FAMILIESUSA
THE VOICE FOR HEALTH CARE CONSUMERS

January 27, 2018

The Honorable Eric D. Hargan, Acting Secretary
U.S. Department of Health and Human Services
200 Independence Avenue, S.W. Washington, DC 20201

Re: Comments regarding Kansas's 1115 KanCare renewal, KanCare 2.0 Application

Dear Acting Secretary Hargan:

Families USA appreciates the opportunity to provide comments on Kansas's request to renew its 1115 waiver for the KanCare program.

Families USA is a national health care advocacy organization that supports policies and programs at the state and federal levels to expand access to quality, affordable health care, with a particular focus on policies that affect lower-income individuals.

Our comments are focused on the section of the application related to "Employment Programs." The program described in that section does not meet the requirements for approval under section 1115 of the Social Security Act, is therefore incompatible with federal Medicaid law, and should be denied.[1]

General Comments

The state requests imposing a work requirement on adults in Medicaid (with listed exemptions) and, for adults subject to that work requirement, limiting Medicaid eligibility to 36-months. Both the imposition of a work requirement and eligibility time limits violate federal Medicaid law. Both are outside of the scope of policies that the Secretary can approve under 1115 waiver authority. Specifically, Section 1115 requires that waivers be experimental, pilot or demonstration projects; be likely to promote the objectives of the Medicaid program; be limited to compliance with requirements of section 1902 of the Social Security Act; **and** be

[1] 42 U.S.C. section 1315(a) (codification of Social Security Act section 1115)

FamiliesUSA.org
1225 New York Avenue, NW, Suite 800
Washington, DC 20005
main 202-628-3030 / fax 202-347-2417

limited to the extent necessary for the state to carry out the experimental project. The employment program Kansas proposes does not meet those statutory requirements.

The objectives of both the Medicaid program and the requirements for 1115 waivers are set out in statute. Regardless of how the administration defines the objectives of 1115 waivers on the Medicaid.gov website, it is the statute, not the website language, that governs what is and is not within the Secretary's authority.

Furthermore, the policies proposed are in conflict with Kansas's stated goals. Kansas claims its goal for KanCare 2.0 is "coordinating services and supports for social determinants of health and independence."[2] On page 3, the application lists "Social Determinants of Health." The third item listed is access to health care services. However, the proposed employment program is centered on denying and limiting, rather than coordinating, Kansans' access to health insurance through Medicaid. Limiting Kansans' access to Medicaid will reduce, not "coordinate," their access to health services. The key feature of the employment program runs counter to Kansas's stated goals for the program.

Comments on specific waiver requests.

Time limits.

Kansas's request to limit KanCare eligibility for adults to 36 months is outside the Secretary's authority, does not support the objectives of the Medicaid program, serves no demonstration purpose, does not meet the basic requirements for a demonstration project, and therefore must be denied.

Kansas proposes limiting Medicaid eligibility for adults subject to the program's work requirement to 36 months.

Imposing a time limit on Medicaid eligibility would change the Medicaid program in a manner far beyond what was ever intended to be within the Secretary's 1115 waiver authority and therefore must be denied. Section 1115 of the Social Security Act gives the Secretary authority to approve pilot, experimental or demonstration projects that he or she believes will "assist in promoting the objectives of" the Medicaid program.[3]

The objective of the Medicaid program is set out in section 1901 of the Social Security Act. It is to provide federal funding to enable each state "to furnish (1) medical assistance on behalf of

[2] KanCare 2.0 application page 3.

[3] Social Security Act sec. 1115 [42 U.S.C. 1315(a)].

[statutorily eligible individuals], and (2) rehabilitation and other services to help such [individuals] attain or retain capability for independence or self-care….."[4] "Independence" within the context of the statute is clearly referring to improved physical function that can be achieved through medical services and rehabilitation.

Limiting the months that an individual in any eligibility category can receive benefits fundamentally conflicts with the program's core objective of furnishing medical assistance to low income people and changes the very nature of the program.

Congress has placed income and other limits on individual eligibility, but in the over 50 years Medicaid has been in operation, it has never placed a limit on the time that otherwise eligible individuals can receive benefits. Limiting time-on-program would be adding a new eligibility requirement that would fundamentally change the program itself.

It is Congress's unambiguous intent that there should not be time limits on Medicaid eligibility and the Secretary must give effect to Congress's intent.[5] Adding time limits through a waiver request is far beyond the Secretary's waiver authority, would be in conflict with Congressional intent, and therefore, the Secretary must deny this request.

