

February 7, 2019

via Electronic Submission

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

RE: TennCare Waiver Amendment 38

Dear Secretary Azar:

The Disability Rights Education and Defense Fund (“DREDF”) appreciates the opportunity to provide comment on proposed Amendment 38 to the TennCare Demonstration. DREDF is a national cross-disability law and policy center that protects and advances the civil and human rights of people with disabilities through legal advocacy, training, education, and development of legislation and public policy. We are committed to increasing accessible and equally effective healthcare for people with disabilities and eliminating persistent health disparities that affect the length and quality of their lives. DREDF has significant experience in Medicaid law and policy, given that disabled individuals disproportionately live in poverty and depend on Medicaid services and supports.

DREDF unequivocally opposes Tennessee’s proposed amendment, which would impose work requirements on a large number of TennCare beneficiaries. The proposal will create new barriers to health care for thousands of low-income people, including people with disabilities, and serve to further entrench workplace prejudices and stereotypes. It will result in large health coverage losses, thus undermining the express purposes of the Medicaid program. Under Section 1115 of the Social Security Act (“SSA”), which only permits the HHS Secretary to approve waiver applications that promote the objectives of Medicaid, the proposal cannot stand.

I. Approval of the TennCare Amendment Is Unlawful Under Section 1115 of the Social Security Act

Section 1115 of SSA gives the HHS Secretary authority to waive a State’s compliance with certain requirements of the Medicaid Act, but only for an “experimental, pilot, or demonstration project which . . . is likely to assist in promoting the objectives” of the Medicaid Act. 42 U.S.C. § 1315(a). The express purpose of the Medicaid Act is to enable each State “to furnish [] medical assistance on behalf of [individuals] whose income and resources

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are insufficient to meet the costs of necessary medical services” and to provide “rehabilitation and other services to help such families and individuals attain or retain capability for independence or self-care.” *Id.* § 1396-1.

The changes called for in the Tennessee proposal apply to all non-exempt TennCare enrollees aged 19–64 who are in the parent/caretaker relative eligibility category. This category encompasses approximately 113,291 low-income Tennesseans.¹ A proposal for permanent changes that affect such a significant number of TennCare enrollees cannot be called a “pilot,” nor experimental—except in the euphemistic sense of lacking any documented connection between the waiver’s proposed actions and achieving the Medicaid Act’s stated purpose.

The TennCare amendment proposal does not promote, and indeed will undermine, the objectives of the Medicaid program by decreasing access to “medical assistance” and “other services” that individuals, and in particular people with disabilities, depend on “for independence and self-care.” See *id.* § 1396-1. As the U.S. District Court for the District of Columbia recently held, Medicaid work requirements do not further the program’s objective of furnishing medical assistance. See *Stewart v. Azar*, 313 F. Supp. 3d 237 (D.D.C. 2018) (granting plaintiffs’ motion for summary judgment and vacating the HHS Secretary’s approval of work requirements in the Kentucky Medicaid program). Indeed, as we have seen in other States that have unlawfully implemented Medicaid work requirements, such as Arkansas, these new eligibility conditions construct cumbersome administrative barriers and lead to large coverage losses.²

¹ See Courtnee Melton, THE SYCAMORE INST., *Obstacles to Work Among TennCare Enrollees Potentially Affected by a Work Requirement 2* (Aug. 24, 2018) (analyzing the 2016 American Community Survey), <https://www.sycamoreinstitutetn.org/wp-content/uploads/2018/08/2018.08.24-FINAL-Obstacles-to-Work-Among-TennCare-Enrollees-Potentially-Affected-by-a-Work-Requirement.pdf>.

² See, e.g., Robin Rudowitz, et al., KAISER FAMILY FOUNDATION, *Year End Review: December State Data for Medicaid Work Requirements in Arkansas* (Jan. 17, 2019), <https://www.kff.org/medicaid/issue-brief/state-data-for-medicaid-work-requirements-in-arkansas/>.

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II. Disabled Enrollees Will Be Disproportionately Harmed by TennCare Work Requirements

A. Contrary to the State's Hollow Assertion, Some People with Disabilities Will Not Be Exempt from TennCare's Work Requirements

DREDF is deeply concerned with the structure of the TennCare work requirement exemptions. The proposal contains exemptions for people "determined to be medically frail" and individuals with "a short-term or long-term disability or an acute medical condition validated by a medical professional that would prevent them from complying." These exemptions are underinclusive and underdeveloped, and—even with further definition—they will inevitably exclude some people with functional limitations and chronic conditions from their purview.

