FAMILIESUSA
THE VOICE FOR HEALTH CARE CONSUMERS

August 2, 2017

The Honorable Tom Price, Secretary
United States Department of Health and Human Services
200 Independence Ave., SW
Washington, DC 20201

Submitted electronically via Medicaid.gov

Re: Comments on Kentucky Health 1115 Demonstration Modification Request

Dear Secretary Price:

Families USA is grateful for the opportunity to comment on the Commonwealth of Kentucky's request to modify its initial Kentucky Health waiver application.

Families USA is a national healthcare advocacy organization with the mission of supporting policies and policy changes that will expand access to affordable healthcare for all Americans.

We are extremely supportive of Kentucky's decision to accept federal funding to extend Medicaid to more low income parents and adults, a choice that has demonstrably improved the health access and financial stability for hundreds of thousands of Kentuckians. We share the Governor's goals, stated in the modification request, of achieving long-term improvements in the health of the Commonwealth's residents and giving them opportunities to take an active role in their health care.

However, based on the best available evidence, some of the program elements requested in the initial waiver application and in the modification request would increase the number of uninsured Kentuckians, preclude their ability to take an active role in their healthcare by cutting them off from the health care system, and have a negative impact on population health across the Commonwealth.

These comments supplement our October 4, 2017 comments on the initial Kentucky Health waiver request and focus on the modification request. Many of these concerns can, and

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should, be addressed during the waiver approval process. Some elements of the request do not comport with federal law and should be denied.

Comments on Specific Provisions in the Modification Request

1. **Request to shift to static work or community engagement hours from the graduated hours outlined in the initial waiver request.**

The waiver seeks to link Medicaid eligibility to an individual satisfying a work or community service requirement. The hours needed to satisfy that requirement were to be graduated based on time enrolled in Kentucky Health in the initial submission. The modification requests changing the requirement to a flat 20 hours per week/80 hours per month with a 3 month notice period. The exempt populations are unchanged from the initial request. The reasons stated for the modification are IT and member communication challenges.

Granting either the initial or modified work requirement request would be an abuse of the Secretary's Section 1115 Demonstration authority and should be denied.

In our initial comments on the Kentucky Health request we expressed our concerns with the work or community service requirement. Moving from graduated to flat hours required does not eliminate any of those concerns.

The requested program, both in its original and modified form, is beyond the statute's objectives and the Secretary's authority to approve and is in conflict with the Commonwealth's stated goals. There are alternative approaches to achieving the Commonwealth's goals that are consistent with the Medicaid statute and within the Secretary's authority.

Our concerns and suggestions for changing the program are outlined below.

- **Adding a work requirement to Medicaid is outside of the Secretary's authority under Section 1115 of the Social Security Act.** 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.[1] A work requirement is fundamentally in conflict with the core Medicaid objective of furnishing medical assistance to low-income people and is therefore outside of the Secretary's authority to approve.

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

The objective of the Medicaid program is to provide federal funding to assist states "to furnish (1) medical assistance on behalf of [statutorily eligible individuals], and (2) rehabilitation and other services to help such [individuals] attain or retain capability for independence or self-care…." [2]

The Commonwealth's work requirement is in conflict with those goals. According to the Commonwealth, the purpose of the requested work requirement is to "to provide dignity to individuals as they move towards self-reliability, accountability, and ultimately independence from public assistance.[3] Regardless of the merits of that goal, withdrawing medical assistance for otherwise eligible low income people is antithetical to the objective of furnishing medical assistance and rehabilitation services as stated in Section 1901.

It is clear from section 1901 that the term "independence" is referring to improved physical function that can be achieved through medical rehabilitation services. That is not what the Commonwealth means by "independence" in the context of its work program. "Independence" used in that context refers to no longer receiving Medicaid coverage—a construction entirely alien to section 1901 and to the Medicaid statute as a whole.

