



October 20, 2017

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

Dear Secretary Hargan:

Families USA appreciates the opportunity to comment on Massachusetts' request to amend its Section 1115 Demonstration project.

Families USA is a national non-profit, non-partisan health care advocacy organization dedicated to the achievement of quality, affordable healthcare for all Americans.

While we strongly support Massachusetts efforts to extend coverage to its residents through MassHealth, we have concerns the amendment as requested would impede access to care and run counter to the objectives of the Medicaid program—that is, to provide medical assistance eligible individuals in need of care.

Overarching Comments

The state of Massachusetts has gone to great lengths to ensure nearly universal coverage, and that is to be commended. Of course, the cost of this expansion must also be taken seriously by the state. Nevertheless, when it comes to a change in the Medicaid program through Section 1115 of the Social Security Act, the law requires that changes must be, as a threshold matter, “likely to promote the objectives of the Medicaid program. The objective of the Medicaid program is “to furnish medical assistance to individuals whose incomes and resources are insufficient to meet the costs of necessary medical care, and to furnish such assistance and services to help these individuals attain or retain the capacity for independence and self-care.”¹

The waiver fails in several ways to justify how it will promote the objectives of the Medicaid program. Instead, the waiver relies heavily on the justification that the waiver will 1.) save the state money or 2.) better align Medicaid coverage with private coverage. For example, goal six of the amendment request is “to ensure the long-term financial sustainability of the MassHealth program...” (p.17) and reference to evaluation of MassHealth alignment to commercial market plans is heavily referenced the evaluation criteria for Goal 6 and elsewhere. Budget savings and private market alignment are not legally sufficient justification for the approval of an 1115 waiver, and on those grounds alone the amendment should be rejected by the Secretary.

¹ Perkins, Jane and Mara Youdelman. “Waiver of Medicaid Requirements- A Quick Review.” NHeLP. April 4, 2017. <http://www.healthlaw.org/issues/medicaid/waivers-medicaid-requirements-review#.WPDqrPnyu00>

1. Request to Waiver Non-Emergency Medical Transportation (NEMT)

The state provides insufficient support for its request to waive NEMT. Massachusetts's request to waive non-emergency transportation coverage should not be granted. The Medicaid Alternative Benefit Package outlined in the Affordable Care Act is designed to meet the needs of a low-income population. Congress specifically designating this benefit package—which includes services, such as non-emergency transportation, that are in addition to the Essential Health Benefits package—because they recognized the special needs of the low-income individuals who would be gaining coverage through a Medicaid expansion.

Massachusetts does not offer any health, only budgetary, justification that would warrant excluding non-emergency transportation. The request justification stated in the amendment is to “better align coverage with commercial plans.” Better alignment with commercial plans is not an objective of the Medicaid program. Absent a justification related to patient care or health outcomes, this request should not be approved.

A. Data has shown that NEMT is a cost effective means of ensuring access to care for Medicaid enrollees, particularly those with complex conditions and high health care needs. Research has shown that, particularly for preventative care, NEMT is an effective means of linking Medicaid enrollees with the care they need.² The waiver amendment notes its commitment to improving care to those with chronic conditions. NEMT has been shown that some of the most common services accessed through NEMT are behavioral health and substance use services, dialysis and specialist care.³ A waiver of Massachusetts NEMT would be in direct contravention to Goal 5 (p.17) of the waiver to address the needs of those with substance use disorders.

B. A waiver of NEMT does not have a demonstration purpose. Iowa has received approval to waive NEMT on a conditional basis, and its own data has revealed gaps in care and problematic outcomes. In its request to extend its NEMT waiver, the state report showed that 22 percent (over one fifth) of IHWP members reported usually or always needing help from others to get to a health care visit. Thirteen percent reported an unmet need for transportation to or from a health care visit.⁴ These are not inconsequential percentages.

