



Georgetown University
Health Policy Institute
CENTER FOR CHILDREN
AND FAMILIES

Medicaid Learning Lab

Section 1115 Waivers October 21, 2021

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Section 1115 Demonstrations

- Named after Section 1115 of the Social Security Act
- Allows the Secretary of Health and Human Services to grant **waivers** of certain requirements in Medicaid, CHIP, and a few other programs
 - Waivers must be necessary to conduct a true health coverage demonstration, experiment, or pilot project
 - Demonstrations must promote the objectives of Medicaid: to furnish medical assistance and rehabilitation and other services

Other Limits for Section 1115 Demos

- HHS can only waive specified Medicaid requirements (those in section 1902 of the Medicaid Act)
- Can only waive to the extent and for the period "necessary" to conduct the experiment
- Demonstrations must be budget neutral for the federal government
- Demonstration requests must comply with transparency requirements, including a notice and comment process

How Long do Waivers Last?

- Only “for the period ... necessary” to carry out experiment
- Initial approval period is usually five years
- Renewal/Extension typically three years
 - Short term extensions are often granted while agreements are being negotiated
- Trump-era CMS authorized longer (10 year) extensions



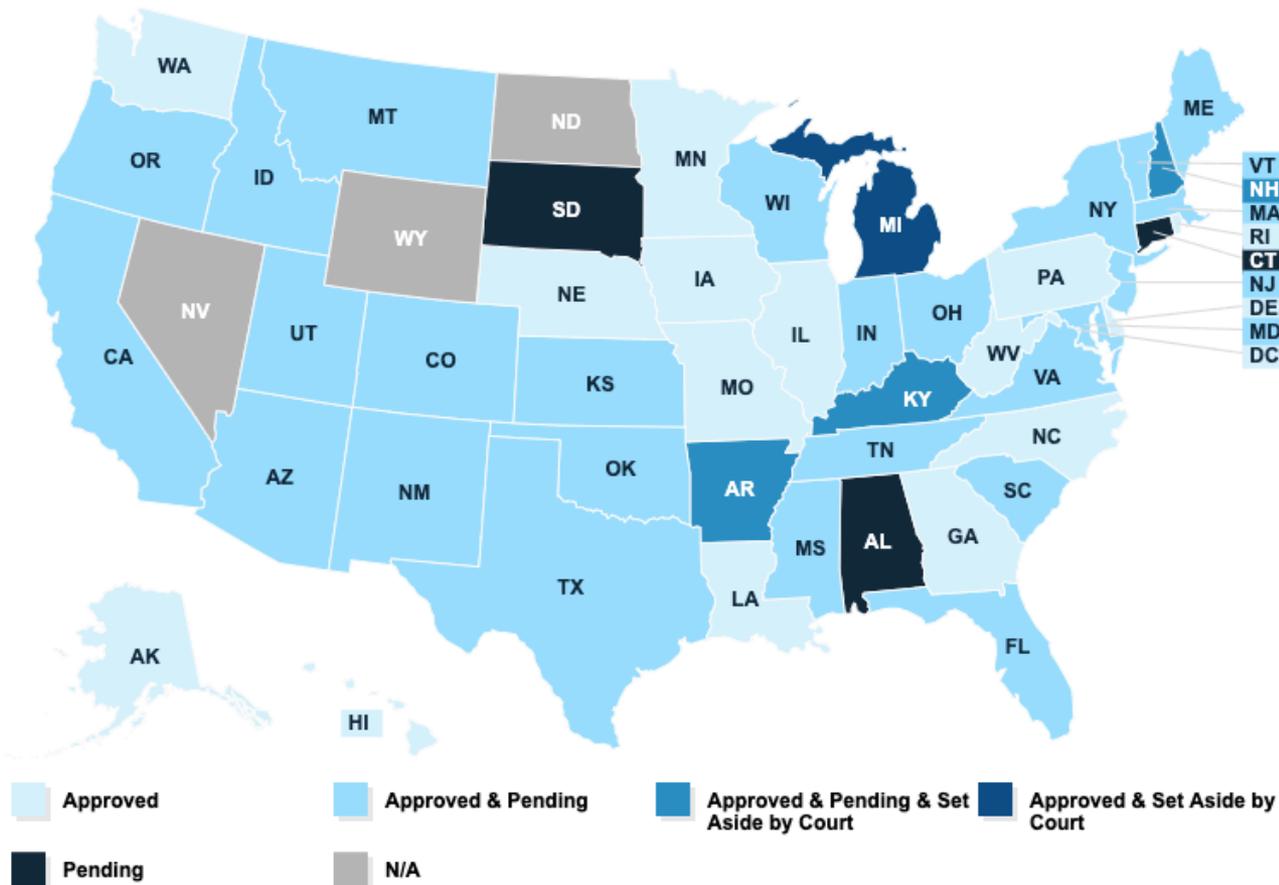
Budget Neutrality

- HHS applies a budget neutrality test to 1115 demonstrations, requiring that the “With Waiver” costs not exceed the “Without Waiver” (WOW) costs
- This is calculated over the life of the waiver, which requires a lot of projections and assumptions
- Budget neutrality is intended to protect the integrity of federal dollars, but can also limit state investments or encourage cuts
- Recently budget neutrality has been grossly misapplied to try and “block grant” Medicaid spending

Why Pay Attention?



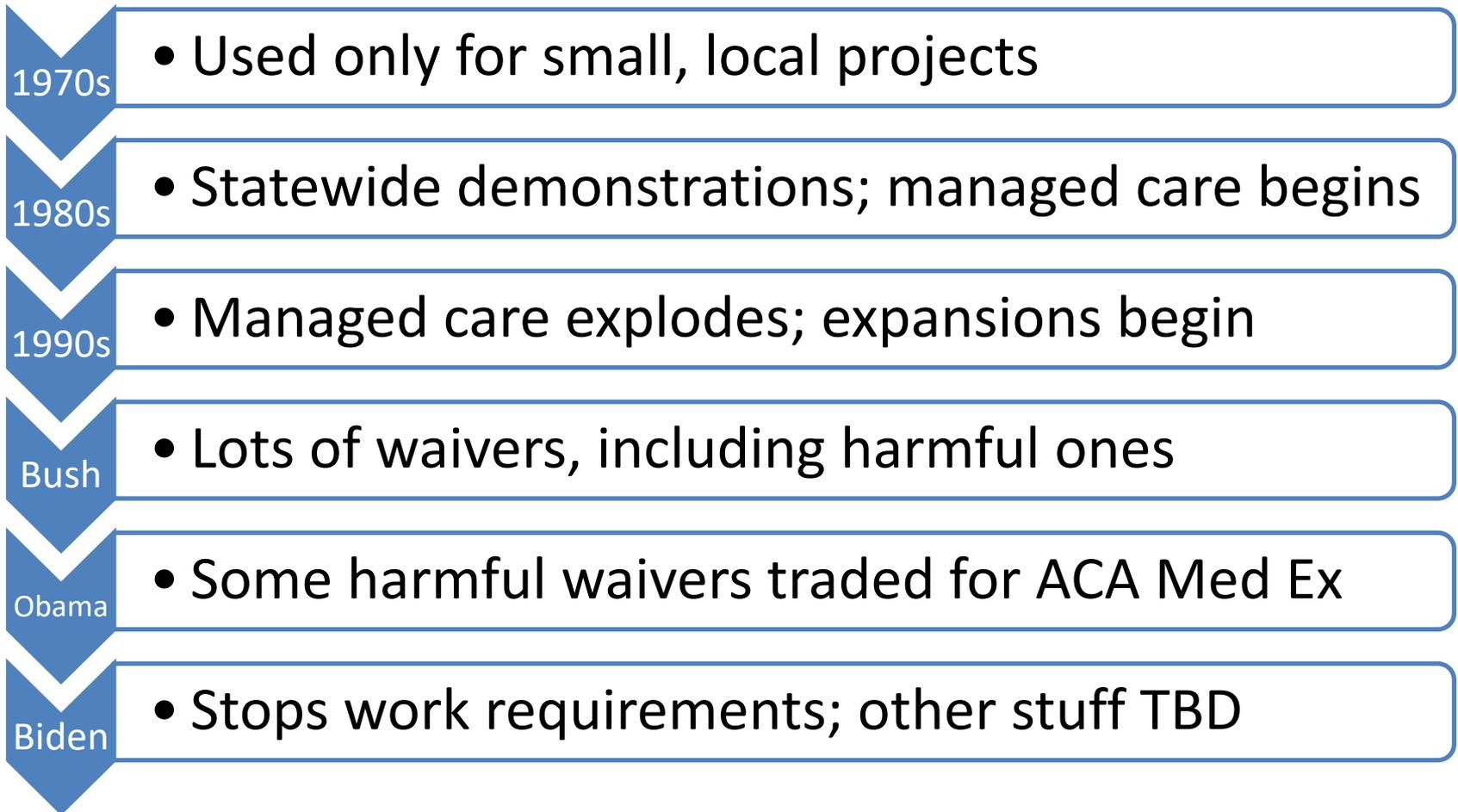
Section 1115 Medicaid Waivers: Approved and Pending as of October 8, 2021



