FAMILIESUSA
THE VOICE FOR HEALTH CARE CONSUMERS

September 16, 2016

Honorable Silvia Matthews Burwell, Secretary
U.S Department of Health and Human Services
200 Independence Avenue SW
Washington, DC 20201

Submitted via Medicaid.gov

Re: New Hampshire Health Protection Program Premium Assistance Waiver Amendment

Dear Secretary Burwell:

Thank you for the opportunity to comment on New Hampshire's Section 1115 wavier amendment request referenced above.

Families USA is a national organization representing the interests of health care consumers, with a specific focus on the low income population. We are extremely supportive of New Hampshire's decision to take up the Affordable Care Act's option to extend Medicaid coverage to all low income adults in the state under the New Hampshire Health Protection Program.

Since the implementation of this program, over 42,600 New Hampshirites have gained Medicaid coverage.[1] Largely as a result of the Medicaid expansion, the state's uninsured rate has declined from 13.8% in 2013 to 8.7% in 2015.[2] By accepting federal funds to extend coverage, New Hampshire has ensured that thousands of low income individuals have access to health care when they need it, and the financial security that comes with the protections of health insurance coverage.

The state is now asking federal approval to amend that program. We believe that some of the elements of the state's proposed waiver amendment could undo some the advances that New Hampshire has made; some are incongruous with the intent of the Medicaid program generally,

[1] "5 Years Later: How the Affordable Care Act is Working for New Hampshire," HHS, November 2, 2015 available online at: http://www.hhs.gov/healthcare/facts-and-features/state-by-state/how-aca-is-working-for-new-hampshire/index.html.

[2] Witters, Dan. "In U.S., Uninsured Rates Continue to Drop in Most States," Gallup, August, 10, 2015 available online at: http://www.gallup.com/poll/184514/uninsured-rates-continue-drop-states.aspx

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the ACA's Medicaid expansion in particular, as well as New Hampshire's stated goals for this demonstration. If approved, these elements could present new barriers to insurance coverage and appropriate care or result in many eligible New Hampshire residents losing their Medicaid coverage. Furthermore, we believe that under current Medicaid law, HHS does not have the authority to approve some of the requested changes.

We encourage CMS to thoroughly evaluate New Hampshire's waiver amendment, as it would a new waiver, considering the magnitude of the changes being proposed and the size of the population affected.

Our comments are focused on three aspects of the request that are of particular concern to us: the proposed work requirement; emergency room cost sharing levels; and proposed documentation requirements.

The request to incorporate TANF work requirements into Medicaid should be denied.

- ***Tying Medicaid benefits to work or work related activities is not allowed under federal law.*** CMS has clearly stated that federal Medicaid funds cannot be used for promoting employment.[3] This decision is consistent with Medicaid's role as a health coverage program. To date, CMS has appropriately denied all other states' requests for work requirements and should do so here. While New Hampshire can continue to use state funds to promote employment for Medicaid enrollees, it cannot tie any aspect Medicaid eligibility to employment or employment related activities.

- ***Medicaid and TANF are not analogous.*** In its waiver application, the state seeks to apply work requirements from the Temporary Assistance for Needy Families (TANF) program to Medicaid. As noted above, current law does not allow application of work requirements to the Medicaid program, whether those requirements are drawn from TANF or any other program. Furthermore, TANF's stated objective is to help needy families achieve self-sufficiency.[4] In contrast, Medicaid is a medical assistance program that pays for health services or insurance coverage for low-income individuals in order to improve their access to affordable health care. The fundamental objectives of the two programs are not analogous. Adding a work requirement would fundamentally change the nature of the Medicaid program. Approving such a fundamental program change is outside the Secretary's authority under section 1115 of the Social Security Act.

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[3] Centers for Medicare and Medicaid Services, CMS and Indiana Agree on Medicaid Expansion. January 2015, https://www.cms.gov/Newsroom/MediaReleaseDatabase/Press-releases/2015-Press-releases-items/2015-01-27.html

[4] The goals of the TANF program are enumerated at Department of Health and Human Services, Department of Assistance website, http://www.acf.hhs.gov/ofa/programs/tanf/about.