- **Even in terms of its stated goals, the program, both in its initial and modified form, would not increase sustained employment.** Evidence from work requirements in other social services programs indicates that they do not result in sustained employment and any employment increases faded over time.[4] In fact, individuals with the most significant barriers to employment often do not find work.[5]

    - **The program, in the initially requested and modified form, would place a barrier to coverage and care for otherwise statutorily eligible individuals.** The presence of the requirement itself will be a barrier to enrollment, causing some eligible working individuals to forego applying for coverage, and will make it more difficult for some statutorily eligible individuals to maintain coverage. [6] Those predictable outcomes are inconsistent with the objectives of the Medicaid program. The Commonwealth's

[2] Social Security Act Sec. 1901. **[**42 U.S.C. 1396**].**
[3] Kentucky Health Section 1115 Demonstration Modification Request, page 3.
[4] LaDonna Pavette, *Work Requirement Don't Cut Poverty, Evidence Shows* (Washington, DC: Center of Budget and Policy Priorities, June 2016) online at https://www.cbpp.org/sites/default/files/atoms/files/6-6-16pov3.pdf.
[5] *Ibid.*
[6] Hannah Katch, *Medicaid Work Requirement Would Limit Health Care Access Without Significantly Boosting Employment* (Washington, DC: The Center on Budget and Policy Priorities, July 2016), available online at http://www.cbpp.org/research/health/medicaid-work-requirement-would-limit-health-care-access-without-significantly.

own estimates indicate enrollment would decline significantly, under both the initially proposed waiver program and even more with the program modification.[7] Adopting policies designed to place impediments in the way of statutorily eligible individuals obtaining coverage is in direct conflict with the Medicaid program's objective of furnishing medical assistance to those same individuals.

Approving a program so clearly in conflict with the objectives of the Medicaid program is outside of the Secretary's authority under Section 1115 and must be denied.

- **A work requirement is a radical change to the Medicaid program; approving such a change through the 1115 waiver process would be an abuse of 1115 waiver authority.** A work requirement would create a new eligibility requirement. Approval would represent a radical change to the Medicaid program. It is outside the Secretary's discretion to make such radical changes through an 1115 waiver. Rather, imposition of an entirely new eligibility criterion must be undertaken through the legislative process—and indeed Congress recently considered precisely such a change.

- **The mere fact of a relationship between community service or work and health does not create a sufficient connection to legally justify use of Medicaid waiver authority that renders otherwise eligible people uninsured.** In its modification request, Kentucky states that "Only by helping members engage in their healthcare and their communities will the Commonwealth achieve long term improvements in the health of its citizens."[8]

  While community engagement may improve health, the mere connection between an activity, i.e. community engagement or employment, and health does not create a sufficient connection to support a claim that making Medicaid coverage conditional on that activity promotes the objective of the Medicaid program.

  The list of items and activities related to an individual's health is nearly endless: food choices, clean air, clean water, educational attainment, the community in which one lives, access to parks, sufficient time to engage in an exercise program, and so on. Medicaid eligibility cannot be conditioned upon each and every issue related to individual health.

[7] For all adults, over the 5 year demonstration program members months under the initial program request were projected to be 13.4 percent below the program without the waiver; with the modification, the decline is projected to increase to 14.8 percent. Families USA calculation based on Kentucky Health enrollment projection in the waive modification application.

[8] Kentucky Health waiver modification request, page 3.

Medicaid is a health insurance program; its purpose and objectives have been outlined fully above. The mere presence of a link between an activity and health is insufficient to support a claim that making Medicaid coverage conditional on that activity promotes the objectives of the Medicaid program.

It does not matter how commendable the activities in question, or whether those activities have been shown to promote health and well-being. Conditioning eligibility for the Medicaid program on participation in activities that are outside of the purpose of the Medicaid program changes the nature of the program itself and is outside of the Secretary's authority under Section 1115 of the Social Security Act.

