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BAZELON
CENTER
FOR MENTAL HEALTH LAW

December 24, 2018

Seema Verma, Administrator
Centers for Medicare & Medicaid Services
Attention: CMS-9936-NC
Baltimore, Maryland 21244

Re: **Recently Updated Guidance for Section 1332 Waivers, State Relief and Empowerment Waivers (CMS-9936-NC)**

Dear Administrator Verma:

The Bazelon Center for Mental Health Law submits these comments in response to the latest guidance regarding State Innovation Waivers under Section 1332 of the Patient Protection and Affordable Care Act (PPACA). 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.

The guidance sets forth a new and impermissible reading of Section 1332 which ignores the legislation's explicit purpose and undermines guardrails meant to protect against the very demonstrations CMS is now encouraging. Despite assurances that coverage for people with pre-existing conditions cannot be waived,[1] the guidance permits waivers that would do just that, and its erosion of the law's guardrails is a significant threat to the affordability of plans for those with pre-existing conditions and the availability of needed services.

1. **The new guidance improperly interprets Section 1332 and ignores Congressional intent.**

Section 1332 was not enacted as a way to bypass the coverage or affordability requirements of the PPACA or any of its mandated essential health benefits (EHBs). Rather, it was enacted to allow states to experiment within the confines of those requirements—in other words, establishing a floor upon which state reforms could attempt to build. A plain reading of the statutory text makes that clear, as does the legislative history. This is made clear in the language of Section 1332 stating that "the Secretary may grant a request for a waiver . . . *only if*" it meets the following conditions:[2]

> (A) will provide coverage that is *at least* as comprehensive as the coverage

[1] CMS, *Section 1332 State Relief and Empowerment Waiver Concepts Discussion Paper* (Nov. 29, 2018) https://www.cms.gov/CCIIO/Programs-and-Initiatives/State-Innovation-Waivers/Downloads/Waiver-Concepts-Guidance.pdf.
[2] 42 U.S.C. § 18052(b)(1) (emphasis added).

> defined in section 18022(b) of this title and offered through Exchanges . . . ;
> (B) will provide coverage and cost sharing protections against excessive out-of-pocket spending that are *at least* as affordable as the provisions of this title would provide;
> (C) will provide coverage to *at least* a comparable number of its residents as the provisions of this title would provide; *and*
> (D) will not increase the Federal deficit.[3]

These four guardrails are connected by the word "and," indicating that *all* must be met in order for a waiver to be granted and that they must all be considered together in determining whether to approve a waiver. The legislative history of Section 1332 confirms this reading. In discussing the purpose of Section 1332, which he authored, Senator Wyden stated that "[i]f States think they can do health reform better than under this bill, *and they cover* the same number of people with the same comprehensive coverage, they can get a waiver exempting them from the legislation and still get the Federal money that would have been provided under the bill."[4]

2. **<u>The new guidance undermines Section 1332's guardrails.</u>**

The new guidance interprets Section 1332's guardrails in a way that effectively allows states to return to a pre-PPACA market, permitting coverage that does not meet the set of minimum standards clearly called for within the PPACA. The new guidance focuses on "access" to coverage that meets the minimum standards set by the PPACA, rather than ensuring people actually *have* such coverage, as required by the statutory language "will provide coverage." The focus on "access" suggests that as long as coverage that is sufficiently comprehensive and affordable *exists*, it does not matter what coverage people actually have.

A core purpose of the PPACA was to ensure all plans met certain minimum standards,including ensuring that people actually have or are offered comprehensive and affordable coverage. Ignoring that requirement would not only violate the statute but would have long-term adverse public health consequences and likely lead to an increase in uninsured or underinsured Americans.

The new guidance undermines the comprehensiveness guardrail.

Under the previous guidance, states were required to show that coverage that is at least as comprehensive as their essential health benefits package would be provided to as many or more people as it would have been absent the waiver.[5] However, the new guidance severs the comprehensiveness guardrail from the coverage guardrail, suggesting that as long as the possibility of purchasing coverage that is at least as comprehensive exists, it does not matter how

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[3] *Id*. (emphasis added).
[4] Statement of Senator Ron Wyden, Congressional Record, S13853 (Dec. 23, 2009) https://www.congress.gov/crec/2009/12/23/CREC-2009-12-23-senate-bk2.pdf.
[5] Department of Health and Human Services and Department of the Treasury, *Waivers for State Innovation*, 80 Fed. Reg. 78131 (Dec. 16, 2015).

many people are provided with such coverage.[6] This would result in less comprehensive plans competing with plans that meet the minimum PPACA requirements.[7] In permitting this, the Administration would be encouraging the potential destabilization of plans that offer EHBs.