- ***Because a work requirement is contrary to the purpose of the Medicaid program, it does not meet the requirements of 42 U.S.C. 1315(a)***. The purpose of an 1115 demonstration project is to give the Secretary authority to approve pilot, experimental or demonstration projects that promote the objectives of the Medicaid program.[5] As outlined in the bullet above, the objective of the Medicaid program is to provide medical assistance to low-income individuals by paying for health services or insurance coverage. A work/community service requirement is not only not related to providing medical assistance, but would make it more difficult for low-income individuals to qualify for or keep Medicaid coverage, in direct conflict with the requirements of an 1115 demonstration project.[6] In its waiver request, New Hampshire asserts that waivers are intended "to grant states flexibility to expand Medicaid in a way that recognizes local considerations and conditions." While 1115 waivers often do that, their primary purpose is to promote the objectives of the Medicaid program.[7] That is true for all 1115 waivers, including those targeting the Medicaid expansion population.

- ***There are additional public policy and possibly legal reasons to deny the request to apply TANF requirements.*** TANF provides cash assistance to individuals. Medicaid pays health care providers for services provided to Medicaid enrollees or purchases insurance coverage for enrollees. In most cases, Medicaid does not pay enrollees.[8] Enrollees may go many months without receiving any direct benefit from Medicaid (i.e., people do not use health services all the time, the need is often unpredictable, hence the rationale for insurance to protect one from unpredictable costs). The two programs are not analogous in their objectives, as outlined above, or in terms of the benefit to program participants.

  Furthermore, applying the TANF community service component as a basis for Medicaid eligibility is tantamount to requiring individuals to work for free in exchange for health insurance coverage. That is not only bad public policy—essentially requiring work in exchange for a non-monetized benefit—there is also the potential for labor market disruption. In communities with weak labor markets, "free labor" provided through community service work could displace paying jobs and have the effect of increasing the ranks of the poor. Additionally, other laws may be violated. While Families USA is not an expert in this area, we urge CMS to solicit input from the Department of Labor regarding this aspect of New Hampshire's proposal. In addition to being contrary to Medicaid law, it may also be in violation of the Fair Labor Standards Act.

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[5] 42 U.S.C. 1315(a).

[6] While most individuals who gain coverage through the Medicaid expansion are working, not all are working. It is not the purpose of Medicaid to penalize individuals who are not working by withholding health coverage from them.

[7] See also Medicaid.gov, Section 1115 Demonstrations, at https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/Section-1115-Demonstrations.html.

[8] Medicaid may pay enrollees directly under some long-term services and supports programs.

- ***There are less punitive, and more cost-effective, ways to connect Medicaid enrollees with employment.*** New Hampshire can continue to build upon and better finance its state funded assistance for unemployed Medicaid enrollees, provided through the state's department of employment security.

States already have sufficient options to impose higher costs for non-emergency use of ER services. The proposed fee is unreasonably burdensome and should be denied.

- ***New Hampshire's requested cost-sharing for all non-emergency use of the ER after the first visit is excessive and should be denied.*** The state already has the ability to charge up to an $8 copay for non-emergency use of the emergency room. A $25 copay for non-emergency use of the ER after the first visit is a significantly larger burden for low income individuals and has been rightfully denied in every state except Indiana, where the state is required to evaluate the impact of higher cost sharing under strict protocols. Indiana's copay is limited to a select test group of enrollees with incomes above 100 percent of the federal poverty line. Charging this level of cost sharing for all enrollees, especially those with extremely low incomes, would unduly burden this population.

- ***Medicaid enrollees do not need to be specifically deterred from using the ER.*** Research shows that a very small portion of Medicaid enrollees use the ER for nonemergency care, and that portion is comparable to the portion of privately covered individuals who use the ER inappropriately.[9]

- ***Increased cost sharing for non-emergency use of the ER have not been shown to improve appropriate ER use.*** There is a growing body of literature that suggests that nonemergency ER copays are not an effective means to reduce ER utilization in Medicaid.[10] In fact, they may even be counterproductive and encourage enrollees to avoid using the ER even when it is medically necessary. Indiana's program evaluations have yet to show whether or not their higher copays have affected appropriate use of the ER and CMS should not approve this request for other states until it has seen the results from Indiana's pilot.

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[9] Boukus, Ellyn R, Emily Carrier and Anna Sommers. "Dispelling Myths About Emergency Department Use: Majority of Medicaid Visits Are for Urgent or More Serious Symptoms", Center for Studying Health System Change, July 2012, available online at http://www.hschange.com/CONTENT/1302/

[10] Karoline Mortenson, *Copayments Did Not Reduce Medicaid Enrollees' Nonemergency Use of the Emergency Departments,* 29 HEALTH AFFAIRS 1643 (2010); David J. Becker et al., *Co-payments and Use of Emergency Department Services in the Children's Health Insurance Program,* 70 MED. CARE RES. REV. 514 (2013).