- **The community service requirement may violate other federal laws.** As we noted in our comments on the initial waiver application, the proposed community service requirement may violate additional laws. In many cases, particularly in economically challenged areas of Kentucky where unemployment is high and jobs are scarce, individuals may have no option other than engaging in community service to maintain health coverage.[9] Essentially the requested program would require individuals to work without pay in exchange for health coverage, a non-cash benefit that they may or may not use over a given period. We continue to urge CMS to solicit input from the Department of Labor regarding this aspect of Kentucky's proposal. In addition to being contrary to Medicaid law, the community service requirement in the request may be in violation of the Fair Labor Standards Act.

- **The program's structure is in conflict with the Commonwealth's stated goals.** The Commonwealth's assertion that "[O]nly by helping members engage in their healthcare and their communities will the Commonwealth achieve long term improvements in the health of its citizens" is in conflict with the very structure of the program for which it is seeking approval. Its work/community engagement requirement would bar individuals from health coverage if they do not comply. It is not possible for individuals to remain engaged in their health care when their very access to that care is terminated.

  We urge the Secretary to work with the Commonwealth to develop a more constructive approach that would not have terminating health coverage as one of its core elements. We have outlined a suggested approach in the next section of our comments.

[9] In Kentucky, 25 counties have unemployment rates exceeding 7 percent, significantly higher than the national average of 4.4 percent. A driver of high unemployment is lack of jobs in many areas of Kentucky. See US Department of Labor, Bureau of Labor Statistics, Local Area Unemployment for Kentucky, May 2017 at https://data.bls.gov/timeseries/LNS14000000; and, Bill Estep, "In Eastern Kentucky. 'there's so many people unemployed fighting over so few jobs,'" *Lexington Herald Leader,* March 1, 2014 at http://www.kentucky.com/news/hot-topics/article44474187.html.

Suggested alternative

The proposed program would expend significant administrative resources—evidenced by the Commonwealth's requested modification based on IT complexity—to set up a program that is unlikely to create long-term employment gains, will likely worsen health by cutting individuals off from coverage, and will be targeting only a small number of individuals since most adults covered by Medicaid either work or would fall into one of the program exemptions.[10]

Before taking such a radical and costly step, a more measured approach is called for that is both consistent with the objectives of the Medicaid program and more likely to achieve the goals of addressing barriers to work that some enrollees confront. This would involve creating work and training programs, with Medicaid eligibility not conditioned on participation, and ensuring that those programs are structured to address the actual barriers to work that individuals are confronting. For example: Is lack of transportation an impediment to work? Or lack of child care? Or lack of appropriate skills for available jobs in the area? Or mental health challenges?

This approach would be built on an understanding of barriers to work in various regions of Kentucky and an understanding of what has and has not worked in other state programs to address barriers to work. It would be designed to provide targeted and appropriate support based on individual circumstances and acknowledging regional barriers to work.

This alternative approach would likely yield more sustained results than coverage termination.[11] It would be consistent with the Medicaid program, not be in potential violation of the Fair Labor Standards Act, and be a constructive way to connect people to work while ensuring that they retain their access to vital health services.

We urge the Secretary to reject the initial and modified work program and encourage Kentucky to establish a program consistent with our suggested alternative.

2. Disenrollment for failure to report a change in circumstances.

Kentucky requests expanding their request to disenroll members for 6-months for failure to complete redetemination paperwork to include disenrollment for failing to report a change in circumstances that would affect income or failing to properly report community service hours

[10] Rachel Garfield, et al., *Understanding the Intersection of Medicaid and Work* (Washington, DC: Kaiser Family Foundation, February 15, 2017) online at http://www.kff.org/medicaid/issue-brief/understanding-the-intersection-of-medicaid-and-work/.

[11] LaDonna Pavette, *op cit.,* noting that the most successful programs to boost employment have focused on building individual skills.

or intentionally falsely reporting community engagement acts (although the breadth of the reporting requirement is unclear, as the application sometimes uses the term "any changes" or "all changes," not always limiting "changes" to those material to Kentucky Health eligibility or enrollee obligations).