2. Modifying income eligibility levels to MAGI adults to less than or equal to 100 percent of federal poverty level.

² P. Hughes-Cromwick and R. Wallace, *et al.*, *Cost-Benefit Analysis of Providing Non-Emergency Medical Transportation*, Transit Cooperative Research Program (Oct. 2005), http://onlinepubs.trb.org/onlinepubs/tcrp/tcrp_webdoc_29.pdf.

³ The Kaiser Family Foundation, https://www.kff.org/report-section/medicaid-non-emergency-medical-transportation-overview-and-key-issues-in-medicaid-expansion-waivers-issue-brief/#endnote_link_177328-10

⁴ State of Iowa Letter request to the Department of Health and Human Services seeking renewal of Non-Emergency Medical Transportation waiver (Sept. 23, 2014) available online at <https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/ia/Wellness-Plan/ia-wellness-plan-pending-app-09232014.pdf>

Massachusetts is requesting to reduce the upper income eligibility limit for the state's Medicaid expansion (including parents and caretaker relatives who have had longstanding eligibility under Massachusetts waiver) to an amount that is less than the statutory requirement for Medicaid expansions entitled to the enhanced federal match.⁵ The Secretary does not have the authority to approve an enhanced federal match for expansions that do not extend coverage to 133 percent of poverty.⁶ This request should be denied.⁵

A. Congress intended that the enhanced match only apply when a state expanded coverage to all individuals in the groups defined in section 1902(a)(10)(A)(i)(VIII) of the Social Security Act.

The statutory language clearly defines the expansion group as a whole, consisting of “*all individuals... who are under 65 years of age, not pregnant, not entitled to, or enrolled for, benefits under part A of title XVIII, or enrolled for benefits under part B of title XVIII, and are not described in a previous subclause of this clause, and whose income (as determined under subsection (e)(14)) does not exceed 133 percent of the poverty line.*” The group was defined clearly without permissive language or flexibility. The group for which states can receive enhanced funding is clearly defined as a whole; it is not divisible.

A state's receipt of enhanced federal funding is predicated on it meeting all of the coverage requirements outlined in section 1902(a)(10)(A)(i)(VIII).

B.. The Secretary lacks the legal authority to approve a “partial expansion” at enhanced match. The requirement to cover all individuals up to 133 percent of poverty in order to receive an enhanced federal match is not affected by the National Federation of Independent Business decision.

The Supreme Court decision in *National Federation of Independent Business v. Sebelius (NFIB)*⁷ made expanding Medicaid an option for states. It did not, however, change the requirement that states that take up the option to expand coverage extend that coverage to all individuals with incomes below 133 percent of poverty in order to receive an enhanced federal match.

There is no question that in passing the Affordable Care Act, Congress intended all states to extend Medicaid eligibility to all otherwise eligible adults with incomes below 133 percent of poverty.

NFIB held that Congress unconstitutionally coerced states when it enacted provisions requiring states to expand Medicaid eligibility to low income adults or risk losing all of their existing federal Medicaid funding. A majority of the Court held that the problem was “*fully remedied*” by prohibiting the Secretary from using her authority to terminate existing funding of a state that did not implement the expansion. *Id.* at 2606-07 (emphasis added). The Court explicitly found: “The Medicaid provisions of the Affordable Care Act ... require States to expand their Medicaid programs by 2014 to cover *all* individuals under the age of 65 with incomes below 133% of the federal poverty line,”

4. PL 111-148, sec 2001 (a)(3); Social Security Act sec 1905 (y) [42 USC sec. 1396d(y)].

⁶ This and all future references include a five percent disregard, as outlined for Medicaid coverage in PL 111-134-sec2001.

⁷ *NFIB v Sebelius*, 567 U.S. 519 (2012)

(emphasis in original), and “Nothing in our opinion precludes Congress from ... requiring that states accepting such funds comply with the conditions on their use.”⁸

In his opinion, Justice Roberts stated that the ruling did not affect the Secretary’s ability to withdraw funds “if a State that has chosen to participate in the expansion fails to comply with the requirements of that Act. This is not to say, as the joint dissent suggests, that we are rewriting the Medicaid expansion.”⁹ The defining condition for receiving such enhanced funding is expanding coverage up to 133 percent of poverty. There is nothing in *NFIB* to authorize partial expansion.

