctions and Case Closings*, 76 Soc. Serv. Rev. 387, 398 (finding that individuals in “poor” or “fair” health were more likely to lose TANF benefits than those in “good,” “very good,” or “excellent health”); Vicki Lens, *Welfare and Work Sanctions: Examining Discretion on the Front Lines*, 82 Soc. Serv. Review 199 (2008).

²⁴ See, e.g., Yeheskel Hasenfeld et al., *The Logic of Sanctioning Welfare Recipients: An Empirical Assessment* Departmental Paper, University of Pennsylvania School of Social Policy and Practice (2004)
http://repository.upenn.edu/spp_papers/88.

²⁵ Ohio Waiver Proposal, pg. 4.

²⁶ *Id.*

CMS has said it will not do.²⁷ Under the proposal, persons who are not exempted will be individually assessed “to determine whether supports are needed to help” meet the work requirement.²⁸ If supports are needed, the individual will be either matched to available services or exempt from the requirement if services are unavailable.²⁹ This scheme to avoid harming persons with disabilities fails to establish any funding stream for the support services proposed.

And while it is true, as the proposal points out, that for SNAP participants, SNAP work supports will continue,³⁰ this cannot possibly be intended as an effective way to mitigate the harms from the proposed Medicaid work requirements. Among other things, these supports may not be available to all Group VIII enrollees.

Even if Ohio were to find a way to fund the services necessary to assist individuals with mental or psychiatric disabilities in meeting the work requirement, Ohio’s waiver application fails to describe the services in any detail. There is no information regarding what kinds of services will be provided, beyond transportation, or what scope of services will be provided, despite the fact that many other barriers exist to employment. The proposal raises serious questions not only about what the supports and services will be, but where the funding will come from and whether cuts to other services would be made to offset the costs.

Similarly concerning is the fact that Ohio’s proposal does not adequately indicate how it will maintain compliance with federal civil rights laws protecting persons with disabilities, as required by CMS.³¹ Although the proposal off-handedly claims that screening processes for eligibility determination “will be compliant with all federal anti-discrimination statutes,”³² there is no indication of methods that will be put in place to ensure this is the case.

Having access to health care promotes independence. Rather than implementing a work requirement likely to *increase* the underemployment of persons with disabilities and *increase* health care concerns as a result of lost coverage, Ohio could instead expand work opportunity programs and attempt to address the fundamental lack of sufficient community-based support. Ohio has already successfully received federal funding in this area through previous 1915(c) waivers such as the SELF and IO waiver, and knows how to promote employment in more effective ways than imposing work requirements. It makes little sense to attempt to do so through work requirements for 1115 waiver participants. For all of these reasons, Ohio’s waiver proposal should be denied.

²⁷ DEPT. OF HEALTH AND HUMAN SERV., CENTERS FOR MEDICARE & MEDICAID SERV., DEAR STATE MEDICAID DIRECTOR, RE: OPPORTUNITIES TO PROMOTE WORK AND COMMUNITY ENGAGEMENT AMONG MEDICAID BENEFICIARIES (Jan. 11, 2018), <https://www.medicaid.gov/federal-policy-guidance/downloads/smd18002.pdf>.

²⁸ Ohio Waiver Proposal, pg. 8.

²⁹ *Id.*

³⁰ Ohio Waiver Proposal, pg. 10.

³¹ *Id.*

³² Ohio Waiver Proposal, pg. 8.

Respectfully submitted,

Jennifer Mathis
Director of Policy and Legal Advocacy
jenniferm@bazelon.org

Bethany Lilly
Deputy Director of Policy and Legal Advocacy
bethanyl@bazelon.org