

1115 Waiver Transparency Requirements and Developing a Waiver Advocacy Strategy

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Section 1115 of the Social Security Act allows the Secretary of Health and Human services to waive certain Medicaid requirements to give states the flexibility to test new benefit designs and new approaches for delivering health care—so long as they promote the objectives of the Medicaid program. States have been using these waivers for decades.

Until 2012, the waiver review and approval process took place largely behind closed doors with little opportunity for public input. The Affordable Care Act included a requirement for meaningful public comment as part of the waiver process. In April 2012, the Center for Medicare and Medicaid Services (CMS) **published the rules** pertaining to that requirement.

These rules are still in effect. States and CMS must follow them.

Transparency rules at a glance

The rules require states to provide clear opportunities for public comment before submitting an 1115 waiver request to CMS. When a state submits an 1115 waiver application to CMS, it has to show that there was a meaningful state comment period and that it has taken the comments into consideration when preparing the final submission. There is another opportunity for public comment after the application is filed at CMS.

The rules apply to all new Section 1115 waiver application and waiver renewals. The rules do not apply to waiver amendments. However, under the Obama administration, CMS routinely required state and federal comment periods for substantive waiver amendments. After the appointment of Tom Price to head HHS and Seema Verma to head CMS, one of their initial communications to governors **noted a commitment to transparency**. Hopefully this will include continuing the practice of routinely holding state and federal public comment periods for 1115 waiver amendments.

At What Points in the Process Does the Public Have a Chance to Comment on Waivers?

Before a Waiver Application Goes to CMS

There are opportunities to comment in writing to the state and to attend state public hearings before a waiver request is filed with CMS.

- **There must be a 30-day state comment period before the state submits the waiver to CMS.**

During that 30-day period, the state must make the proposal available for public review. CMS has the option of requiring states to hold additional comment periods if important changes are made to the waiver proposal during the approval process.

- **The state must hold at least two hearings in two different locations 20 days before submitting its application to CMS.**

The state must be able to show that the hearings were accessible statewide. A state can meet this requirement by making one of the hearings accessible by telephone or through internet conferencing.

- **Information about the waiver must be easily accessible to the public.**

The state agency that's responsible for waiver applications must post up-to-date information in a readily apparent place on its website or on a separate waiver web page that is linked to the agency's main website. The posting must include the proposal itself, information on hearings, and information on how to submit comments online and by mail. The state must also publish a notice in a state newspaper with large circulation and provide ways for residents to sign up for email updates.

- **The application that is made available to advocates during the comment period must include a meaningful description of all proposed changes.**

The application that's posted for review must explain important elements like the goals of the waiver, how the waiver will achieve those goals, the populations the waiver will affect, and how the waiver will change what the state is already doing. It must also include a financial analysis. If a state is renewing a waiver, the proposal must include information on whether the waiver has met its goals.

- **There is a process for waiving the timeline requirements for reviewing waivers in emergency situations.**

If a Section 1115 waiver is designed to address a public health emergency, natural disaster, or other state emergency that threatens lives, CMS has the authority to waive all or parts of the public notice procedures so that states can react to such emergencies quickly.

After a Waiver Has Been Submitted to CMS

There is a second comment period after the waiver request is submitted to CMS.

- **In the CMS submission, the state must respond to all comments received during the hearings and public comment period and explain to CMS how the proposed waiver addresses those comments.**

The application submitted to CMS must include the comments the state received with an explanation of why the state did or did not incorporate those comments into its final waiver submission. CMS will not review a waiver if any part is missing, which includes the state's justification for how it handled public comments.

- **CMS must hold another 30-day comment period.**

Within 15 days of receiving the proposal, CMS must either request more information from the state or let it know that its application is complete. Once the application is complete, a 30-day federal comment period begins. Comments CMS receives must be posted online. CMS will make its final decision no earlier than 45 days from the date the application was completed.

- **The waiver application and supporting documents will be posted on Medicaid.gov.**

CMS will periodically update the posted information to let people know what is happening with the waiver application.

After a Waiver Has Been Approved

There are additional opportunities for the public to talk with CMS and the state Medicaid agency.

- **Complaints or problems with a waiver can be submitted to CMS.**
CMS will review any complaints it has received about waivers and review them with the state. CMS can cancel or suspend waivers that are not complying with the terms of the proposal or that are not achieving their goals.
- **The state must hold a public forum within six months after the waiver implementation date and annually thereafter.**
States are required to post a notice about the forum on the website of the agency that's overseeing the waiver, and they must send summaries of the public concerns that were raised in these forums to CMS in their annual report.

What Can Advocates and Health Care Consumers Do?

While these regulations do increase transparency in the waiver process, this transparency isn't meaningful unless people act on it. Advocates must use these regulations, make sure they are enforced, and work to improve them.

- **Use the state comment period.**
This will force the state to respond to concerns when it sends its waiver application to CMS.
- **Urge multiple groups to submit comments during the public comment period.**
Volume matters. The greater the number of letters received, the harder it is for a state to ignore concerns and the easier it is for CMS to push to incorporate changes that address those concerns into the final waiver. It is okay to collaborate with other groups and submit a template letter, but try to get as many groups and individuals as possible to submit comments separately. Individualizing the comments, even if only slightly, will help ensure they get attention.
- **Let people know about the public hearings so they can attend and tell their stories.**
States are required to publicize their hearings. Advocates can act as a bridge to get people there so that they can tell the state and CMS how they will be affected by the changes proposed. Personal stories presented at hearings can also make good material for the press or internet advocacy.
- **Talk to the press.**
The media can help generate interest in the proposed changes and generate more comments. Talk to journalists and make sure they are covering the story and attending hearings. Having available a personal story from someone who would be affected by the waiver can make the press even more interested. Personal stories can also help generate broader public interest, and that can lead to more comments being submitted.
- **Get others involved.**
Try to get as many different groups as possible involved in the process. It is hard to

ignore an opinion when many different kinds of groups are all saying the same thing. Try to engage subject matter experts to submit comments at the state and the federal level.

- **Use the federal comment period to help make sure these regulations are enforced.**

Let CMS know if the state didn't follow the rules discussed earlier, or if the state's process didn't actually achieve the transparency that was intended. Also, let CMS know if the state's proposal did not adequately address comments submitted during the state's comment period.

- **Submit formal comments—that's critical.**

Comments and commenting is important. Even if it seems it won't change how a program is structured, formal comments become part of an administrative record that can be used by other administrations or in litigation. They put the state and CMS on notice about predictable issues with a waiver proposal, e.g., if there is copious data showing that a particular proposal will harm program enrollees or be at odds with the purpose of the Medicaid program. Comment at both the state and federal level, even if you think your comments are redundant. It is important to get your comments on the record at both points in the process.

- **Be proactive.**

A new Section 1115 waiver in one state can start a policy shift in other states. It is important to be aware of what other states are doing and be prepared to advocate against bad ideas and to encourage the state adopt good ones.

It is critical that the public participate in the comment process, and to hold states and the federal government to the required transparency rules.

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