Imposing a time limit does not promote the objectives of the Medicaid program. Section 1115 allows the Secretary to waive requirements of section 1902 of the Medicaid Act "[I]n the case of any experimental, pilot, or demonstration project which, in the judgment of the Secretary, is likely to assist in promoting the objectives of title…..XIX."[6] As noted above, the program's objectives are to furnish medical assistance and rehabilitative services.

Imposing a limit on the number of months that someone can receive medical assistance—when individuals' need for medical care is unpredictable throughout one's life—does not promote those objectives. It runs in opposition to those objectives. The predictable outcome of limiting Kansans' access to Medicaid would be an increase in the state's uninsured population, thus reducing their access to medical and rehabilitative services.

[4] Social Security Act Sec. 1901. [42 U.S.C. 1396].

[5] See *Comacho –v- Texas Workforce Commission,* 408 F.3rd 209, April 29, 2005, Holding that Texas cannot terminate medical benefits for TANF recipients who do not vaccinate their children, citing *Chevron, U.S.A. Inc. –v- Natural Res. Def. Council, Ins.* 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 noting "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."

[6] Section 1115 of the Social Security Act.

It has been CMS policy that time limits do not support program objectives. In September 2016, CMS denied Arizona's request to impose a time limit in coverage, noting that a time limit does "not support the objectives of the program."[7]

Imposing a time limit on Medicaid eligibility is inconsistent with Medicaid's core statutory goal of furnishing medical assistance and the request should be denied.

The request to add a time limit serves no demonstration purpose and therefore does not meet the requirements of section 1115 and must be denied. Section 1115 of the Social Security Act is titled: Demonstration Projects. That is because the waivers are, by statute, to serve a demonstration or experimental purpose. Kansas's request to limit individuals' time on Medicaid does not serve any plausible demonstration purpose.

The proposed program would have as its main outcome an increase in the state's low-income uninsured population. It is well documented that lacking or losing health insurance has a negative impact on low-income individuals' ability to access health care services.[8] No further study of the issue could possibly be needed.

Lacking any plausible demonstration purpose, the request must be denied.

Work requirements.

Work requirements are not part of the Medicaid program, are outside of the Secretary's authority to approve through an 1115 waiver, therefore the request must be denied.

Kansas proposes to require adult Medicaid enrollees who do not fall into listed exemptions to meet a work requirement. The requirement can be met through a minimum number of hours per week employment, subsidized employment, volunteer work, job search activities, and certain educational activities. For those who do not meet those requirements, Medicaid eligibility is limited to 3 months.

---

[7] CMS letter to the state of Arizona, September 30, 2016, https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/az/Health-Care-Cost-Containment-System/az-hccc-demo-ext-09302016.pdf.

[8] This lists a few of the many studies on this point: National Center for Health Statistics, "Health Insurance and Access to Care," February 2017, at https://www.cdc.gov/nchs/data/factsheets/factsheet_hiac.pdf; Annals of Internal Medicine, "The Relationship of Health Insurance and Mortality: Is Lack of Insurance Deadly?" 2017; 167 (6): 4240431 at http://annals.org/aim/fullarticle/2635326/relationship-health-insurance-mortality-lack-insurance-deadly#; Kaiser Family Foundation, "Key Facts About the Uninsured Population," September 19, 2017, at https://www.kff.org/uninsured/fact-sheet/key-facts-about-the-uninsured-population/; Julia Paradise, "What is Medicaid's Impact on Access to Care, Health Outcomes, and Quality of Care? Setting the Record Straight on the Evidence," Kaiser Family Foundation, August 2, 2013, at https://www.kff.org/report-section/what-is-medicaids-impact-on-access-to-care-health-outcomes-and-quality-of-care-setting-the-record-straight-on-the-evidence-issue-brief/.