- ***This request is not appropriate for demonstration purposes and does not meet the requirements of 42 USC 1396o (Section 1916 of the Social Security Act).*** This change is not unique, as it is already being tested in Indiana, nor has it been proven to accomplish its intended goal and therefore inappropriate for demonstration purposes. There is also no indication that benefits will be equal to the risk to recipients. Furthermore, it is not structured to test a hypothesis with the use of control groups, not is it voluntary, as required for the Secretary to grant cost-sharing changes under the applicable section the Social Security Act, 42 USC 1396o(f). The request should be denied for failure to meet the requirements of the relevant statutory authority or, at the least, restructured to meet those requirements.

New Hampshire's request to add documentation requirements related to citizenship and residency is overly restrictive and should be denied.

- ***New Hampshire's proposal to require newly eligible adults to verify that they are citizens would make it impossible for legal immigrants who are eligible for Medicaid to enroll in the program.*** The state's request to require proof of citizenship would make it impossible for qualified immigrants eligible for Medicaid to enroll. It is not clear that is the state's intent, but that would be the consequence of requiring documentation of citizenship from all applicants. Proposals that add such barriers to obtaining coverage are in conflict with the requirements of 42 U.S.C. 1315(a).

- ***In addition to the citizenship verification noted above, narrow residency documentation requirements are also likely to present a barrier to enrollment, decrease the number of people with coverage.*** Imposing strict documentation requirements makes it more difficult for eligible applicants to enroll in Medicaid coverage. Similar changes to citizenship documentation procedures that were part of the Deficit Reduction Act of 2005 resulted in states seeing a steep decline in enrollment.[11] States reported that these enrollment declines were a result of the requirement, which caused delays in or losses of Medicaid coverage for many individuals who were likely eligible.[12] New Hampshire specifically saw a significant decline in enrollment in its children's Medicaid program and an increase in the percentage of incomplete Medicaid applications.[13] CMS should not allow a program

[11] *States Reported That Citizenship Documentation Requirement Resulted in Enrollment Declines for Eligible Citizens and Posed Administrative Burdens*, United States Government Accountability Office, June 2007 available online at http://www.gao.gov/new.items/d07889.pdf

[12] *States Reported That Citizenship Documentation Requirement Resulted in Enrollment Declines for Eligible Citizens and Posed Administrative Burdens*, United States Government Accountability Office, June 2007 available online at http://www.gao.gov/new.items/d07889.pdf

[13] Cohen Ross, Donna. "New Medicaid Citizenship Documentation Requirement is Taking a Toll: States Report Enrollment is Down and Administrative Costs are Up", Center for Budget and Policy Priorities, March 13, 2007

change that would present new barriers to eligible New Hampshire residents getting the health coverage they need. Proposals that add such barriers to obtaining coverage are in conflict with the requirements of 42 U.S.C. 1315(a).

- ***The residency documentation would present an undue burden for New Hampshire's low-income population.*** Studies in other states show that low income individuals are much less likely to have government issued IDs, like driver's licenses or non-driver's license picture identification cards.[14] To even apply for coverage, many people in New Hampshire would be required to make the trip to one of only 15 DMVs[15] in the state to purchase a driver's license, which costs $50, or a non-driver's picture identification card, which costs $10.[16] This requirement will be difficult for many people to fulfill financially because it may be difficult for them to access DMVs due to their location and short business hours.

- ***Requiring these specific types of identification discriminates against already disadvantaged populations.*** Statistics show that individuals with low incomes, racial and ethnic minorities, and older Americans are much less likely to have a government issued photo ID.[17] As mentioned in the majority of comments from the state comment period, homeless individuals also face numerous barriers to acquiring these types of identification. Individuals in all of these categories already face numerous barriers to accessing health care and are more likely to have unmet health needs. Adding documentation restrictions that will disproportionately affect these populations is neither productive nor just and could worsen already existing health disparities.

- ***Narrowing proof of residency documentation is unnecessary and costly.***
    - *New Hampshire already follows strict citizenship verification processes.* The state claims that it is working to improve immigration and citizenship monitoring with this new requirement. However, New Hampshire already follows strict federal procedures for citizenship verification, which often also prove state residency.