These plans—and the protections they offer—may be further undermined by allowing PPACA subsidies to be used to help people pay for non-compliant, less comprehensive plans.[8] In addition, the new guidance allows waivers that weaken the amount of coverage of EHBs that a state provides, rather than ensuring states provide coverage equivalent to what they have provided in the past--a change which would allow plans to be considered at least as comprehensive under the terms of the guidance, while not actually providing state residents with the same scope of coverage of those benefits as was previously available.[9]

The new guidance undermines the affordability guardrail.

Under the previous guidance, waivers were required to provide "coverage that provides a minimal level of protection against excessive cost sharing" to as many people as would have received such coverage absent the waiver.[10] That interpretation followed the plain reading of the statute. The focus on "access to coverage" in the new guidance, however, suggests that states would no longer need to provide as many people with plans that protect them against excessive cost sharing, as long as those plans are still available. This would allow states to provide less comprehensive coverage, placing people at greater risk of excessive cost sharing and potentially preventing people from receiving necessary care.

The new guidance would also permit waivers that make coverage more affordable for a larger swath of the population but less affordable for some people. This contradicts previous guidance, under which a waiver would be rejected if it increased "the number of individuals with large health care spending burdens relative to their incomes" even if it improved "affordability on average."[11] That interpretation protected people from being subjected to unreasonably high health care costs in order to benefit the majority.

The new guidance undermines the guardrail ensuring coverage to a comparable number of residents.

The clear meaning of Section 1332 is that waivers must ensure that a comparable number of

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[6] Department of Health and Human Services and Department of the Treasury, *State Relief and Empowerment Waivers*, 83 Fed. Reg. 53575, 53578 (Oct. 22, 2018).
[7] Department of Health and Human Services and Department of the Treasury, *State Relief and Empowerment Waivers*, 83 Fed. Reg. 53575, 53577 (Oct. 22, 2018).
[8] CMS, *Section 1332 State Relief and Empowerment Waiver Concepts Discussion Paper* 9 (Nov. 29, 2018).
[9] Department of Health and Human Services and Department of the Treasury, *State Relief and Empowerment Waivers*, 83 Fed. Reg. 53575, 53578-53579 (Oct. 22, 2018).
[10] Department of Health and Human Services and Department of the Treasury, *Waivers for State Innovation*, 80 Fed. Reg. 78131 (Dec. 16, 2015).
[11] Department of Health and Human Services and Department of the Treasury, *Waivers for State Innovation*, 80 Fed. Reg. 78131 (Dec. 16, 2015).

people have coverage that is as comprehensive and affordable as the coverage available in the absence of a waiver. In other words, a comparable number of people must have coverage that meets the minimum requirements of the PPACA. The 2015 guidance reflects this view. The new guidance, on the other hand, reads the comparaibility guardrail as entirely separate from the comprehensiveness and affordability guardrails, essentially declaring the type of coverage people have to be irrelevant.

The new guidance would consider both short term limited duration insurance (STLDI) and association health plans (AHPs) coverage for the purposes of this guardrail, even though such plans can discriminate against people with preexisting conditions by denying them coverage, charging higher premiums, or selling them coverage that does not cover treatment of preexisting conditions.[12] STLDIs and AHPs are also not required to provide EHBs, including mental health services, substance use disorder treatment, and prescription drug coverage. Thus, in spite of CMS' assurances that states cannot waive protections for people with preexisting conditions, it would approve waivers that counted as coverage plans that do exactly that, contrary to the PPACA and one of its most popular provisions.

The new guidance would also permit approval of waivers that temporarily cause reductions in coverage, as long as they do not do so long term. As the guidance states, a waiver may be approved "even where a state expects a temporary reduction in coverage but can demonstrate that the reduction is reasonable under the circumstances, and that the innovations will produce longer-term increases in the number of state residents who have coverage such that, in the aggregate, the coverage guardrail will be met or exceeded over the course of the waiver term."[13] That interpretation of the coverage guardrail is inconsistent with the statute. The statute explicitly states that a waiver may only be approved if a comparable number of people are provided with coverage, not that a waiver may be approved if a comparable number of people are projected to eventually be provided with coverage.[14]

3. <u>The new guidance will harm people with disabilities.</u>

Allowing temporary reductions in coverage as long as the number of people covered under the waiver is expected to eventually return to or exceed pre-waiver levels is particularly dangerous for people with disabilities. Many people with disabilities need continuity of care and losing coverage, even when that loss is temporary, may have life-threatening consequences.