A work requirement is a radical change to the Medicaid program; approving such a change through an 1115 waiver is an abuse of the Secretary's authority. As we have written in our 1115 comments for Utah's Primary Care Network waiver request, Wisconsin's Badgercare Reform waiver request, Kentucky's Kentucky Health modified waiver request, and Arkansas's Arkansas Works waiver request, work requirements are outside of the Secretary's authority. The fact that work requirements have no place in Medicaid law was recently noted by the Congressional Budget Office in September, 2017, in a report in which they stated: "Under current law, states may not condition the receipt of Medicaid on any criteria related to a person's employment status."[9]

Linking Medicaid eligibility to work—whether requiring hours worked or a job search or job training—is adding a whole new aspect to Medicaid eligibility, one that would fundamentally change the program. Such a radical change to the program must be made through the legislative process, not through waivers. Indeed, Congress has recently failed to pass such a change despite recently taking up such a provision in the American Health Care Act and the Better Care Reconciliation Act. The work requirement on the TANF and SNAP programs were all enacted through Congressional legislation. The Secretary must give effect to Congress's unambiguous intent.[10]

Like time limits, adding a work related eligibility requirement to the Medicaid program is beyond the Secretary's authority to approve through a waiver, a change that would be in conflict with Congressional intent, and therefore, the Secretary must deny this request.

A work requirement is inconsistent with Medicaid objectives, and therefore not appropriate for approval under an 1115 waiver. As discussed in detail above, Medicaid's objectives are to provide medical and rehabilitative services to eligible individuals. A work requirement is far afield from those objectives and is therefore inappropriate for approval through an 1115 waiver.

In its application, Kansas states that the work requirement is presented as part of the state's effort to encourage member independence. Regardless of the merits of that goal, withdrawing medical assistance from otherwise eligible low income individuals is antithetical to Medicaid's objectives of furnishing medical assistance and rehabilitative services.

It is true that the word "independence" is used in section 1901 of the Social Security Act to define Medicaid's objectives: "to furnish…..(2) rehabilitation and other services to help such

[9] Congressional Budget Office, "Preliminary Analysis of Legislation That Would Replace Subsidies for Health care With Block Grants," September 25, 2017, https://www.cbo.gov/publication/53126.

[10] *Comacho –v- Texas Workforce Commission,* op cit.

[individuals] attain or retain capability for independence or self-care….."[11] However, it is plainly clear that "independence" within that context is referring to improved physical function that can be achieved through medical services and rehabilitation. Removing Medicaid coverage from individuals will make it harder for them to attain the very independence the statute is referring to.

Section 1115 does not give the Secretary authority to add new requirements to Medicaid. A work requirement adds a totally new eligibility requirement unrelated to any other program requirements or the program's purpose and is therefore outside of 1115 authority. Section 1115 gives the Secretary the authority to waive requirements of section 1902 when the request meets conditions set out in the statute. It does not give the Secretary the authority to add new requirements to 1902. A work requirement would be the addition of a totally new eligibility requirement that is unrelated to Medicaid's objectives and is therefore not the kind of program change supported by 1115 authority.

Compensating volunteer work with health insurance may violate other federal laws. Kansas proposes using unpaid volunteer work to satisfy the work requirement. This is bad economic policy that could drive down wages, further impoverishing the very people this program claims it is designed to help, and result in paid employees being laid off in favor of an unpaid workforce. This may also violate federal law.

In this country, people are generally paid for work that they do. The Fair Labor Standards Act created a right to a minimum wage.[12] Medicaid coverage is not a substitute for wages. Medicaid pays doctors and other health care providers for services rendered to patients. It does not pay enrollees.

***Work requirements seek to solve a problem that doesn't exist and there is no evidence the requirement will promote employment*.** Most people on Medicaid who can work, do so. For people who face major obstacles to employment, harsh penalties for not working—such as taking away the insurance that affords them access to health care—will not help them overcome those barriers to work. Indeed, the work requirements and disenrollment penalty laid out in the KanCare application are likely to have the opposite effect.[13]

---

[11] Social Security Act Sec. 1901. [42 U.S.C. 1396].

[12] The Fair Labor Standards Act of 1938, 29 U.S.C. sec 203.

[13] The Kaiser Family Foundation, *The intersection of Medicaid and Work* (The Kaiser Family Foundation: Washington, DC) Feb, 15, 2017 available online at http://www.kff.org/medicaid/issue-brief/understanding-the-intersection-of-medicaid-and-work/

An individual needs to be healthy in order to obtain and maintain employment. Kansas's proposed disenrollment penalty will mean that many individuals will not be able to access to health care that could help them be able to work.[14]

Furthermore, this requirement will punish people who cannot find jobs because they live in an economically depressed area, particularly those in struggling rural economies or areas with high rates of unemployment.