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available online at http://www.cbpp.org/research/new-medicaid-citizenship-documentation-requirement-is-taking-a-toll-states-report

[14] Gaskins, Keesha and Sundeep Iyer. *The Challenge of Obtaining Voter Identification*, Brennan Center for Justice at *New York University School of Law*, July 29, 2012 available online at http://www.brennancenter.org/sites/default/files/legacy/Democracy/VRE/Challenge_of_Obtaining_Voter_ID.pdf

[15] "Today, New Hampshire Students Will Likely Pay The Price For The State's New Voter ID Law", *ThinkProgress*, February 9, 2016 available online at https://thinkprogress.org/today-new-hampshire-students-will-likely-pay-the-price-for-the-states-new-voter-id-laws-3b3d50fc4ca9#.jggv85qe4

[16] "Driver Licensing > Apply for a Driver License → Licensing Fees", New Hampshire Department of Safety Division of Motor Vehicles, http://www.nh.gov/safety/divisions/dmv/driver-licensing/apply/fees.htm

[17] Gaskins, Keesha and Sundeep Iyer. *The Challenge of Obtaining Voter Identification*, Brennan Center for Justice at *New York University School of Law*, July 29, 2012 available online at http://www.brennancenter.org/sites/default/files/legacy/Democracy/VRE/Challenge_of_Obtaining_Voter_ID.pdf

- *Strict documentation requirements will be difficult and costly to implement.* Following the implementation of strict citizenship documentation requirements, states reported that the requirement forced them to spend significantly more time and money on enrollment processes.[18] States attributed this burden to the fact that, like New Hampshire's proposed requirement, documents had to be originals and did not allow for exceptions.[19] New Hampshire's request to further limit the list of acceptable documents to just two would exacerbate this problem. These added costs will affect both the state and the federal government.

- *There are other widely used methods for applicants to prove residency.* States with residency verification procedures follow the federal recommendation to use electronic verification of state residency and only ask for paper documentation if an issue presents itself.[20] However, verification procedures in and of themselves may be unnecessary as 38 states, including New Hampshire, currently allow Medicaid applicants to self-attest their state residency and are not seeking to change these requirements.[21] These methods are tested, widely used, and much less costly for the state to implement.

Conclusion

New Hampshire's existing Medicaid expansion program has allowed thousands of low income individuals to access the health care they need. The state has made great strides to improve its insurance rate as well as the health and financial health of its low income citizens. However, we are concerned that several elements in the state's waiver amendment proposal would work to undo these gains and make it more difficult for individuals to get and keep their health coverage. We believe that some of the requested changes are beyond the Secretary's authority and may possibly be in violation of federal labor laws.

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[18] Cohen Ross, Donna. "New Medicaid Citizenship Documentation Requirement is Taking a Toll: States Report Enrollment is Down and Administrative Costs are Up", Center for Budget and Policy Priorities, March 13, 2007 available online at http://www.cbpp.org/research/new-medicaid-citizenship-documentation-requirement-is-taking-a-toll-states-report

[19] Cohen Ross, Donna. "New Medicaid Citizenship Documentation Requirement is Taking a Toll: States Report Enrollment is Down and Administrative Costs are Up", Center for Budget and Policy Priorities, March 13, 2007 available online at http://www.cbpp.org/research/new-medicaid-citizenship-documentation-requirement-is-taking-a-toll-states-report

[20] Artiga, Samantha, Tricia Brooks, Elizabeth Cornachione, Alexandra Gates and Sean Miskell. *Medicaid and CHIP Eligibility, Enrollment, Renewal and Cost-Sharing Policies as of January 2016: Findings from a 50-State Survey.* Georgetown University Center for Children and Families and Kaiser Family Foundation, January 2016 available online at http://files.kff.org/attachment/report-medicaid-and-chip-eligibility-enrollment-renewal-and-cost-sharing-policies-as-of-january-2016-findings-from-a-50-state-survey

[21] Eligibility Verification Policies. Center for Medicare and Medicaid Services. https://www.medicaid.gov/medicaid-chip-program-information/program-information/eligibility-verification-policies/eligibility-verification-policies.html

We urge CMS to deny these elements of New Hampshire's request and preserve the success of the existing program.

We appreciate the opportunity to submit comments and urge your careful review of these comments, and all comments, received during the federal comment period. Please do not hesitate to contact us with any questions.

Respectfully submitted,

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