Our initial comments addressed the request related to redetermination. We are limiting our comments here to the extension requested.

This request is inconsistent with the objectives of the Medicaid program and should be denied.

We do not in any way condone fraudulent beneficiary reporting; however, most reporting errors will not rise to the level of fraud. The onerous burdens and outsized penalty this program would place on enrollees, and objectives of the request itself, are inconsistent with the objectives of the Medicaid program.

- **Medicaid is the only type of insurance that requires annual eligibility redetermination.** There is no plausible premise that penalizing recertification failures is related to training people to participate in commercial coverage. Neither employer coverage nor marketplace coverage requires an annual renewal or redetermination if enrollees are not changing plans.

- **The request fails to consider the realities of income fluctuations among lower-income people.** Shift work and changing schedules are among the many things can lead to frequent income fluctuations for lower-income people.[12] For lower-income families, income not only frequently changes, but monthly income can be hard to predict.[13] A change in income in one 10-day period may not affect overall monthly income and a change in income may not affect any aspect of an individual's Kentucky Health enrollment.

  The required reporting and the severe consequences of failure to report fail to recognize the realities of the economic challenges and financial uncertainty confronting lower income families. In fact, given the frequency of income changes among the group enrolled in

[12]Patricia Cohen, "Steady Job with Pay and Hours That Are Anything But," *New York Times,* May 31, 2017 at https://www.nytimes.com/2017/05/31/business/economy/volatile-income-economy-jobs.html.

[13] Fifty percent of individuals with income below poverty and 40 percent with incomes between 100% and 150% of poverty reported that it was difficult to predict monthly income. Jonathan Morduch, *The Financial Diaries: How American Families Cope in a World of Uncertainty,* "83 Charts to Describe the Hidden Financial Lives of Working Americans," Slide 31, online at https://static1.squarespace.com/static/53d008ede4b0833aa2ab2eb9/t/54878a58e4b0f57918c24718/1418168930635/83charts.pdf. Data based on a survey of 244 households across the country, with Kentucky and Ohio representing 28% of the sample size,

Medicaid, full compliance with this requirement might inundate Kentucky Health staff with reported changes that have utterly no impact whatsoever, creating backlogs, large potential for administrative errors, and mounds of unnecessary paperwork at taxpayers' expense.

- **Not all failures to report constitute intentional fraud**. In its request, Kentucky implies that any failure to report any change in income, employment status, work or community engagement hours or "any change" in circumstances equals intentional fraud.[14] This will not be the case and not all situations should be treated equally.

  Fraud by definition requires a deliberate attempt to deceive.[15] The Kentucky Health program is extremely complex, with new reporting requirements for enrollees, requirements that will by their very complexity predictably lead to unintentional reporting errors that fall far short of fraud.

- **It is unclear how well these requirements will be communicated to enrollees or how well Kentucky Health or its agents will be equipped to address enrollee inquiries accurately and in a timely manner**. Most failures to report will likely be inadvertent, based on income miscalculations, or based on misinformation or a misunderstanding of requirements. Treating all failures to report "any changes" equally with the harsh penalty of six-months termination, without any indication that enrollees will have any chance to appeal a determination prior to disenrollment, is overreach and is inconsistent with the Medicaid program's objectives of furnishing medical assistance.

  Misreporting that does in fact rise to the level of fraud should be treated as such, but that will not be every time someone fails to report something. Determining whether a situation is or is not fraud should be undertaken thoughtfully. Kentucky has procedures and penalties in place to address actual Medicaid fraud.[16]

- **The Commonwealth's rationale for this request is inconsistent with the objectives of the Medicaid program.** Kentucky's rationale for this request is that the "disenrollment period will be used as a learning tool for enrollees regarding the importance for maintaining accurate information to maintain insurance coverage, helping further prepare enrollees for commercial market insurance policies." This rationale is not only not consistent with the

[14] See number (2) on page 3 of the waiver modification request.
[15] Wex Legal Dictionary, at Cornell Law online at https://www.law.cornell.edu/wex/fraud.
[16] Kentucky Revised Statutes (KRS) Chapter 205 Public Assistance Programs, 205.8463, Fraudulent Acts-Penalties online at http://www.lrc.ky.gov/Statutes/statute.aspx?id=7857

objectives of the Medicaid program, but the program itself is not in line with what is generally required to maintain commercial insurance.

