JUDGE DAVID L. BAZELON CENTER FOR MENTAL HEALTH LAW

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 Mississippi Medicaid Workforce Training Initiative 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 Mississippi's proposed work requirements. This proposal, as drafted, is not permitted by the Medicaid statute and both would have damaging effects on the state's system of services for people with disabilities.

Work or Work-Related Requirements for Adult Enrollees

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 or work-related activities.[1] 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 Mississippi work requirement does not promote the objectives of the Medicaid program nor is it an experiment, pilot, or demonstration of the sort contemplated by the Medicaid statute.

Mississippi'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 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 demonstration would promote Medicaid's objectives include whether the demonstration would:

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[1] MISSISSIPPI WAIVER APPLICATION 4 (Dec. 18, 2017).
[2] Centers for Medicare & Medicaid Services, *About Section 1115 Demonstrations*, https://www.medicaid.gov/medicaid/section-1115-demo/about-1115/index.html.
[3] 42 U.S.C. 1396-1.

> 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]

Mississippi's proposed work requirements 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' healthcare and decision-making. In fact, they would have the *opposite* effect of reducing access to needed services, including those that enable people with disabilities to work.

Years of experience with work requirements in the TANF program—another program where participants receive benefits critical to their subsistence—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.[5] 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."[6]

These outcomes—together with budgetary uncertainty and reliance on a separate state department to expand the availability of employment services, training programs, and other services that would assist participants to meet the work requirements—strongly suggest that many participants will not succeed in meeting the work requirements and hence will lose the critical coverage of health care that they receive through the Section 1115 waiver.

Further, Mississippi fails to provide any reasoned explanation of how its proposed work requirements promote the goals of the Medicaid program. Mississippi says that it believes these work requirements "will further the objectives of the Medicaid program by providing individuals with increased time, health security, and resources to transition from Medicaid to private healthcare."[7] But the state does not identify how the proposed work requirements will provide greater employment opportunities or how it will ensure that individuals subject to these requirements will be able to secure and maintain employment at sufficient levels, or provide any

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[4] *About Section 1115 Demonstrations*, *supra* note 2.
[5] *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/work-requirements-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-lessons-from-the-tanf-experience/.
[6] *Work Requirements Don't Cut Poverty*, *supra* note 5.
[7] MISSISSIPPI WAIVER APPLICATION, *supra* note 1, at 5.

research or data showing how many individuals who are or will become eligible for Medicaid are not currently working. The state acknowledges that it is at the bottom of almost every health ranking scale.[8] Mississippi's Medicaid eligibility numbers are also among the lowest in the country, suggesting that few individuals living in poverty can access health care.[9] Without Medicaid coverage of needed health care 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."[10] The Foundation's surveys concerning the impact of health coverage on employment of Medicaid beneficiaries are instructive:

> 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. A study examining Michigan's Medicaid expansion found that nearly seven in 10 (69%) enrollees who were working said they performed better at work once they got Medicaid coverage. Over half (55%) of Michigan expansion enrollees who were not working indicated that having Medicaid coverage made them better able to look for work. Having access to regular preventive health care to manage chronic conditions and address health issues as early as possible before they worsen is important so that individuals are healthy enough to work. In addition, an unmet need for mental health or addiction treatment results in greater difficulty with obtaining and maintaining employment, and Medicaid is an important source of coverage for mental health and addiction treatment services, such as opioid addiction.[11]

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

Medicaid 1115 Demonstration programs are also not intended to serve as thoughtless experiments with individuals' lives. They are supposed to contain clearly defined goals, identify a specific problem that is being addressed, have 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. Mississippi's proposal does not meet this test.

The proposal offers no indication of how the premises of its hypotheses will even be met, much less how it will ensure that individuals are not harmed. Mississippi's hypotheses are that: 1)

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[8] MISSISSIPPI WAIVER APPLICATION, *supra* note 1, at 5-7

[9] Kaiser Family Foundation, *Where Are States Today? Medicaid and CHIP Eligibility Levels for Children, Pregnant Women, and Adults* (Updated Mar. 15, 2017) https://www.kff.org/medicaid/fact-sheet/where-are-states-today-medicaid-and-chip/.

[10] *Medicaid Enrollees and Work Requirements, supra* note 4.

[11] *Id.*

"[p]roviding workforce training opportunities will result in transitions to other health insurance" and 2) "[p]roviding workforce training opportunities will result in an increase in the number of individuals entering the workforce."[12] But it is not even clear what training opportunities will be offered. The state indicates that it is "seeking to garner enhanced federal funding designed to assist with workforce training activities"[13] but does not describe these activities, and in fact states that it will provide no new services: "[t]he benefits provided under the demonstration will not differ from those provided under the Medicaid State Plan."[14] Perhaps Mississippi intends to provide some form of skills training in conjunction with the Mississippi Department of Human Services and the Office of Employment Security,[15] but it is far from clear what type and scope of services would be provided, if this is even the state's plan.

Nor does Mississippi identify a problem or any evaluation metrics. The state does assert that "[a] detailed evaluation design will be developed for review and approval by CMS."[16] The entire purpose of the 1115 waiver application process is to provide both the public and CMS with an opportunity to review such designs *before* approval. Mississippi is clearly still in the preliminary stages of developing any form of demonstration, and it would defeat the purpose of the waiver application process to approve a proposal without any meaningful design details.

CMS should not allow Mississippi to cut off Medicaid eligibility for non-exempt individuals who do not meet proposed work requirements without any assurance that work opportunities will be available. As we discussed above, the evidence demonstrates that people have more success finding and keeping work when they have Medicaid coverage.

The proposal's harmful impact on people with disabilities.

In addition, there is little indication from the application that Mississippi has considered how this work requirement proposal will impact people with disabilities. While the waiver application proposes specific exemptions for individuals diagnosed with a mental illness or "physically or mentally unable to work," these categories do not capture all people with disabilities. 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, the need for supported employment services that are scarcely available, or the lack of reliable, accessible transportation. Mississippi says nothing about ensuring that people with disabilities who can work gaining access to supported employment services or other assistive services that they might need to work.

Because of all of these issues, 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

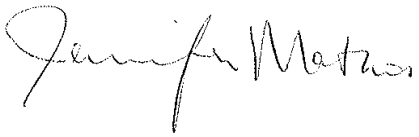
[12] MISSISSIPPI WAIVER APPLICATION, *supra* note 1, at 7
[13] *Id*. at 5.
[14] *Id*. at 9.
[15] *Id*. at 5 ("During this demonstration waiver, we will partner with agencies such as the Department of Human Services (DHS) and the Office of Employment Security (OES) to assist with identifying and providing necessary workforce skills training to qualified Medicaid members").
[16] *Id*. at 7.

without disabilities.[17] 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.[18] Dr. Gary Bond, then Professor of Psychiatry at Dartmouth Psychiatric Research Center, testified that the reason for the dramatic gap between the desire of people with serious mental illness to work and their low employment rates is not an inability to work, but rather "attitudinal, service, and system barriers" such as stigma and discrimination, inadequate treatment, and lack of employment services.[19]

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.[20] 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.[21]

For all of these reasons, Mississippi's waiver amendment application should be denied.

Respectfully submitted,



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[17] 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).

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

[19] Written Testimony of Dr. Gary Bond, *U.S. Equal Employment Opportunity Commission public meeting on Employment of People with Mental Disabilities* (March 15, 2011) https://www.eeoc.gov/eeoc/meetings/3-15-11/bond.cfm.

[20] *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.

[21] *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).