First, the TennCare work requirement proposal reflects a clear lack of forethought regarding its exemption mechanisms. In its incredibly brief proposal, Tennessee offers no definition or guidance on the meaning of the terms "medically frail," "short-term or long-term disability," or "acute medical condition." Further, it contains no mention of the procedures through which an enrollee can apply for an exemption; how the State will consider and process exemption applications; or how an enrollee can appeal an adverse decision. This lack of necessary detail and specificity raises serious concerns of how the exemptions can be effectively implemented so as to protect the rights and health care coverage of people with disabilities. With so many implementation details still unclear and the stakes for disabled TennCare enrollees so high, the exemptions cannot be relied upon to shield individuals with disabilities from the work requirements.

Second, even if there were further definition and procedural mechanisms in place, the exemptions will inevitably be underinclusive of people functional limitations and chronic conditions that prevent or make it more difficult for them to work. The problem is that the exemptions rely on a fictional binary distinction between people who are "able-bodied" and people who are "disabled"—attempting to fit individuals with work-limiting conditions into neat, exclusive exemption categories by using still-undefined criteria. The difficulty with this approach is that, in reality, disabled individuals experience far more nuanced, episodic, and compounding periods of functional impairment that cannot be readily classified by a binary, inflexible exemption process.

For example, individuals may have multiple chronic conditions such as diabetes, high blood pressure, high cholesterol, chronic obstructive pulmonary disease, hemorrhoids, cataracts, and/or glaucoma. No one condition would qualify them for a disabled-based exemption from

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the work requirements. Nonetheless, when any one condition flares up, it will likely exacerbate other conditions, leaving the individual feeling unwell and even facing difficulty breathing, pain, or bleeding. Worsening vision will affect their capacity to find work and complicate the ability to transport themselves to needed health care services. In reality, these people may periodically have great difficulty finding or maintaining employment—especially in rural areas of Tennessee where job possibilities for those with physical functional limitations can be limited. Nonetheless, they likely will not qualify for an exemption because such episodic symptoms are not typically viewed as ‘severe’ or ‘persistent’ enough for a disability-based exemption.³ Such individuals will very likely be subject to TennCare’s work requirements, and if they cannot satisfy them, they will lose their health care benefits. Then, perversely, without the health coverage they need to manage their health, it will be even more difficult for them to work.

The problems with these exemptions will be widely felt. Indeed, in a recent survey of non-SSI, working age TennCare enrollees, 18 percent of respondents (approximately 84,977 people) indicated that they could not work due to a disability or illness.⁴ Under the binary, inflexible exemptions that TennCare intends to employ, some of these people with functional impairments will be subject to the program’s requirements for failing to satisfy the criteria that the state perceives to be ‘disabled enough.’ For these individuals, their health care coverage and correlated potential to maintain independence and live productive and fulfilling lives, hangs in the balance.

B. TennCare Work Requirements Will Cause Disabled Individuals to Disproportionately Lose Access to Medical Assistance, Contrary to the Purposes of Medicaid

The TennCare amendment proposal will require all non-exempt beneficiaries to engage in at least 20 hours of employment or community engagement activities per week. For the

³ See, e.g., Sharon Parrott, CTR. BUDGET & POLICY PRIORITIES, *The New TANF Requirements and Individuals with Disabilities* (March 2007) (finding that individuals with “severe temporary disabilities” are usually not exempt from work requirements within the TANF program), <https://www.cbpp.org/sites/default/files/atoms/files/3-1-07tanf.pdf>.

⁴ Rachel Garfield, et al., KAISER FAMILY FOUND., *Issue Brief: Understanding the Intersection of Medicaid and Work* 9–10 (Jan. 2018) (analyzing March 2017 Current Population Survey), <http://files.kff.org/attachment/Issue-Brief-Understanding-the-Intersection-of-Medicaid-and-Work>.

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disabled enrollees who do not qualify for exemption, it will be disproportionately more difficult to satisfy these harsh work requirements.

