August 2, 2017

The Honorable Tom Price, Secretary
U.S. Department of Health and Human Services
200 Independence Avenue, SW
Washington, DC 20201

Dear Secretary Price:

The undersigned organizations appreciate the opportunity to comment on several amendments to Kentucky's proposal for a demonstration project under section 1115 of the Social Security Act, known as Kentucky HEALTH. Our comments supplement the extensive comments some of us submitted on October 7, 2016, which explain that Kentucky's proposal shouldn't be approved because it would keep eligible people from enrolling and keep others from getting the care they need. The changes Kentucky is proposing to its original proposal provide additional reasons the proposal should be rejected, because they would increase the harm to Kentuckians.

Kentucky wants to make these changes to make Kentucky HEALTH easier to administer, referring to the changes as "operational modifications." Yet the budget neutrality estimates submitted with the waiver amendment show the state expects enrollment to decrease by 95,000 under the amendment compared to 86,000 under the original proposal. These so-called operational modifications by the state's own admission would further decrease participation in Kentucky's Medicaid expansion.

A third-year survey of the impact of Medicaid expansion on three states—Kentucky, Arkansas, and Texas—shows that gaining coverage under the Affordable Care Act "was associated with a 41-percentage point increase in having a usual source of care, a $337 reduction in annual out-of-pocket spending, significant increases in preventive health visits and glucose testing, and a 23-percentage point increase in "excellent" self-reported health."[1] These gains would all be at risk with approval of Kentucky's waiver proposal, which would lead many thousands to lose coverage and make it harder for many more to stay enrolled.

Changes to Work Requirement Would Cause Further Loss of Coverage

Kentucky wants to replace the graduated hours for work or work-related activities in its original proposal with a flat 20-hour per week requirement. This is solely to make it easier for the state to track work or work-related activities reportedly to hold down vendor costs for tracking the hours people should be working. We wrote extensively on the problems with making eligibility contingent on work or work-related activities in our original comments. Speeding up the way these requirements would kick in just exacerbates the problem for people needing coverage. Moreover, the proposal is still complicated with a three-month phase-in that depends on the number of months an individual has been enrolled over a five-year period. It's not clear that the change does much to reduce state costs, while at the same time causing further harm to beneficiaries.

[1] Benjamin D. Sommers, *et al.*, "Three-Year Impacts of the Affordable Care Act: Improved Medical Care and Health

Disenrollment for Failure to Report Changes Is Unprecedented and Unworkable

Kentucky HEALTH is a very complicated proposal, with income-based premiums that for some beneficiaries increase based on time in the program, lock-outs or cost-sharing as a penalty for non-payment depending on income, lockouts for failure to submit renewal paperwork, different rules for people determined medically frail, deductible and rewards accounts and an employer-based premium assistance program. It's not surprising that the state now understands that implementation would be difficult and costly. Just as an illustration, information on Arkansas' attempt to implement health savings accounts showed that the state collected $426,457 from eligible enrollees, but spent $595,135 in co-payment protections.[2] In addition to spending more than it collected, the state spent $9 million to contract with a vendor to manage the accounts.[3]

Instead of making Kentucky HEALTH less complicated, the state wants to lock beneficiaries out of coverage for six months when they fail to report changes in income, work or work-related activities. This is the same penalty Kentucky wants to apply to people who fail to submit their renewal paperwork on time.

Federal rules require that states have procedures requiring beneficiaries to make timely and accurate reports of change in circumstances that may affect their eligibility.[4] Kentucky requires that beneficiaries report changes within 10 days. The proposal does not, however limit the reporting requirement to changes that may affect eligibility for coverage. It extends the requirement to "changes in income that would be substantial enough to impact the member's premium amount, changes in employment status that could impact access to employer sponsored insurance, and self-attestation of community engagement and employment hours." The proposal goes on to say that "to deter beneficiaries from failing to timely report changes in income or from falsely reporting community engagement hours, Kentucky now seeks to apply the same six-month disenrollment penalty for these intentionally fraudulent member actions." This statement is astounding. Kentucky appears to be requiring that beneficiaries report even minor changes in income that take them from one income band to another, and then equating a failure to do so as intentional fraud. Similarly, eligibility for employer coverage does not disqualify people from receiving Medicaid. Yet Kentucky would penalize people whose hours change and many others who don't report minor changes, equating any failure to report with intentional fraud.

