



June 14, 2018

Submitted via the Federal Medicaid.gov Portal

Centers for Medicare & Medicaid Services
Department of Health and Human Services
P.O. Box 8016
Baltimore, MD 21244-8016

**Re: Group VIII Work Requirement and Community Engagement 1115 Demonstration
Waiver Application**

To Whom It May Concern:

The HIV Health Care Access Working Group (HHCAWG) appreciates the opportunity to comment on Ohio's Group VIII Work Requirement and Community Engagement 1115 Demonstration Waiver Application (the "Ohio Application") under Section 1115 of the Social Security Act. HHCAWG is a coalition of over 100 national and community-based HIV service organizations representing HIV medical providers, public health professionals, advocates, and people living with HIV who are all committed to ensuring access to critical HIV- and Hepatitis C (HCV) related health care and support services.

The Medicaid program is a critical source of health coverage for life-saving care for people living with HIV. More than 40 percent of people living with HIV in care count on the Medicaid program for the healthcare and treatment that keeps them healthy and productive.¹ Ensuring uninterrupted access to effective HIV care and treatment is important to the health of people living with HIV and to public health.² When HIV is effectively managed, the risk of transmitting the virus drops to near zero.³ Ohio's proposal to impose work requirements on vulnerable populations threatens to reverse the progress in providing access to prevention, care, and treatment and reducing health care costs.

¹ Kates, Jennifer and Lindsey Dawson. [Insurance Coverage Changes for People with HIV Under the ACA](#). Kaiser Family Foundation. February 2017.

² Panel on Antiretroviral Guidelines for Adults and Adolescents. Guidelines for the use of antiretroviral agents in HIV-1-infected adults and adolescents. Department of Health and Human Services. Available at <http://www.aidsinfo.nih.gov/ContentFiles/AdultandAdolescentGL.pdf>.

³ Cohen, MS., et al. [Antiretroviral Therapy for the Prevention of HIV-1 Transmission](#). N Engl J Med 2016; 375:830-839. September 1, 2016.

HHCAWG is very concerned that the work requirement policy put forth in the Ohio Application would substantially decrease meaningful access to care for low-income people living HIV, HCV, and other chronic health conditions. For the reasons discussed in detail below, we strongly oppose the Ohio Application and urge the Centers for Medicare and Medicaid Services (CMS) within the Department of Health and Human Services (HHS) to reject it.

I. Ohio’s proposed work requirement would violate the core objectives of the Medicaid program and would thus be unlawful

If approved, the Ohio Application would violate the basic conditions required for approval of a section 1115 waiver. Section 1115(a) of the Social Security Act, codified at 42 U.S.C. § 1315(a), allows a federal waiver to facilitate a State’s “experimental, pilot, or demonstration project” that, “in the judgment of the Secretary, is likely to assist in promoting the objectives” of the Medicaid program. One of the primary objectives of Medicaid, as explained by § 1901 of the Social Security Act, is to enable each State to furnish “medical assistance on behalf of families with dependent children and of aged, blind, or disabled individuals, whose income and costs are insufficient to meet the costs of medically necessary services.”⁴ The work requirement would achieve the exact opposite result intended by this objective, resulting in more individuals losing access to health coverage and medically necessary services.

These restrictive work requirements would not achieve the objective Ohio sets out in its application, let alone the objectives of the Medicaid program. Ohio states that in implementing these policies, it seeks to “improve health outcomes in Ohio and enhance individuals’ economic stability. . .” Forcing enrollees to find and maintain employment to receive health coverage will in no way achieve this objective. Instead, these policies will leave vulnerable individuals without health care, pushing them further into poverty.

Further, a robust body of research shows that tying Medicaid eligibility to work or work-related activities would fail to increase long-term employment or reduce poverty.⁵ The proposal does not contemplate any action to increase the availability of jobs across the state, or to assist beneficiaries with finding and keeping employment such as by providing transportation, education, job search services, or training. Beneficiaries living in rural areas without opportunities or transportation are likely to struggle to meet these new requirements.