People with disabilities face more difficulties finding and maintaining employment than people without disabilities. This reality is reflected in Tennessee's employment statistics: In 2017, the employment rate of non-institutionalized working-age people with disabilities in Tennessee was 34.5 percent, compared with 79.4 percent of people without disabilities.⁵ This disproportionate employment rate is due in large part to external factors that disabled individuals have no control over. People with disabilities continue to face discrimination in the workplace. Whether it is explicit or implicit biases in the hiring process, an adverse employment action (e.g., firing, failure to promote, or demotions) based on misguided assumptions, or a failure to provide reasonable accommodations to an employee, disability discrimination in employment remains pervasive. In 2017, the U.S. Equal Employment Opportunity Commission reported 808 complaints of workplace disability discrimination in Tennessee alone, accounting for 30.6% of all discrimination complaints in the State.⁶

Disparities in health care access and health outcomes among people with disabilities also contribute to disparate employment rates. A recent study commissioned by the National Academies of Sciences, Engineering, and Medicine confirmed that "[c]onscious and unconscious biases and stereotypes among health care providers and public health practitioners about . . . people with disabilities[] contribute to observable differences in the quality of health care and adverse health outcomes among individuals within [that] group[]." ⁷ The documented disparities in quality of health care can have a tangible impact on the capacity of disabled individuals to work, as many rely on health services to support their employment activities. People with disabilities depend on health services such as pain management treatments, mental health supports, glucose monitors, respirators, or mobility aids to function and go to work. Indeed, there have been several studies on the impact that

⁵ CORNELL UNIV., *2017 Disability Status Report: Kentucky* 31 (2018), http://www.disabilitystatistics.org/StatusReports/2017-PDF/2017-StatusReport_TN.pdf.

⁶ EQUAL EMP'T OPPORTUNITY COMM'N, *FY 2009-2017 EEOC Charge Receipts for Tennessee*, https://www1.eeoc.gov/eeoc/statistics/enforcement/charges_by_state.cfm#centercol (last visited Feb. 6, 2019).

⁷ Silvia Yee, et al., *Compounded Disparities: Health Equity at the Intersection of Disability, Race, and Ethnicity*, NAT'L ACADS. SCI., ENG'G, & MED. (2017), <http://nationalacademies.org/hmd/Activities/SelectPops/HealthDisparities/Commissioned-Papers/Compounded-Disparities>.

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increased access to health care—and specifically the *expansion* of Medicaid—has had on employment rates. Most studies show a significant positive link between Medicaid expansion and employment rates; none show a negative correlation.⁸

These factors, among others, compound to make it disproportionately more difficult for people with disabilities to find and maintain employment. For the disabled individuals who do not qualify for an exemption, TennCare’s work requirements will create a large and potentially insurmountable barrier to Medicaid eligibility. Some will simply not be able to meet its parameters and will consequently lose eligibility for TennCare.

The Secretary only has authority to grant a Section 1115 waiver when the program “is likely to assist in promoting the objectives” of the Medicaid Act, which are, in part, “to furnish [] medical assistance” and to provide “services to help [individuals] attain or retain capability for independence or self-care.” 42 U.S.C. §§ 1315(a), 1396-1. TennCare’s work requirements will not promote these goals. Instead, they place a disproportionately large burden on disabled enrollees and risk decreasing access to the medical assistance that they rely on to maintain health, independence, and livelihoods. For many people with disabilities, health care services and supports—benefits as simple as a wheelchair, physical therapy, prescription medications, or an accurate glucose monitor—are critical to maintaining employment, raising families, participating in communities, or even getting out of bed. Without them, an individual’s “capability for independence or self-care” can be severely diminished and some can even be at risk of institutionalization. Thus, by approving a waiver that runs contrary to these principles, as articulated in the Medicaid Act, the Secretary will exceed his Section 1115 authority.

C. The New Administrative Burdens Created by TennCare Work Requirements Will Cause Many Disabled Individuals, Including Those Who Qualify for an Exemption, to Wrongfully Lose Access to Medical Assistance, Contrary to the Purposes of Medicaid

The proposed TennCare amendment will impose onerous new requirements on disabled individuals, who must either demonstrate that they satisfy its mandates or prove qualification for an exemption. While the specific details are still undefined, the proposal will presumably

⁸ Larisa Antonisse, et al., KAISER FAMILY FOUND, *The Effects of Medicaid Expansion under the ACA: Updated Findings from a Literature Review* 7–8 (Sept. 2017), <http://files.kff.org/attachment/Issue-Brief-The-Effects-of-Medicaid-Expansion-Under-the-ACA-Updated-Findings-from-a-Literature-Review>.

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require non-exempt beneficiaries to submit monthly documentation proving compliance with the work requirements. Likewise, it will presumably require exempt individuals to recognize that they qualify for the exemption, obtain medical documentation sufficient to prove their qualification, and submit an exemption application to the State. It may also require continued re-verification of one's exemption status.

