JUDGE DAVID L. BAZELON CENTER FOR MENTAL HEALTH LAW

Aug. 18, 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 revised Kentucky HEALTH Section 1115 demonstration 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 demonstration application. We urge you to reject the proposal. While we fully support the goals of expanding employment and promoting independence and economic self-sufficiency, we believe HHS lacks the authority to approve Kentucky's revised proposal to condition Medicaid eligibility on individuals engaging employment or community engagement activities, and the proposal would be particularly harmful for beneficiaries with disabilities. Kentucky's revised application, aligning work requirements with those in the SNAP program, does not solve the problems that were the basis for a federal court vacating the approval of the initial demonstration application.

1. **<u>The Department of Health and Human Services (HHS) does not have the authority to grant Kentucky's request.</u>**

HHS lacks the authority to approve the revised proposal to condition Medicaid eligibility for Section 1115 waiver participants on these individuals engaging in work, work-related activities, or community engagement activities. 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]."[1] The Kentucky work requirement does not meet this standard.

Kentucky'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

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

resources are insufficient to secure needed medical services, and (2) services to help such individuals and families attain or retain independence and self-care.[2]

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 [. . .][3]

Kentucky's new proposed work requirements would not promote the goals of furnishing medical assistance and services, 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.

Evidence from other benefits programs demonstrates that work requirements do not increase health and well-being. 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.[4] 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."[5]

Furthermore, the SNAP ABAWD work requirements have similar issues. A study shows that SNAP recipients who work face difficulty documenting hours and fear losing their benefits if

[2] 42 U.S.C. 1396-1.
[3] About Section 1115 Demonstrations, supra note 1.
[4] See, e.g., LaDonna Pavetti, Center on Budget and Policy Priorities, *Work Requirements Don't Cut Poverty, Evidence Shows* (Jun. 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/.
[5] Work Requirements Don't Cut Poverty, supra note 4.

their hours fall in a given month.[6] Among SNAP recipients who are not working, there are high rates of disability.[7] In addition, comprehensive evidence shows that additional paperwork results in more individuals losing coverage, regardless of eligibility.[8]

These outcomes strongly suggest that many participants will not succeed in meeting the proposed work requirements and hence will lose the critical health care coverage. Kentucky estimates 95,000 individuals will lose Medicaid and does not show any evidence they will obtain coverage from other sources. 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."[9] The Foundation's health 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.[10]

Since the work requirement will cause individuals to lose coverage and there is no evidence will assist people to work, the proposal does not promote the objectives of Medicaid and cannot be granted by the Secretary.

Kentucky'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.

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[6] Heather Hahn et. al, Urban Institute, Work Requirements in Social Safety Net Programs (Dec. 2017), https://www.urban.org/sites/default/files/publication/95566/work-requirements-social-safety-net-programs_4.pdf, at pg. 10-11.
[7] *Id.*
[8] *See* Kaiser Family Foundation, Rachel Garfield, Robin Rudowitz, MaryBeth Musumeci, and Anthony Damico, Implications of Work Requirements in Medicaid: What Does the Data Say? (Jun 12, 2018), https://www.kff.org/medicaid/issue-brief/implications-of-work-requirements-in-medicaid-what-does-the-data-say/; New York Times, Margot Sanger-Katz, *Hate Paperwork? Medicaid Recipients Will Be Drowning in It* (Jan. 18, 2018), https://www.nytimes.com/2018/01/18/upshot/medicaid-enrollment-obstacles-kentucky-work-requirement.html.
[9] Medicaid Enrollees and Work Requirements, *supra* note 4.
[10] *Id.*

As discussed above, it is unclear how the proposed work requirement helps achieve these goals. Additionally, the proposal does not put forth any indicators describing the problem at hand that the Waiver is attempting to solve. For instance, Kentucky does not detail the number of individuals who are not working or provide any information about why Kentucky HEALTH members are not working. These seem like absolutely crucial components of any demonstration, pilot, or experiment, given the evidence above that work requirements will not assist individuals in obtaining jobs.

While the Bazelon Center agrees with the goals of increasing employment and encouraging involvement in the community, it is utterly unclear how implementing work requirements that will likely result in massive loss of health care coverage solves these concerns. 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. The proposal, which lacks any evidence to the contrary, should be rejected.

2. <u>Kentucky's proposal would be particularly harmful to people with disabilities</u>

Indeed, the revised work requirements would be particularly harmful for people with disabilities, including mental and psychiatric 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, 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.[11] 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.[12]

Additionally, many people with disabilities who are working may be working part-time schedules of fewer the required number of hours a 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

[11] 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.

[12] 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.

work requirements, participants with physical and mental health issues were more likely to be sanctioned for not completing the work requirement.[13] 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.[14]

The Kentucky proposal also provides no detail on how the state plans to ensure people with disabilities have access to the supports and services they might need to work. This leaves persons with disabilities who need supports in order to work two unfortunate options. Persons with disabilities may be found exempt from the requirement, but will be left without additional augmented supports and now at greater risk of losing their Medicaid coverage because of challenges complying with heightened paperwork demands. Alternatively, the exemption process will fail and subject many persons with disabilities to unattainable requirements without adequate supports, all in the name of 'increasing employment'.

As discussed above, having access to health care promotes independence and work. Rather than implementing a work requirement likely to *increase* the issue of underemployment of persons with disabilities and *increase* health care concerns as a result of lost coverage, Kentucky could instead expand the work opportunity programs and attempt to address the fundamental problems and lack of sufficient support. Kentucky could actually encourage work, rather than penalize persons who the system has failed. For all of these reasons, Kentucky's waiver proposal should be denied.

We appreciate the opportunity to provide comments on the revised Kentucky application. Our comments include citations to supporting research and our prior comments, including direct links for the benefit of HHS in reviewing our comments. We direct HHS to the studies cited and made available to the agency through active hyperlinks, and we request that the full text of each of the studies cited, along with the full text of our current and prior comments, be considered part of the administrative record in this matter for purposes of the Administrative Procedure Act.

Respectfully submitted,

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[13] 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).
[14] 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.

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