- Preparing people for commercial insurance may be well intentioned, however, it is outside of the objectives of the Medicaid program, which are furnishing medical assistance and medical rehabilitation services.
- Even if one believes that such preparation is a goal of the Medicaid program, this policy would not further that goal. For individuals who gain commercial coverage through work, their employers will track their hours and wages and adjust their coverage and any premium contributions accordingly. For individuals with marketplace coverage, reporting income changes "as soon as possible" is recommended. That is not because enrollees will otherwise be disenrolled. It is to make sure that enrollees are getting the correct tax credits and do not have to pay tax credits back at the end of the year. In contrast, under the premise of preparing people for commercial coverage, Kentucky's program would impose an incredibly harsh penalty for not meeting reporting requirements that are inconsistent with and beyond what would be expected of individuals in commercial coverage.
- Kentucky's rush to terminate Kentucky Health members is not only in conflict with the objectives of the Medicaid program writ large, but also in conflict with the stated objectives of Kentucky Health.[17]

Suggested alternatives

It is predictable that this program, if implemented, will result in individuals being terminated from Medicaid for inadvertent failures, for failing to report changes that have no impact on their Kentucky Health coverage, or through administrative error.

Before approving this or any comparable program, it is incumbent upon the Secretary to understand (1) what the impact on Medicaid enrollees would be; (2) whether it is necessary, ie, is there any real reporting problem that needs addressing; (3) whether the Commonwealth is adequately informing enrollees of program requirements; (4) whether the Commonwealth has the capacity to administer the tracking required; and, (5) estimated costs to administer this aspect of the program.

Prior to starting any program such as this, the Commonwealth should be required to at least have Kentucky Health in operation for 1 year and, during that year, conduct a thorough and

[17] Empowering individuals to improve their health is one of Kentucky Health's primary goals. Individuals cannot improve their health is they are terminated from the program.

unbiased study of enrollee reporting and enrollees' program understanding. This would help the Commonwealth determine whether or there actually is any issue with reporting. The study should also include an assessment of the materials provided to enrollees, the adequacy of the assistance Kentucky Health administrative staff is providing to enrollees, and the capacity of staff to take on the added tracking burdens of this program element. Enrollees should not be penalized if they are not being adequately informed of program requirement or if there is insufficient Kentucky Health staff to provide accurate, timely assistance to enrollees.

If, at the end of the study period, the Commonwealth and the Secretary believe that actions are warranted (we continue to oppose penalties), disenrollment should not be part of the considerations. Disenrollment is harsh, counterproductive, and inconsistent with the goals of the Medicaid program and therefore beyond the Secretary's 1115 waiver authority.

3. Request to maintain current PE sites.

The state had initially expected to expand presumptive eligibility sites with implementation of the Kentucky Health waiver. Its modification withdraws that portion of its waiver request. It asserts that adding additional PE sites is not necessary and would be burdensome for members and PE providers.

Kentucky should fully implement its initially proposed presumptive eligibility system.

We refer to our comments on Kentucky's initial waiver request related to retroactive coverage. We urged CMS to reject the Commonwealth's request to omit retroactivity eligibility. However, we stated that if CMS did approve that request, it should ensure that Kentucky fully implements its proposed PE system and keeps it robust. We reassert that position.

Thank you for your consideration of our comments and for the opportunity to submit them. Please contact us if you have any questions.

Sincerely,

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