The dictionary definition of fraud is "intentional perversion of truth in order to induce another to part with something of value or to surrender a legal right.[5]" Studies show that low-income people often experience fluctuations in income and family circumstances, often occurring on a monthly

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[2] By making monthly contributions to their accounts, enrollees were "protected," or not required to pay co-payments for services rendered in the subsequent month. The $595,135 represents state spending to offset the enrollee's co-payment obligation.

[3] Joseph Thompson, *et al.,* "Arkansas Experience with Health Savings Accounts in a Medicaid Expansion Population," Arkansas Center for Health Improvement, June 27, 2017, https://academyhealth.confex.com/academyhealth/2017arm/meetingapp.cgi/Paper/18272.

[4] 42 CFR §435.916(c).

[5] Merriam-Webster dictionary at https://www.merriam-webster.com/dictionary/fraud

basis, especially for beneficiaries employed in seasonal work.[6] In fact, Medicaid has special rules designed to keep people eligible when they experience these types of fluctuations. These rules prevent gaps in coverage resulting from the fact that Medicaid determines eligibility based on monthly income and the marketplaces use annual income.[7] It's an enormous leap to assume that every failure to report common changes that occur in the lives of Medicaid beneficiaries is equivalent to intentional fraud, but that's what Kentucky appears to be doing.

The rules for KY HEALTH are so complex that even a minor change could affect eligibility. Beneficiaries are generally aware that they have to report income changes that would make them lose their eligibility for Medicaid such as getting a new job with increased pay, but the additional requirements unique to KY HEALTH require beneficiaries to be able to determine and report changes that affect their premium obligation, access to employer-sponsored insurance, or any factors regarding their compliance with the community engagement requirement. It would be very difficult, if not impossible, for beneficiaries to understand what changes they must report. State workers would have to ask for verification of reported changes, leading to frequent burdensome requests for documents and increased paperwork. Here's three examples of how this could affect beneficiaries, and many more could be imagined:

- **Change in Premium** – A beneficiary working 20 hours per week at $11 per hour has income below the poverty line and pays an $8 monthly premium. If she picks up an extra shift in any month, her income would be over 100 percent of the poverty line, changing her monthly premium to $15. She would have to know that the extra shift increases her premium and report the change. If she failed to do so, she could be disqualified for six months under Kentucky's proposal.

- **Employer-Sponsored Insurance (ESI)** – A beneficiary who works 20 hours per week at minimum wage picks up some additional shifts. Because he is now working 30 hours per week, he has access to ESI. Even though he is still eligible and owes the same amount of premium, he could be disqualified for not reporting that he has access to ESI.

- **Community Engagement** – A beneficiary volunteers at her children's school 20 hours per week to meet the community engagement requirement. However, the school is closed during winter break. Depending on how Kentucky implements the engagement requirement, she could be disqualified for failing to report the change or disqualified for failing to meet the community engagement requirement during the closure.

Kentucky is requiring that beneficiaries know, understand and apply complicated eligibility rules to their own circumstances at the risk of losing benefits and being accused of fraud. Moreover, the state is also increasing its own administrative burden. State workers would have to not only deal with increased reports of changes, verify the reports and decide whether they affect eligibility or premium payments, they would also have to monitor whether people are reporting, decide whether any of the limited good cause exceptions in the proposal apply, and adjudicate appeals when beneficiaries dispute the sanctions.

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[6] Benjamin D. Sommers and Sara Rosenbaum, "Issues In Health Reform: How Changes In Eligibility May Move Millions Back And Forth Between Medicaid And Insurance Exchanges," *Health Affairs,* February 2011.

[7] 42 CFR §435.603(i).

There is no precedent for this and no justification. It is outside the scope of what is allowable under section 1115, which authorizes demonstration projects that promote the objectives of Medicaid. Kentucky doesn't even purport to justify its proposal on this basis but only as a way to help the state administer its proposal. As we wrote in our October 2016 comments, the underlying proposal does not meet the criteria for a demonstration project under section 1115. The amendment only strengthens that conclusion, and provides further reason Kentucky's proposal should be rejected.

Thank you for your willingness to consider our comments. If you would like any additional information, please contact Judith Solomon (solomon@cbpp.org) or Joan Alker (jca25@georgetown.edu).

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