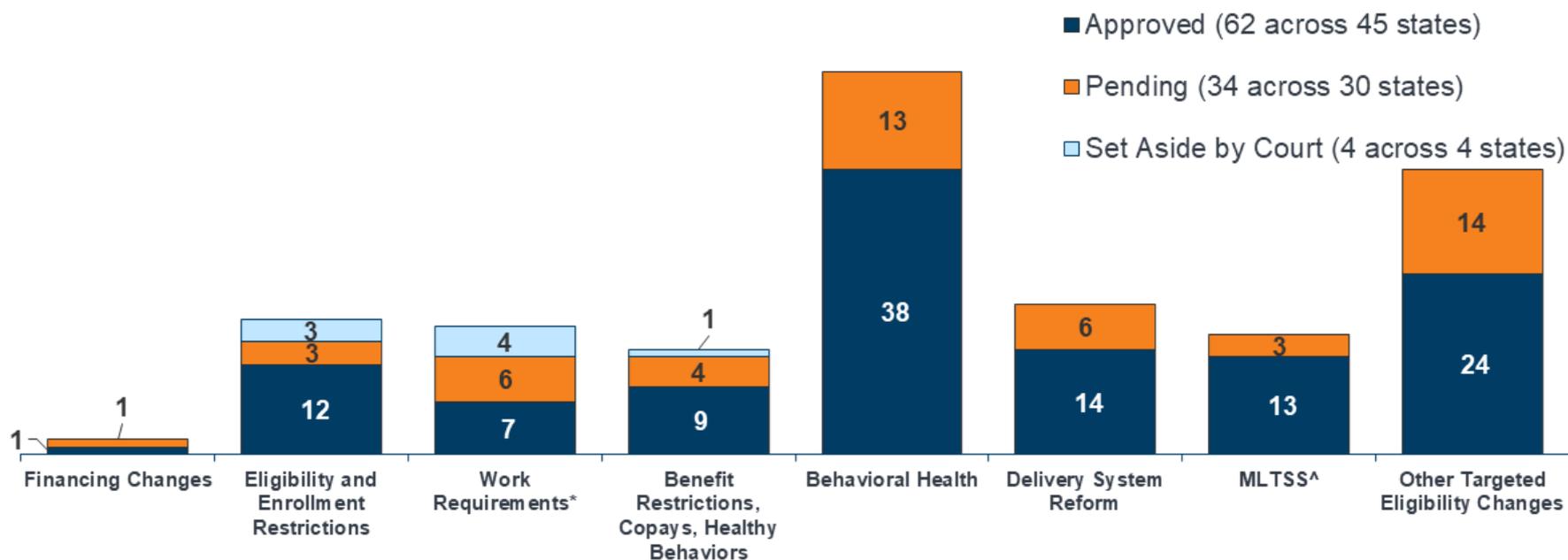
Waiver Policy is Often an Important Tool Reflecting an Administration's Priorities