While waiver applications must still identify how comprehensiveness and affordability impact people with disabilities, decreasing the comprehensiveness or affordability of coverage for people with disabilities would no longer guarantee that a waiver will be rejected. The previous guidance included a test ensuring that vulnerable populations would not be harmed a state's Section 1332 waiver, but the current guidance has no such test indicating when a waiver would

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[12] Department of Health and Human Services and Department of the Treasury, *State Relief and Empowerment Waivers*, 83 Fed. Reg. 53575, 53579 (Oct. 22, 2018).
[13] Department of Health and Human Services and Department of the Treasury, *State Relief and Empowerment Waivers*, 83 Fed. Reg. 53575, 53579 (Oct. 22, 2018).
[14] 42 U.S.C. § 18052(b)(1).

fail due to the harm caused to vulnerable populations. Instead, it says that "[w]hile analysis will continue to consider effects on all categories of residents, the revised guardrails will give states more flexibility to decide that improvements in comprehensiveness and affordability for state residents as a whole offset any small detrimental effects for particular residents."[15]

This would open the door to allowing states to provide coverage to people with disabilities that is less affordable or less comprehensive in order to make coverage more affordable or comprehensive for people without disabilities—including through the use of high-risk pools. A discussion paper recently released by CMS encourages states to submit waivers that would create high-risk pools in an attempt to reduce costs for people without disabilities, effectively prioritizing the affordability of insurance for people without disabilities over the affordability and utility of insurance for people with disabilities.[16] High risk pools do not work. They have never worked. They provide expensive and often limited coverage to beneficiaries and are extraordinarily expensive to maintain.[17] Common features include annual or lifetime dollar limits on covered services, high deductibles, higher premiums than those charged in the general marketplace (often 150-200%), and waiting periods for new enrollees to receive coverage for pre-existing conditions. Even with all of those limitations on coverage, in 35 state high-risk pools, an average loss of $5,510 per enrollee was reported in 2011.[18]

The PPACA clearly prohibited discrimination against people with preexisting conditions. Implicit in that is the maintenance of EHBs, which provide a minimum level of comprehensive coverage in order to ensure that insurance companies can no longer refuse to cover necessary treatment in the name of cost. This guidance battempts to undermine that protection, allowing plans that can refuse to provide EHBs and can deny coverage to or otherwise discriminate against people with preexisting conditions to operate as long as nondiscriminatory coverage options exist.

Section 1557 of the PPACA prohibits discrimination on the basis disability in "any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance."[19] This guidance, through its promotion of STLDIs and AHPs, which, as discussed above, are allowed to discriminate against people with preexisting conditions, and through its refusal to guarantee protection of coverage levels, comprehensiveness of coverage, and affordability for people with disabilities.

We appreciate the opportunity to provide comments on this new guidance. Our comments include citations to supporting research and our prior comments, including direct links for the

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[15] Department of Health and Human Services and Department of the Treasury, *State Relief and Empowerment Waivers*, 83 Fed. Reg. 53575, 53578 (Oct. 22, 2018).
[16] CMS, *Section 1332 State Relief and Empowerment Waiver Concepts Discussion Paper* 34 (Nov. 29, 2018).
[17] Karen Pollitz, *High-Risk Pools For Uninsurable Individuals* 4, Kaiser Family Foundation (Feb. 2017), https://www.kff.org/health-reform/issue-brief/high-risk-pools-for-uninsurable-individuals.
[18] Karen Pollitz, *High-Risk Pools For Uninsurable Individuals* 5, Kaiser Family Foundation (Feb. 2017), https://www.kff.org/health-reform/issue-brief/high-risk-pools-for-uninsurable-individuals.
[19] 42 U.S.C. § 18116(a).

benefit of CMS in reviewing our comments. We direct CMS 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 comments, be considered part of the administrative record in this matter for purposes of the Administrative Procedures Act.

Respectfully submitted,

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