

September 26, 2018

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

Dear Secretary Azar:

The Bazelon Center for Mental Health Law submits these comments in response to the South Dakota Career Connector 1115 Demonstration Waiver Application. The Bazelon Center is a national non-profit legal advocacy organization that promotes equal opportunity for individuals with mental disabilities in all aspects of life, including health care, community living, housing, education, employment, voting, and other areas. Our comments focus on South Dakota’s proposed work requirements.

We urge you to reject the proposal. While we fully support the goals of expanding employment and promoting independence and economic self-sufficiency, we believe HHS lacks the authority to approve the proposal to condition Medicaid eligibility for Section 1115 waiver participants on these individuals engaging in 80 hours/month of employment or work-related activities, and the proposal would be particularly harmful for beneficiaries with disabilities.¹

1. The Department of Health and Human Services (HHS) does not have the authority to grant South Dakota’s request.

HHS lacks the authority to approve the revised proposal to condition Medicaid eligibility for Section 1115 waiver participants on these individuals engaging in work, work-related activities, or community engagement activities. As HHS has repeatedly stated, Section 1115 waivers may only be approved for “any experimental, pilot, or demonstration project which, in the judgment of the secretary, is likely to assist in promoting the objectives of [the Medicaid program].”² The South Dakota work requirement does not meet this standard.

South Dakota’s proposal does not promote the objectives of Medicaid.

The statutory objectives of the Medicaid program are to furnish (1) “medical assistance” to people with disabilities, seniors, and families with dependent children, whose income and resources are insufficient

¹ SOUTH DAKOTA WAIVER APPLICATION 4-5 (Aug. 10, 2018).

² Centers for Medicare & Medicaid Services, *About Section 1115 Demonstrations*, <https://www.medicare.gov/medicaid/section-1115-demo/about-1115/index.html>.

to secure needed medical services, and (2) services to help such individuals and families attain or retain independence and self-care.³

HHS's criteria for determining whether a proposed demonstration would promote Medicaid's objectives include whether the demonstration would:

Improve access to high-quality, person-centered services that produce positive health outcomes for individuals; [. . .] Support coordinated strategies to address certain health determinants that promote upward mobility, greater independence, and improved quality of life among individuals; Strengthen beneficiary engagement in their personal healthcare plan, including incentive structures that promote responsible decision-making [. . .]⁴

South Dakota's proposed work requirements would neither promote the goals of furnishing medical assistance and services, nor improve access to high quality services, support strategies to address health determinants promoting upward mobility and independence, or strengthen engagement in individuals' healthcare and decision-making. In fact, they would have the opposite effect of reducing access to needed services, including those that enable people with disabilities to work.

Years of experience with work requirements in the TANF program—another program where participants receive benefits critical to their subsistence—have consistently shown that work requirements do not assist individuals in obtaining full employment or lift them and their families out of poverty. Studies of these requirements have shown that: (1) stable employment among recipients subject to work requirements was the exception rather than the norm, and (2) most recipients who had significant barriers to employment never found employment.⁵ Indeed, within five years, “employment among recipients not subject to work requirements was the same as or higher than employment among recipients subject to work requirements in nearly all of the programs evaluated.”⁶

South Dakota acknowledges this concern, but notes that the Career Connector program “differs from SNAP and TANF in a variety of ways . . . including the flexible and individualized nature of the program and emphasis on education and training”⁷ and that the “program also provides more ways to comply.”⁸ However, the proposal contains no clear commitment to maintain sufficient staff and resources to provide such individualized support and services for each participant who needs them to meet the work requirements. While South Dakota says that “[t]he framework for the program builds from existing

³ 42 U.S.C. 1396-1.

⁴ *About Section 1115 Demonstrations*, *supra* note 2.

⁵ See, e.g., LaDonna Pavetti, Center on Budget and Policy Priorities, *Work Requirements Don't Cut Poverty, Evidence Shows* (June 2016), <https://www.cbpp.org/research/poverty-and-inequality/work-requirements-dont-cut-poverty-evidence-shows>. See also Marybeth Musumeci, Kaiser Family Foundation, *Medicaid Enrollees and Work Requirements: Lessons From the TANF Experience* (Aug. 18, 2017), <https://www.kff.org/medicaid/issuebrief/medicaid-enrollees-and-work-requirements-lessons-from-the-tanf-experience/>.

⁶ *Work Requirements Don't Cut Poverty*, *supra* note 5.

⁷ SOUTH DAKOTA WAIVER APPLICATION 16 (Aug. 10, 2018).

