December 2, 2017

Submitted via the Federal Medicaid.gov Portal

Centers for Medicare & Medicaid Services
Department of Health and Human Services
7500 Security Boulevard Baltimore, MD 21244

Re: New Hampshire Health Protection Program Premium Assistance – 2017 Amendment Request

To Whom It May Concern:

We are writing on behalf of the Chronic Illness and Disability Partnership (CIDP). CIDP consists of national organizations representing people living with a wide range of chronic illnesses and disabilities, including cancer, cystic fibrosis, diabetes, HIV, Hepatitis B and C, multiple sclerosis, and mental health and substance use disorders. We represent the 117 million Americans estimated to be living with a chronic illness and/or disability, many of whom rely upon Medicaid to obtain needed care.[1] While our organizations are national in scope, we also affiliate with strong regional, state, and community based advocacy networks.

We appreciate the opportunity to provide comments on New Hampshire's Health Protection Program Premium Assistance demonstration project request (the "New Hampshire Request") under Section 1115 of the Social Security Act. CIDP is very concerned that the work requirement policy put forth in the New Hampshire Request would substantially decrease meaningful access to care for low-income people living with chronic illnesses and disabilities. For the reasons discussed in detail below, we strongly oppose the New Hampshire Request and urge the Centers for Medicare and Medicaid Services (CMS) within the Department of Health and Human Services (HHS) to reject it.

I. New Hampshire's proposed work requirement would violate the core objectives of the 1115 program and would thus be unlawful

If approved, the New Hampshire Request would violate the basic conditions required for approval of a section 1115 waiver, and thus would be unlawful. 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 and the courts, is to enable each State to furnish "medical assistance on behalf of families

[1] U.S. Centers for Disease Control and Prevention, Chronic Disease Overview (February 23, 2016), available at https://www.cdc.gov/chronicdisease/overview/.

with dependent children and of aged, blind, or disabled individuals, whose income and costs are insufficient to meet the costs of medically necessary services." HHS recently changed the criteria for considering whether a proposed demonstration would promote Medicaid's objectives to include projects that "support coordinated strategies to address certain health determinants that promote upward mobility, greater independence, and improved quality of life among individuals."[2] Because several portions of the proposed waiver are not "likely to assist in promoting the[se] objectives," federal law bars HHS from approving those sections of the waiver.[3]

As to the proposed work requirement, 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, as discussed below.[4] This research has shown that a work requirement would harm New Hampshire's Medicaid beneficiaries and restrict access to care, in direct conflict with the objectives of the Medicaid program. Moreover, the proposal does not include a hypothesis, nor does it include an evaluation design to measure its success.

The proposed work requirement would worsen access to care for tens of thousands of New Hampshire residents. If implemented, the New Hampshire Request would take away health coverage for many who would otherwise be eligible for NH Medicaid. Far from addressing the health needs of vulnerable low-income populations, a work requirement would very likely 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 New Hampshire has made on these issues and placing residents at unnecessary risk.

Moreover, the proposed work requirement should not properly be seen as an "experimental, pilot, or demonstration project" as required by section 1115 of the Social Security Act, codified at 42 U.S.C. § 1315(a). As the Ninth Circuit explained: "The Secretary's obligation under § 1315 to 'make some judgment that the project has a research or a demonstration value' cannot be satisfied by '[a] simple benefits cut, which might save money, but has no research or experimental goal." [5] New Hampshire's Request makes some gestures toward experimental goals, stating that the waiver request would enable the state Medicaid program to analyze the impact on "appropriate utilization and improve health outcomes." It is clear, however, that this is merely window-dressings for a simple benefit cut – precisely the type of change that federal Medicaid requirements are meant to prevent. Accordingly, HHS should reject this proposal as failing to meet the law's requirements for an experimental or demonstration project.

For the reasons described above, we urge CMS to reject the New Hampshire Request 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.

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[2] Centers for Medicare & Medicaid Services, accessed on November 27, 2017, https://www.medicaid.gov/medicaid/section-1115-demo/about-1115/index.html.

[3] *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).

[4] 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.

[5] *Newton-Nations v. Betlach*, 660 F.3d 370, 381 (9th Cir. 2011) (citing *Beno v. Shahala*, 30 F.3d 1057, 1069 (9th Cir. 1994)).

II. The New Hampshire Request would inappropriately block otherwise eligible individuals from health care services needed to manage chronic illnesses and disabilities.

