



Medicaid Demonstration Waivers: Legal Framework & Litigation

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About NHeLP

- National non-profit committed to improving health care access and quality for low income and underserved individuals and families
- State & local partners:
 - Disability rights advocates – 50 states + DC
 - Poverty & legal aid advocates – 50 states + DC
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Overview

- Legal Framework to § 1115
- What's happening now?
- Litigation & advocacy
- Concluding theme

What Is Section 1115?

- Under Medicaid, states receive federal funding to provide health care to enrollees, but the states must comply with federal Medicaid requirements
- Section 1115 (Social Security Act) allows the Secretary to **waive** some of these requirements for states conducting a demonstration program
- Historically, this authority has been used to do things like managed care, coverage expansions, family planning expansions, etc.

§ 1115 Statutory Language Excerpt

Sec. 1115. [42 U.S.C. § 1315]

In the case of any experimental, pilot, or demonstration project which, in the judgment of the Secretary, is likely to assist in promoting the objectives of [Medicaid] ... the Secretary may waive compliance with any of the requirements of section ... 1902 ... to the extent and for the period he finds necessary to enable such State ... to carry out such project...

Key Legal Limits of § 1115 Statute

1. § 1115 project must be an experiment

Key Legal Limits of § 1115 Statute

- Congress:
 - Test out a unique approach
 - Detailed research methodology and comprehensive evaluation
- Courts:
 - A simple benefit cut, which might save money, but has no research or experimental goal, would not satisfy this requirement.



Key Legal Limits of § 1115 Statute

1. § 1115 project must be a “demonstration”
2. Must promote the “objectives of” Medicaid



The “Objectives” of Medicaid

Sec. 1901. [42 U.S.C. 1396-1]

APPROPRIATION

For the purpose of enabling each State ... to furnish (1) **medical assistance** on behalf of families with dependent children and of aged, blind, or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services, and (2) **rehabilitation** and other services to help such families and individuals attain or retain capability for independence or self-care...



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TANF: Stark Contrast

42 U.S. Code § 601

Purpose

(a) IN GENERAL The purpose of this part is to increase the flexibility of States in operating a program designed to—

- (1) provide assistance to needy families so that children may be cared for in their own homes or in the homes of relatives;
- (2) end the dependence of needy parents on government benefits by promoting job preparation, work, and marriage;
- (3) prevent and reduce the incidence of out-of-wedlock pregnancies and establish annual numerical goals for preventing and reducing the incidence of these pregnancies; and
- (4) encourage the formation and maintenance of two-parent families.



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Key Legal Limits of § 1115 Statute

1. § 1115 project must be a “demonstration”
2. Must promote the “objectives of” Medicaid
3. Only items in one section (§ 1902) can be waived

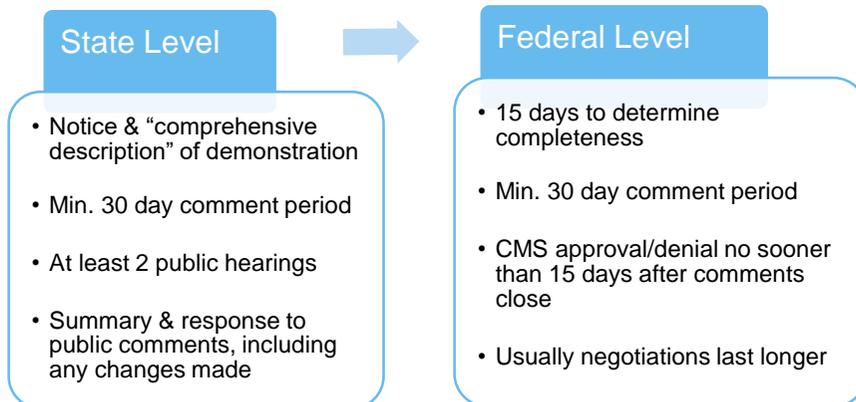
Key Legal Limits of § 1115 Statute

- Medicaid provisions run from § 1900 to § 1946 (over 50 provisions total)
- Can *only* waive in § 1902
- Some provisions are waiverproof
- Examples to look at:
 - Medicare cost sharing, § 1905(p)(4)
 - Spousal impoverishment, § 1924(a)(4)(A)
 - Copayment limits, § 1916(f)
 - Income determination via MAGI, § 1902(e)(14)