- Bush Administration Health Insurance Flexibility and Accountability Initiative – “HIFA” 2001.
 - Intent to expand coverage but not spend any more money and promote private health insurance approaches; allowed states to cut benefits and raise cost-sharing.
- Obama Administration issued guidance on Arkansas style premium assistance approaches for Medicaid expansion in March 2013.
- Trump Administration used waivers to promote work requirements and other barriers to coverage.

Section 1115 Over the Years



Landscape of Approved vs. Pending Section 1115 Medicaid Demonstration Waivers, October 8, 2021



NOTES: Some states have multiple approved and/or multiple pending waivers, and many waivers are comprehensive and may fall into a few different areas. Therefore, the total number of pending or approved waivers across states cannot be calculated by summing counts of waivers in each category. Pending waiver applications are not included here until they are officially accepted by CMS and posted on Medicaid.gov.

* On 2/12/21, CMS under the Biden Administration sent letters to states with approved work requirements to begin the process of withdrawing these waiver authorities (see KFF Medicaid Waiver Tracker for more info).

[^] "MLTSS" = Managed long-term services and supports.



Recent Policy Problems in Section 1115 Waivers

Work Requirements

Premiums

High Cost-Sharing

Lockouts

Transportation

Retroactive Coverage

EPSDT

Drug Formulary

Block Grant

Positive Examples of Section 1115 Waivers

- Eligibility expansions (esp. pre-ACA)
- Family planning waivers (now SPA option)
- Postpartum extensions (SPA option coming)
- Continuous eligibility for adults
- Longer continuous eligibility for children (coming soon?)
- Social determinants of health
- Transition coordination for release from justice system

What are the Rules for Public Notice and Comment?



What are the Rules on Public Participation?

- [Public notice and comment rules](#) apply as a result of the ACA after much concern about waivers being negotiated secretly.
- Apply to new waivers and extensions but not amendments;
 - Federal government and many states have been taking comments on amendments anyway
- Issued in February 2012 and can be found at 42 CFR Part 431 Subpart G.

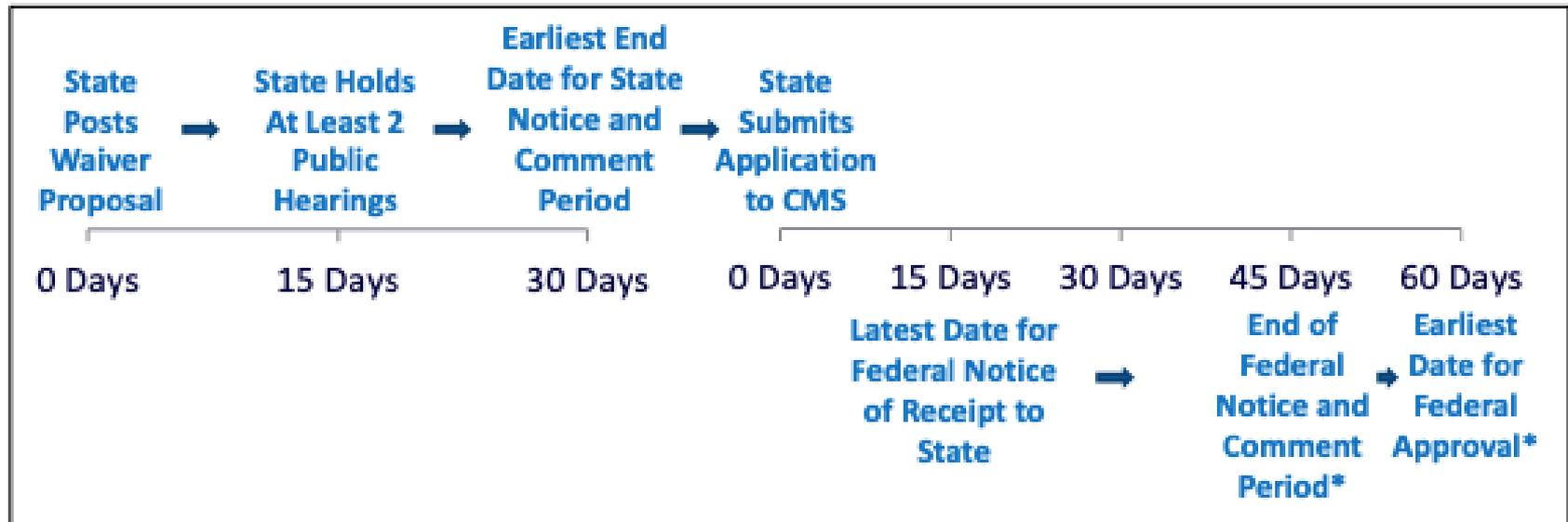
What Process is Required at State Level?