There has been extensive research on the impact that new paperwork and documentation requirements, specifically in the context of work requirements, have had on the enrollment of people with disabilities in public benefit programs. Recent data from the Arkansas Medicaid program confirms that work requirements will lead to large coverage losses for a failure to meet reporting requirements.⁹ Moreover, research has consistently demonstrated that Temporary Assistance For Needy Families ("TANF") recipients with disabilities are more likely to lose their benefits for failing to meet work requirements than individuals without disabilities.¹⁰ This disparity has been linked, in part, to the added administrative burdens placed on disabled enrollees, who often must obtain appropriate assessments and documentation and follow complex procedures to prove their initial and ongoing qualification for an exemption. These administrative obstacles, when compounded with the added cost and time that agencies must put towards verifying and tracking enrollees' employment activities or exemption qualifications, can produce unintended consequences.¹¹

Similar disparate results have been documented within the Supplemental Nutritional Assistance Program ("SNAP"). For example, a comprehensive evaluation of Ohio's SNAP work requirement found that 32.6 percent of individuals who were subject to the requirement had physical or mental health conditions that limited their ability to work and should have—but

⁹ See Rudowitz, et al., *supra* note 2.

¹⁰ See, e.g., Heather Hahn, et al., URBAN INST., *Work Requirements in Social Safety Net Programs* 19 (Dec. 2017), <https://www.urban.org/sites/default/files/publication/95566/work-requirements-in-social-safety-net-programs.pdf>; Ladonna Pavetti, et al., MATHEMATICA POLICY RESEARCH, *Assisting TANF Recipients Living with Disabilities to Obtain and Maintain Employment: Conducting In-Depth Assessments* 2 (Feb. 2008) (report prepared for HHS), https://www.acf.hhs.gov/sites/default/files/opre/conducting_in_depth.pdf.

¹¹ U.S. GOV'T ACCOUNTABILITY OFFICE, *Temporary Assistance for Needy Families: Potential Options to Improve Performance and Oversight* 19 (May 2013), <http://www.gao.gov/assets/660/654614.pdf>.

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did not—exempt them from the requirements.¹² Moreover, a recent nationwide report from the U.S. Department of Agriculture found that implementing SNAP work requirements was an “administrative nightmare” that was “too burdensome” and “error prone” in multiple states.¹³ In several instances, the Department found that states were “improperly applying the [rules]” and terminating individuals’ SNAP benefits “despite qualifying for an exemption.”

Based on these consistent findings, it is reasonable to conclude that the administrative complexities created by the TennCare work requirements will cause some disabled individuals, including people who should technically qualify for an exemption, to wrongfully lose health care coverage. Therefore, the proposed requirements will not “promot[e] the objectives” of the Medicaid Act by “furnish[ing] medical assistance.” Indeed, it will run contrary to these objectives by decreasing access to the medical assistance that many disabled individuals depend on for their health, independence, and livelihoods.

Conclusion

We would like to be very clear that nothing in our comments speaks against the desire and capacity of people with disabilities to be gainfully employed. DREDF fully supports the understanding that activities such as appropriate job training, part and full-time employment, and volunteer work can be economically, socially, and psychologically beneficial to all individuals, including those with disabilities. However, these benefits cannot be realized when there is a loss of medically necessary, consistently-available health care.

The thousands of Tennesseans enrolled in Medicaid who have functional limitations and chronic conditions need greater resources devoted to effective job training and on-the-job supports; they need stronger enforcement of State and Federal employment discrimination laws; they need reasonable accommodations and policy modifications in all State employment and assistance programs; and they need access to reliable health care so that they can remain well enough to work, support their families, and function independently in their communities. TennCare work requirements, however, will only serve to inhibit their

¹² OHIO ASS’N OF FOODBANKS, *A Comprehensive Assessment of Able-Bodied Adults Without Dependents and Their Participation in the Work Experience Program in Franklin County, Ohio* 6 (2015), <http://admin.ohiofoodbanks.org/uploads/news/WEP-2013-2014-report.pdf>.

¹³ U.S. DEP’T OF AGRIC., OFFICE OF THE INSPECTOR GEN., *FNS Controls Over SNAP Benefits for Able-Bodied Adults Without Dependents* 5 (Sept. 29, 2016), <https://www.usda.gov/oig/webdocs/27601-0002-31.pdf>.

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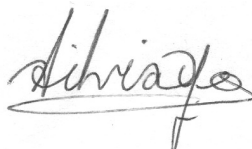
livelihoods and productivity. For these reasons, DREDF strongly opposes Amendment 38 to the TennCare Demonstration.

Thank you again for the opportunity to comment on the TennCare proposal. Please do not hesitate to contact us if you have any questions about the above.

Sincerely,



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