Key Legal Limits of § 1115 Statute

1. § 1115 project must be a “demonstration”
2. Must promote the “objectives of” Medicaid
3. Only items in one section (§ 1902) can be waived
4. Can only waive to “extent and for the period” necessary to carry out demonstration
5. Must comply with transparency requirements

§ 1115 Application & Review Process - Comments & Hearings (42 CFR 431.420)

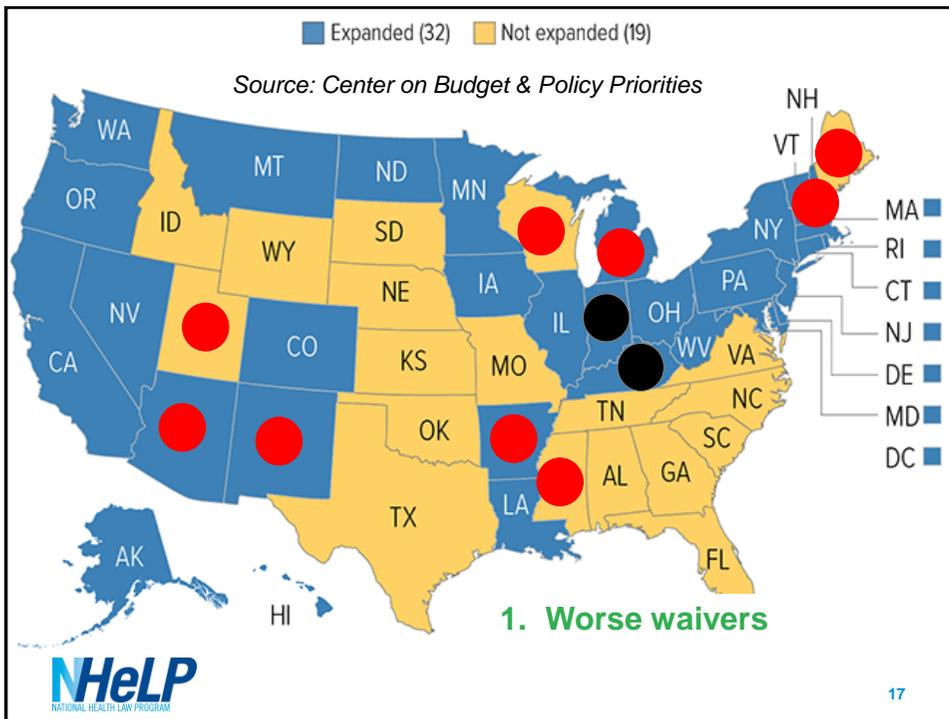


Two More Limits

1. § 1916(f) sets strict requirements for *any* waivers of cost-sharing rules
2. Historically, HHS has applied a “budget neutrality” test to § 1115 projects – meaning they cannot increase the Medicaid costs for the federal government

What’s happening?

- Under the Obama administration, some problematic waivers were granted to entice states to expand Medicaid
- The Trump administration has approved waivers in 2 states (KY, IN) and there are currently multiple state applications pending
- KY, IN, pending apps include numerous & unprecedented requests that harm enrollees



Key Elements of Current 1115 Coverage Waivers

Source: Manatt (as of 1/3/2018)

Proposed Features	AR	AZ	IN	KY	KS	MA	MI	ME	MS	NC	NH	NM	UT	WI
Premiums <i>(some states with lockout)</i>	✓	✓	✓	✓	✓	✓	✓	✓		✓		✓		✓
Cost Sharing	✓	✓	✓	✓		✓	✓	✓		✓	✓	✓	✓	✓
Work Requirements	✓	✓	✓	✓	✓			✓	✓	✓	✓		✓	✓
Healthy Behavior Incentives	✓	✓	✓	✓			✓					✓		✓
Non-Emergency Medical Transportation Waiver			✓	✓		✓								
Institution for Mental Disease Exclusion Waiver		✓	✓	✓	✓	✓	✓			✓			✓	✓
Retroactive Coverage Waiver	✓		✓	✓		✓		✓			✓	✓	✓	
Prompt Enrollment Waiver			✓	✓										
Drug Screening														✓
Limits on Enrollment Duration		✓											✓	✓
Partial Expansion	✓					✓								
Health Savings-Like Accounts		✓	✓	✓	✓		✓							
Late Renewal Paperwork Penalty/Lockout			✓	✓										
1927 Waiver for Closed Formularies						✓								