C. The Secretary does not have the authority to approve enhanced federal funding for Medicaid expansions that do not meet the requirements of section 1905 of the Social Security Act.

The enhanced match for the Medicaid expansion is codified in section 1905 of the Social Security Act and cannot be waived under section 1115 authority, and clearly requires that the enhanced match is only available to states that extend Medicaid coverage up to 133 percent of the poverty line.

The principle that federal matching percentages in section 1905 are not subject to 1115 waiver is legally unquestioned and a cornerstone of CMS Medicaid policy.

As discussed above, the group eligible for enhanced federal payments is:

“all individuals.....who are under 65 years of age, not pregnant, not entitled to, or enrolled for, benefits under part A or title VIII, or enrolled for benefits under part B of title XVIII, and are not described in a previous subclause of this clause, and whose income (as determined under subsection e(14)) does not exceed 133 percent of the poverty line (as defined in section 2110(c)(5) applicable to a family of the size involved....”¹⁰

It is absolutely clear from the language in the statute that the enhanced payments apply to coverage of “*all individuals*” with incomes not exceeding 133 percent of poverty who meet the other coverage related characteristics enumerated. Income is a defining characteristic of the group eligible for enhanced funding.

The Secretary does not have the authority to waive section 1905 and is not authorized to make enhanced payments for coverage of less than *all individuals* with incomes below 133 percent of poverty.

D. A partial expansion serves no demonstration purpose and does not promote the objectives of the Medicaid program.

States have the option to extend coverage to low-income adults at the regular federal match and have had that option for years. Many states have taken up that option, both before and subsequent to the passage of the Affordable Care Act. There is utterly no demonstration purpose to be served by allowing Massachusetts to cover fewer adults—essentially exercising an option that has been available for well before the Affordable Care Act’s Medicaid expansion and enhanced federal match—and receive a

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ Social Security Act 1902 (a)(10)(A)(i)(VIII) [42 USC sec. 1396(a)(10)(A)(i)(VIII)]

higher federal match for doing so. There is also no justification to support how this change would in any way promote the objectives of the Medicaid program.

The most logical assumption is that this request is made principally to reduce state spending while continuing to receive higher federal matching payments. Not only is the receipt of enhanced federal payments not supported by the statute and outside of the Secretary's authority (see discussion above), but approval of a waiver for the purpose of a state saving money without a clear research or Demonstration value is an abuse of the Secretary's discretion.¹¹

In its December 10, 2012 clarifying guidance, CMS correctly stated that the law does not allow for phased-in or partial expansions at the enhanced matching rate.¹² States, including Massachusetts, have the option to extend adult coverage and cap that coverage at less than 133 percent of poverty at the regular matching level.

3. Waiver of Massachusetts' Obligations to Provide Payment of Emergency Services to Lawfully Present Immigrants Is Not Waivable

Massachusetts is seeking to "eliminate redundant MassHealth limited coverage for adults who are also eligible for comprehensive, affordable coverage through the Health Connector" by waiving the requirement to provide Medicaid payment of emergency services for lawfully present immigrants who do not meet the Medicaid immigration standard. Emergency services for lawfully present immigrants who meet all Medicaid requirements except the immigration status requirement are covered under Section 1903(v) of the Social Security Act. Section 1115 may only waive provision of Section 1902 and it is therefore outside the legal scope of the Secretary to grant this amendment request.

Should you have any questions, please don't hesitate to contact Dee Mahan, Director of Medicaid Initiatives at dmahan@familiesusa.org or Andrea Callow, Associate Director of Medicaid Initiatives at acallow@familiesusa.org

Respectfully,

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¹¹ *Beno –v-Shalala*, 30 F3rd 1057 (9th Circuit 1994). .

¹² CMS, Frequently Asked Questions on Exchanges, Market Reforms and Medicaid (December 10, 2012)