Ohio’s application could even end up keeping people from gaining employment, because without health services, it will be more difficult for them to find and hold a job. Ohio’s Department of

⁴ 42 U.S.C. § 1396-1.

⁵ LaDonna Pavetti, “Work Requirements Don’t Cut Poverty, Evidence Shows,” Center on Budget and Policy Priorities, June 2016, <https://www.cbpp.org/research/poverty-and-inequality/work-requirements-dont-cut-poverty-evidence-shows>.

Medicaid found that three-quarters of Medicaid expansion enrollees who were looking for work reported that Medicaid made it easier to do so, and more than half of those who were working said that Medicaid made it easier to keep their jobs.⁶ It is precisely *because* Medicaid meets enrollees' health needs that they are able to focus on finding and keeping employment. An analysis of Ohio's Medicaid enrollees reveals the majority of the program already works: 73% of non-SSI, nonelderly enrollees live in working families, 40% work full-time, and 21% maintain part-time employment.⁷ Further, among non-SSI, nonelderly enrollees that do not work, most face some significant barrier to work, with 58% citing an illness or disability as reasons for not working.⁸ These individuals depend on consistent access to care and treatment in order to stay healthy and lead productive lives. The policies contemplated by the Ohio Application will place access to these services in jeopardy, worsening health outcomes for those affected and removing any chances of economic mobility.

If implemented, the Ohio Application would take away health coverage for many who would otherwise be eligible. Ohio's own conservative numbers estimate that of the state's enrollees in fiscal year 2018, over 18,000 individuals will lose their Medicaid eligibility. Far from addressing the health needs of vulnerable low-income populations, work requirements would decrease access to health coverage for these populations by creating new barriers to health care. As a result, individual and public health in the state will suffer, undermining the progress that Ohio has made on these issues and placing residents at unnecessary risk.

A work requirement would harm Ohio's Medicaid beneficiaries and restrict access to care, in direct conflict with the objectives of the Medicaid program. Accordingly, given the multitude of ways in which these proposals will take health care away from individuals and worsen health outcomes, HHS should reject Ohio's Application for failing to promote the objectives of the Medicaid program, thereby violating the requirements of section 1115.⁹

II. Work Requirements will Disproportionately Harm Individuals Living with Chronic Health Conditions

Individuals living with chronic illnesses stand to be disproportionately harmed by the combined effect of these proposals. Many individuals who live with a chronic illness that is not classified severe enough by the Medicaid program to be considered a disability but that make maintaining

⁶ Ohio Department of Medicaid, "Ohio Medicaid Group VIII Assessment: A Report to the Ohio General Assembly," <http://medicaid.ohio.gov/Portals/0/Resources/Reports/Annual/Group-VIII-Assessment.pdf>.

⁷ Rachel Garfield, Robin Rudowitz, Anthony Damico, Kaiser Family Foundation, *Understanding the Intersection of Medicaid and Work* (<http://files.kff.org/attachment/Issue-Brief-Understanding-the-Intersection-of-Medicaid-and-Work>) (Updated Jan. 2018)

⁸ *Id.*

⁹ *See, e.g., Beno v. Shalala*, 30 F.3d 1057 (9th Cir. 1994) (striking down a section 1115 waiver due, in part, to an inadequate determination by HHS that the plan was likely to promote the Act's objectives). Furthermore, the law requires that the Secretary's decision is based solely on a substantive "judgment" as to whether the waiver "is likely to assist in promoting the objectives" of Medicaid. As the Supreme Court has made clear in *Massachusetts v. EPA*, "the use of the word 'judgment' is not a roving license to ignore the statutory text. It is but a direction to exercise discretion within defined statutory limits." 549 U.S. 497, 533 (2007).

employment impossible would be subject to the work requirement. Chronic illnesses can produce symptoms or disabilities that are not visible, yet serve as impediments to steady employment. Additionally, some chronic conditions like multiple sclerosis produce periods of inability to work due to medication side effects or symptom flare-ups; employees with these conditions require flexible work arrangements that can be hard to find or keep. Episodic disabilities can produce an uneven work history, which in turn can make it more difficult for a person to find consistent employment. These burdens particularly affect people living with chronic illnesses or disabilities, as consistent access to medical care is key to the management of symptoms and overall long-term wellness.