The proposed program would add complexity, bureaucracy, administrative cost. Kansas has set forth 14 work requirement exemption categories and a dozen activities that can be used to meet that requirement. This will be very complex to track, requiring added manpower and systems modifications that will increase program costs. Such a complex system will predictably result in individuals being cut from coverage who either fall within exemptions or who meet the work requirement.

The costs of this added bureaucracy will be borne by the federal government and Kansas, and ultimately federal and state taxpayers. Adding new, complicated requirements to Medicaid eligibility, particularly where there is no supported benefit to Medicaid consumers, is fiscally irresponsible.

When viewed in light of Kansas's Medicaid eligibility limits, it is clear that the work requirement is principally about removing otherwise eligible adults from the Kansas Medicaid program. In Kansas, Medicaid income eligibility for non-disabled adults is limited to parents with dependent children or non-parental children's caregivers who have an annual income of less than 38 percent of poverty.[15]

Here's how the KanCare proposal would play out for a single mother, subject to the work requirement, with one dependent child:

For that two person household, Kansas's Medicaid income eligibility cuts off at $505 in monthly income. The proposed KanCare work requirement for a single adult household is at least 20 hours per week.

If that single mother did not meet the 20-hour per week work requirement, she would lose Medicaid eligibility. However, if she did work 20-hours per week making the federal minimum

[14] Jessica Gehr, et al, "The Evidence Builds: Access to Medicaid Helps People Work," CLASP, December 2017 online at https://www.clasp.org/sites/default/files/publications/2017/04/The-Evidence-Builds-Access-to-Medicaid-Helps-People-Work.pdf.

[15] See KanCare eligibility requirements for Medical assistance for parents or caregivers of children, online at http://www.kdheks.gov/hcf/Medicaid/download/Medical_Coverage_for_Parents_Caregivers.pdf, accessed January 23, 2018.

wage of $7.25, she would earn about $580 in a month, exceeding KanCare's income eligibility limit of $505.[16] She would then lose Medicaid eligibility because of her earnings. It is unlikely that she will have health coverage through her employer. In 2016, only 48 percent of private sector establishments in Kansas offered health insurance to employees.[17]

In effect, under the proposed KanCare program, a single mother with a dependent child is destined to lose coverage no matter what she does—unless she opts to work for free, or engages in endless job training or job searches.

This is not a program to "encourage member independence," as the state claims.[18] This is a program about kicking non-disabled adults off Medicaid.

Independence Accounts

The proposed Independence Account program would not promote Medicaid's objectives, is outside the Secretary's authority to approve, and lacks sufficient detail to qualify as a demonstration.

Kansas's TransMed program provides temporary (up to 12 months) medical assistance to families that have lost Medicaid eligibility due to increased earnings. Kansas is proposing giving TransMed members the option to sign up for an Independence Account. The state would deposit fund into the account, contingent on the individual's continued employment. At the end of 12 months of TransMed coverage, individuals who signed up for accounts would be given a debit card that would give them access to their account funds, which could be used for items specified by the state, with CMS approval.[19]

TransMed members who participate in the Independence Account program will be prohibited from re-enrolling in Medicaid for a period of time to be determined by the state.

The Independence Accounts do not promote Medicaid objectives. The state contends that this program is designed to support enrollee independence.

---

[16] Department of Labor, Federal Minimum Wage, at https://www.dol.gov/general/topic/wages/minimumwage.
[17] Kaiser Family Foundation, State Health Facts, "Percent of Private Sector Health Establishments that Offer Health Insurance to Employees, 2016," accessed January 22, 2018 at https://www.kff.org/other/state-indicator/percent-of-firms-offering-coverage/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D.
[18] KanCare application page 10.
[19] It is unclear in the application whether the Independence Account funds are fully funded by the state, or funded with Medicaid dollars—because fund uses must be approved by CMS, we assume that the funds are Medicaid dollars.

"Independence" in this context—which appears to be independence from Medicaid coverage—is not an objective of the Medicaid program.

Furthermore, the program is designed to offer individuals money in exchange for barring them from future Medicaid coverage for some unspecified period of time.

Congress designed Medicaid as an insurance coverage safety-net program. Essentially using a health account to bribe low-income individuals to give up future Medicaid eligibility is an inappropriate use of Medicaid funds that in no way promotes Medicaid's objectives. The program should be denied.

***

Thank you for your consideration of these comments. If you have any questions, please contact either Dee Mahan or Andrea Callow at Families USA.

Dee Mahan
Director, Medicaid Initiatives

Andrea Callow
Associate Director, Medicaid Initiatives