



September 15, 2019

VIA ELECTRONIC SUBMISSION

The Honorable Alex Azar
Secretary U.S. Department of Health and Human Services
Hubert H. Humphrey Building
200 Independence Ave., S.W.
Washington, DC 20201

Re: Utah Per Capita Cap 1115 Waiver Application

Dear Secretary Azar:

The Bazelon Center for Mental Health Law submits these comments on Utah's "Per Capita Cap" application for a Section 1115 demonstration waiver. 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.

We focus these comments on several aspects of the waiver application seeking approval of new requirements or coverage of new services: the proposals to receive enhanced federal match for a partial expansion, to establish a per capita cap for enrollees in the expansion population, to impose lock-out periods for "intentional program violations," and to cover housing-related services and supports for the expansion population and Targeted Adult Population. We urge CMS to deny approval of the first three proposals and to approve the last proposal (to cover housing-related services and supports).

We also oppose the work requirements and waiver of EPSDT for 19 and 20 year olds that Utah proposes to carry over from its Primary Care Network demonstration waiver to the new demonstration waiver, for the reasons described in the comments submitted by the National Health Law Program.

Enhanced match for partial expansion: Utah seeks the enhanced federal match for a partial Medicaid expansion covering adults with incomes up to the federal poverty line. CMS has already indicated in its letter of Aug. 16, 2019 that it will not approve this proposal. In addition, CMS stated that it similarly could not approve enhanced federal match with Utah's proposed

enrollment cap, which would amount to a partial expansion of Medicaid. We believe those decisions are correct as a matter of policy and also as a matter of law. The Medicaid statute does not permit enhanced match for a partial expansion of Medicaid. The law authorizes enhanced federal match when a state expands Medicaid to cover *all* individuals who meet the statutory eligibility requirements for the expansion. 42 U.S.C. § 1396d(y). Section 1115 of the Social Security Act does not allow for waivers of that provision. 42 U.S.C. § 1315(a).

Per capita cap for enrollees in the expansion population: Utah seeks approval for a “per capita cap” limiting the enhanced federal match once a certain expenditure limit has been reached based on a per-person base amount, and providing for the ordinary federal match rate to apply once that limit has been reached. Because this proposal is based on the availability of an enhanced match for a partial expansion, which CMS has indicated will not be approved, it too must be denied approval. Moreover, it is inconsistent with the statutory requirements of 42 U.S.C. § 1396d(y) authorizing enhanced federal match for a full expansion.

Six-month lock-out periods for “intentional program violations:” Utah seeks approval to “lock out” beneficiaries from coverage for six month periods based on an “intentional program violation.” We urge CMS not to approve this proposal, as it would allow the state to deny coverage for entirely arbitrary and subjective reasons to individuals who are otherwise eligible for coverage under the statute. Of particular concern, the state’s definition of “intentional program violations” includes “misrepresenting, concealing or withholding facts” and “knowingly making false or misleading statements,” which involve subjective determinations and are easily subject to abuse; such determinations can be expected to result in inappropriate suspensions of coverage and lead to needless litigation. Moreover, Utah’s proposal concerning “intentional program violations” appears to be targeted at fraudulent conduct, but the statute and regulations already provide mechanisms to address fraud by Medicaid enrollees, including requiring referral of suspected fraud to law enforcement officials, authorizing substantial fines and imprisonment for individuals convicted of fraud, and authorizing states to restrict or suspend eligibility of such individuals for up to a year. 42 U.S.C. § 1320a-7b(a), 42 C.F.R. § 455.15.

Coverage of housing-related services and supports: We strongly support the proposal to allow coverage of housing-related services and supports—including tenancy support services, community transition services, and supportive living and housing services. The services described in the application are all essential to ensure that people with significant psychiatric and other disabilities can live successfully in community settings and can transition successfully to those settings from institutions or from homelessness; coverage of these services will bring dramatic improvements in individuals’ lives as well as cost savings from expensive care in hospitals and other institutions, emergency departments, shelters, and incarceration. As Secretary Azar has stated, housing is a key social determinant of health.

We appreciate the opportunity to comment on this application.

Respectfully submitted,

A handwritten signature in black ink that reads "Jennifer Mathis". The signature is written in a cursive style with a large initial "J" and a long, sweeping underline.

Jennifer Mathis
Director of Policy and Legal Advocacy