While Ohio's Application ostensibly notes 11 categories of enrollees that will be exempt from the work requirement, the complexity involved in tracking and applying exemptions is likely to prove unduly burdensome on both Ohio and enrollees. The history of administering exemptions to work requirements in other public benefits program shows that states often make mistakes and end up sanctioning beneficiaries that are not formally subject to the requirement.

Ohio is attempting to align the Medicaid work requirement with existing Supplemental Nutrition Assistance Program ("SNAP") work requirements, including the Able-Bodied Adults Without Dependents ("ABAWD") work requirements, to mitigate confusion amongst beneficiaries and reduce the administrative burden. However, administrative challenges associated with implementing work requirements would be more pronounced in Medicaid than in the Supplemental Nutrition Assistance Program (SNAP) and Temporary Assistance for Needy Families (TANF) programs, which have struggled with implementation. SNAP and TANF require substantial interactions with participants, including interviews and frequent reporting. States have encountered numerous obstacles to accurately applying these policies. States' administration of these policies in the SNAP program was error prone, applied inaccurately, and led to eligible individuals being denied benefits.¹⁰ When first implemented, the U.S. Food and Nutrition Service did a study and found that policies were "difficult to administer and too burdensome for the States." One of the biggest shifts was tracking benefit receipt over time, rather than circumstances in a single month, which was a fundamental change to program administration.¹¹ Historical analysis of state experience implementing work requirements in TANF suggests that adding similar requirements to Medicaid could cost states thousands of dollars per beneficiary.¹²

Further, while the Ohio Application includes exemptions for individuals who are "physically or mentally unfit for employment," the specific criteria for this exemption, along with the process for identifying exempt enrollees, is not defined in the application. Instead, the Ohio application would

¹⁰ USDA Office of Inspector General, FNS Controls over SNAP Benefits for Able-Bodied Adults Without Dependents, September 2016, <https://www.usda.gov/oig/webdocs/27601-0002-31.pdf>.

¹¹ Mathematica Policy Research, Inc., Imposing a Time Limit on Food Stamp Receipt: Implementation of the Provisions and Effects on Food Stamp Participation (2001).

¹² Gayle Hamilton et al., "National Evaluation of Welfare-to-Work Strategies: How Effective Are Different Welfare-to-Work Approaches? Five-Year Adult and Child Impacts for Eleven Programs," Manpower Demonstration Research Corporation, December 2001, Table 13.1.

leave the task of setting the criteria and process by which vulnerable populations, including those living with chronic illnesses and episodic disabilities, will be identified and exempted to the regulatory process. In addition to the problems with work requirements and exemptions writ large, this lack of specificity affords advocates and CMS little chance to evaluate how Ohio plans to protect the health of vulnerable populations.

III. **Racially Disparate Impact of Work Requirements**

Ohio's waiver application purports to align its proposed Medicaid work requirements with other existing federal programs. For example, Ohio's waiver application seeks to adopt the methodology of the Supplemental Nutrition Assistance Program (SNAP). SNAP exempts individuals living in counties experiencing high unemployment rates from certain program work requirements – a policy ostensibly designed to protect enrollees from program termination for reasons beyond their ability to control.¹³ Ohio Medicaid now proposes to provide the same county-level exemptions to the work requirement described in its waiver application. While HHCWG opposes the idea of work requirements generally, the borrowing of this exemption method is especially problematic because it would exacerbate existing disparities in access to health care that primarily disadvantage communities of color.