- 30 day state public comment process:
 - State must provide a comprehensive description of the waiver “to ensure meaningful input.”
 - State must hold two public hearings and have a website to keep public informed.
 - State’s final application must note how public comments were incorporated.
- State may have their own rules too.

Federal Public Notice and Comment

- Federal government has 15 days to certify an application is complete and send state notice of receipt.
- Once certified federal public comment opens for 30 days; unlike states feds don't have to provide a written response.
- Federal government cannot render a decision until at least 45 days after receipt.
- All documents are posted on [medicaid.gov](https://www.medicaid.gov).

Timeline of Minimum Public Comment and Approval Process Requirements for Section 1115 Waivers



* If the federal government provides the notice of receipt to the state earlier than within 15 days of the state submission, the timelines for the end of the federal notice and comment period and earliest date for federal approval could be shorter.

Waiver Pressure Points

- CMS National and Regional Offices
- Office of the Secretary of HHS
- Congressional delegation
- State legislators
- State agency
- White House
- Governor
- Litigation



Section 1115 Legal Battles

- Work requirements and some other harmful waivers were blocked by federal courts after lawsuits
- Work requirement case now on appeal with Supreme Court, though it is unclear if court will ever hear the case
- Biden administration has rescinded many of the harmful Trump era approvals
- Some states have appealed those rescissions to an administrative Departmental Appeals Board, and those are pending

Key Legal Takeaways

- Section 1115 waivers are granted at the discretion of the HHS Secretary, so ultimately the Biden administration controls what is actually approved and implemented
- But bad legal outcomes could lead to serious problems in future administrations
- Court decisions have hinged on the purpose of Medicaid (to furnish coverage) and the evidence about waiver policies
- The evidentiary record that courts review includes public comments that YOU file



Example from Court Decision

program if data showed that it was no longer in the public interest. *Id.* The Secretary also concluded that the “overall health benefits to the [a]ffected population . . . outweigh the health-risks with respect to those who fail to” comply with the new requirements. *Id.* at 7. While Arkansas did not have its own estimate of potential coverage loss, the estimates and concerns raised in the comments were enough to alert the Secretary that coverage loss was an important aspect of the problem. Failure to consider whether the project will result in coverage loss is arbitrary and capricious.

In total, the Secretary’s analysis of the substantial and important problem is to note the concerns of others and dismiss those concerns in a handful of conclusory sentences. Nodding

Helpful References

- On public process rules: [The New Approval and Process Rule for Section 1115 Medicaid and CHIP Demonstration Waivers](#) Kaiser Commission on Medicaid and the Uninsured, March 2012
- Kaiser Family Foundation [waiver tracker](#) and other resources
- Georgetown CCF [SayAhh!](#) blog and website has [waiver comments](#)
- [CBPP](#) and [National Health Law Program](#)
- [MACPAC](#) has comprehensive outline of Section 1115 research and demonstration waivers