We also urge CMS to reject the New Hampshire Request because a work requirement would create an unnecessary barrier to vital health care services. Chronic illnesses can produce symptoms or disabilities that are not visible, yet serve as impediments to steady employment. Additionally, some chronic conditions like HIV 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.[6] Episodic disabilities can produce an uneven work history, which in turn can make it more difficult for a person to find employment and result in uneven coverage and access to medical care. 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.

Even with an exemption process for enrollees with diagnosed conditions, a work requirement would inappropriately penalize enrollees who have *undiagnosed* chronic illnesses or disabilities. Many chronic conditions manifest first as a collection of symptoms, not as a single diagnosis. A work requirement would not recognize these symptoms as a substantial barrier to employment and would block people with undiagnosed conditions from the very care they need. Further, experience with states administering work requirements in the Temporary Assistance for Needy Families (TANF) program shows that administering exemptions and exclusions was oftentimes inaccurate, resulting in otherwise eligible individuals being denied benefits.[7] Thus, the administrative complexity resulting from application of a work requirement and exemptions runs an unnecessary risk of harming individuals living with chronic health conditions that the New Hampshire Request does not contemplate subjecting to a work requirement.

III. New Hampshire's proposal would not achieve a meaningful increase in employment rates

The New Hampshire Request's work requirement is severely misguided, even as a measure to cut costs and increase employment rates. Studies have shown that nearly 8 in 10 Medicaid adults are in working families, and 59% are personally working without a formal requirement to do so.[8] Most of the Medicaid adults who are not personally working face some significant barrier to work, with 35% citing a chronic illness or disability.[9] Work requirements have not proven to meaningfully impact employment rates nor have they proven to be effective at increasing employment over the long term. [10] Further, work requirement policies often fail to meaningfully address the significant employment barriers that people living with chronic illness and disabilities have to face.

IV. New Hampshire's proposed work requirement will create an administrative burden that will disproportionately harm people living with chronic illness and disability

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[6] *Getting to Work: a Training Curriculum for HIV/AIDS Service Providers and Housing Providers: Module 1*, https://www.hudexchange.info/trainings/dol-hud-getting-to-work-curriculum-for-hiv-aids-providers/.

[7] 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.

[8] 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(Feb. 2017)

9 Id.

10 MaryBeth Musumeci and Julia Zur, Kaiser Family Foundation, *Medicaid Enrollees and Work Requirements: Lessons From the TANF Experience*, https://www.kff.org/medicaid/issue-brief/medicaid-enrollees-and-work-requirements-lessons-from-the-tanf-experience/, (Aug. 18, 2017).

Medicaid work requirements are not only damaging to individual and public health and ineffective at increasing employment, they are also frequently unreasonably burdensome on Medicaid enrollees, particularly for people living with chronic illness and disability. Individuals who are eligible for NH Medicaid already struggle to enroll in the program and meet existing administrative requirements for maintaining coverage. Navigating the Medicaid enrollment process can be particularly challenging for low-income populations. Individuals with lower incomes often face pervasive stress, insecurity, and instability in their lives, including concerns about housing, nutrition, income, and childcare. People living with chronic conditions furthermore juggle multiple appointments with providers and the need to adhere to complex treatment plans. A tedious verification process would leave room for potential mistakes when determining eligibility to Medicaid benefits, resulting in temporary disruption of coverage or delays in accessing health care while compliance to the requirements is being evaluated. Adding a complex work reporting and verification process to the already challenging Medicaid enrollment process will merely serve to reduce the enrollment rate of eligible individuals. Moreover, New Hampshire's proposal provides for graduated work requirements, which would add a layer of complexity to an already difficult verification process.

We appreciate the opportunity to provide comments on New Hampshire's 1115 Demonstration Request. For all the reasons mentioned above, we strongly urge you to deny this authorization to preserve access to health care and ease the burden for individuals with disabilities and chronic illnesses. With any further questions, please contact Robert Greenwald with the Treatment Access Expansion Project (rgreenwa@law.harvard.edu), Amy Killelea with the National Alliance of State & Territorial AIDS Directors (akillelea@nastad.org), or Jean McGuire at Northeastern University (j.mcguire@neu.edu) if we can be of assistance.

Respectfully submitted by the co-chairs of the Chronic Illness and Disability Partnership

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