Ohio's Medicaid proposal, mirroring SNAP, would result in an exemption from new work requirements for enrollees in about 26 counties.¹⁴ However, enrollees in Ohio's major cities and urban areas in Ohio are not encompassed by this clemency. An analysis of the population demographics of the exempted counties reveals that on average, the population in these counties is 95% white. At the same time, most of the communities that will remain subject to work requirements have either majority or significant Black populations.¹⁵ Ohio's legal advocates outlined how this method of selecting counties for exemptions led to dramatically disparate access for public benefits for white and non-white residents in a 2014 complaint.¹⁶ This disparity will only be replicated in Medicaid if adopted here.

While work requirements already run counter to the express purpose of the Medicaid program, this potential for a racially disparate application of a policy that would restrict access to health care

¹³ The Supplemental Nutrition Assistance Program limits eligibility to only three months within any given thirty-six month period, unless the enrollee is actively engaged in work activities. See 7 U.S.C. § 2015(o)(2). The statute expressly allows the implementing agency to waive these restrictions for "areas" that have more than 10% unemployment, or generally "does not have a sufficient number of jobs to provide employment for the individuals." 7 U.S.C. § 2015(o)(4). Regulations have interpreted the statute to vest total discretion in the state to define the "area" as broadly or narrowly as it deems fit. See 7 C.F.R. Sec. 273.24(f)(6).

¹⁴ Loren Athens, The Center for Community Solutions, *Public Comments to the Ohio Department of Medicaid on the Proposed Medicaid Work Requirement Waiver*, March 2018, <https://www.communitysolutions.com/medicaid-work-requirements-public-testimony/>.

¹⁵ *Id.*

¹⁶ Jackie Borhardt, Food stamp discrimination alleged in civil rights complaint brought against Ohio, Cleveland.com, August 18, 2014 at <http://bit.ly/1lhH1ix>.

threatens to run afoul of other laws, particularly Title VI of the Civil Rights Act of 1964.¹⁷ Title VI prohibits any program receiving federal funds from discriminating on the basis of race.¹⁸ As racially discriminatory motives are difficult to prove, the Supreme Court has recognized and allowed evidence of racially disparate impacts as violating Title VI.¹⁹ In addition, numerous federal agencies, including HHS, have promulgated disparate impact regulations under Title VI. HHS's regulations state that:

[I]n determining the types of services, financial aid, or other benefits, or facilities which will be provided under any such program, or the class of individuals to whom, or the situations in which, such services, financial aid, other benefits, or facilities will be provided under any such program, or the class of individuals to be afforded an opportunity to participate in any such program, may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin.²⁰

Ohio's county-level exemption design, and the disproportionate burdens it would place on communities of color as compared to white communities, would likely violate Title VI, including HHS's own Title VI regulations. The clear effect of this policy would be to create a work requirement that primarily burdens communities of color via direct geographic line-drawing that acts as a proxy for racial classifications. It is clear that HHS cannot countenance such plain racial discrimination.

We appreciate the opportunity to provide comments on Ohio Application. For the reasons described above, we urge HHS to reject the Ohio Application in order to ensure that the 1115 waiver program promotes, rather than undermines, the objectives of the Medicaid program, and that vulnerable populations retain access to crucial medications and health care services. Please contact Robert Greenwald at rgreenwa@law.harvard.edu with the Center for Health Law and Policy Innovation, Amy Killelea with the National Alliance of State and Territorial AIDS Directors at akillelea@nastad.org, or Andrea Weddle at aweddle@hivma.org with the HIV Medicine Association with any questions.

Respectfully submitted by the undersigned organizations:

ADAP Educational Initiative
AIDS Action Baltimore

¹⁷ 42 U.S.C. § 2000d et seq.

¹⁸ *Id.*

¹⁹ *See, e.g., Lau v. Nichols*, 414 U.S. 563 (1974).

²⁰ 45 C.F.R. § 80.3(b)(2).

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