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Legal Issues in § 1115 Waivers

Very Recent HHS Guidance

1. New Informational Bulletin on “improving” § 1115 processes
2. **New § 1115 criteria on the objectives of Medicaid on CMS website**
3. New guidance allowing work requirements

The objectives of Medicaid

Obama era criteria	New criteria
1. Increase and strengthen overall <u>coverage</u> of low-income individuals in the state;	
3. Improve health <u>outcomes</u> for Medicaid and other low-income populations in the state;	1. Improve access to high-quality, person-centered services that produce positive health <u>outcomes</u> for individuals;
4. Increase the <u>efficiency</u> and <u>quality</u> of care for Medicaid and other low-income populations through invitations to <u>transform</u> service delivery networks;	2. Promote <u>efficiencies</u> that ensure Medicaid's sustainability for beneficiaries over the <u>long term</u> ;
	3. Support coordinated strategies to address certain <u>health determinants</u> that promote <u>upward mobility</u> , greater independence, and improved quality of life among individuals;
	4. Strengthen beneficiary engagement in their personal healthcare plan, including incentive structures that promote <u>responsible decision-making</u> ;
	5. Enhance alignment between Medicaid policies and <u>commercial health insurance</u> products to facilitate smoother beneficiary transition;
2. Increase <u>access</u> to, stabilize and strengthen providers and <u>provider networks</u> available to serve Medicaid and low-income populations in the state;	6. Advance innovative <u>delivery system</u> and payment models to strengthen provider <u>network capacity</u> and drive greater <u>value</u> for Medicaid;

Kentucky Litigation Overview

- Class action with 15 plaintiffs
- Filed against HHS, CMS, and leadership
- Filed in U.S. District Court, DC
- Co-counsel: Kentucky Equal Justice Center, Southern Poverty Law Center
 - Additional help from law firm Jenner & Block
- Asking the court to (1) declare waivers illegal and (2) enjoin the waivers



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Kentucky Litigation: Legal Claims

1. Constitutional: “Take Care Clause”
 - The Executive branch can *implement* Congress’s laws, but not *re-write* the law
2. Federal Law: Administrative Procedure Act
 - Federal agency actions cannot be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”
 - Multiple claims: One for each waiver and one for the work requirements guidance



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Going Forward

- Each state will be a separate case
- Litigation will not be a “one and done” solution
- Litigation is just one piece of a larger campaign that is needed to stop bad waivers & protect the integrity of the Medicaid program



Advocacy & Enforcement

There are a lot of different ways to be involved:

coalitions

evidence

comms

plaintiffs

amicus

comments

letters

hearings

Key Theme: What Makes Medicaid

- Congress wrote, and for 50+ years has expanded upon, a Medicaid statute chock full of extraordinary standards protecting low income people
- These standards are not a part of other health insurance systems
- These standards are federal minimums applying to all states

New CMS § 1115 Criteria



1. Improve access to high-quality, person-centered services that produce positive health outcomes for individuals;
2. Promote efficiencies that ensure Medicaid's sustainability for beneficiaries over the long term;
3. Support coordinated strategies to address certain health determinants that promote upward mobility, greater independence, and improved quality of life among individuals;
4. Strengthen beneficiary engagement in their personal healthcare plan, including incentive structures that promote responsible decision-making;
5. Enhance alignment between Medicaid policies and commercial health insurance products to facilitate smoother beneficiary transition; and
6. Advance innovative delivery system and payment models to strengthen provider network capacity and drive greater value for Medicaid.

Medicaid Protections

No
premiums

No high
copays

Transpo,
EPSDT

FQHC
Services

FP Free
Choice

Retro
eligibility

Services
standards



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Thank You

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