⁸ *Id.*

infrastructure and services provided currently by the DLR and DSS”⁹ and that it “anticipates operating the program primarily using existing staff and resources,”¹⁰ it does not indicate how it will handle the additional 1,300 individual cases it anticipates using its current resources. Tracking compliance with reporting requirements and providing individualized services to that many people would almost certainly entail a significant increase in administrative costs.

Several other states, including Tennessee,¹¹ Kentucky,¹² Virginia,¹³ and Pennsylvania¹⁴ all estimate tens of millions of dollars in administrative costs involved in establishing and running work requirement programs. Furthermore, even if there were sufficient staffing and resources to handle the increased caseload, the bureaucratic barriers to access to Medicaid would likely lead to many people losing coverage not simply because they were gainfully employed, but because they were unable to cut through the red tape. This scenario is already playing out in Arkansas, which saw 4,574 Medicaid recipients dropped from the program in the first month of cuts due to lack of compliance.¹⁵ South Dakota estimates that of those participating in the program, 15% will become ineligible each year.¹⁶ It attributes the majority of these losses to increased income,¹⁷ but provides no basis for its estimate or the conclusions it draws from that estimate.

Since the work requirement will cause individuals to lose coverage and there is no evidence will assist people to work, the proposal does not promote the objectives of Medicaid and cannot be granted by the Secretary.

South Dakota’s proposal would create a catch-22 for many individuals subject to the work requirements.

South Dakota states in response to concerns about a catch-22 for individuals subject to the work requirements that its proposal “was designed to mitigate the issue of loss of coverage.”¹⁸ However, it fails to solve the problem. If a person works enough hours to meet the requirement in order to maintain

⁹ *Id.* at 17.

¹⁰ *Id.* at 17-18.

¹¹ Blake Farmer, Nashville Public Radio, *Tennessee Intends To Raid Welfare Funding To Enforce Medicaid Work Requirement*, Mar. 21, 2018, <http://www.nashvillepublicradio.org/post/tennessee-intends-raid-welfare-funding-enforce-medicaid-work-requirement#stream/0>.

¹² Bruce Japsen, Forbes, *Trump’s Medicaid Work Rules Hit States With Costs And Bureaucracy*, Jul. 22, 2018, <https://www.forbes.com/sites/brucejapsen/2018/07/22/trumps-medicaid-work-rules-hit-states-with-costs-and-bureaucracy/#1c38245366f5>.

¹³ Michael Martz, Richmond Times-Dispatch, *Bill gets bigger in revised analysis of Medicaid work requirement*, Feb. 5, 2018, https://www.richmond.com/news/virginia/government-politics/general-assembly/bill-gets-bigger-in-revised-analysis-of-medicaid-work-requirement/article_882a5762-d57d-5edb-b6e4-ff079ace7b38.html.

¹⁴ Lindsay C. VanAsdalan, York Dispatch, *York lawmaker: Medical assistance recipients need ‘bit of a kick’ sometimes*, Apr. 20, 2018, <https://www.yorkdispatch.com/story/news/2018/04/20/york-gop-votes-work-requirements-aims-fix-broken-safety-net-system/524193002>.

¹⁵ Andy Davis, Arkansas Democrat, *Health coverage dropped for 4,574 Arkansas Works enrollees*, Sept. 6, 2018, <https://www.arkansasonline.com/news/2018/sep/06/health-coverage-dropped-for-4-574-20180>.

¹⁶ SOUTH DAKOTA WAIVER APPLICATION 10 (Aug. 10, 2018).

¹⁷ *Id.*

¹⁸ *Id.* at 16.

their Medicaid coverage, he or she will still lose that coverage under South Dakota's proposal. For example, in South Dakota, Medicaid is provided to families earning 50% or less of the poverty level. A single parent with one child, therefore, can earn a maximum of \$686 per month in order to qualify for Medicaid. Meeting the work requirement at a minimum wage job would earn that person \$22 per month beyond that limit.¹⁹

Nor does South Dakota's proposal to provide some short-term assistance to beneficiaries who exceed the income limit solve the problem. In order to qualify for premium assistance after one year of transitional medical benefits, a person must meet the proposal's training and work requirements, have an income within certain limits, and have "completed one Well-Adult visit and one preventative dental visit during the period the individual was enrolled in TMB coverage."²⁰ While this is ostensibly to encourage healthy behaviors, such requirements may become barriers to care for individuals who, were it not for premium assistance, would be unable to afford insurance.

Even for those who can overcome the additional barriers, the premium assistance provided would essentially be meaningless for many low income individuals, as they would still be responsible for "cost sharing amounts including co-payments, co-insurance, and deductibles."²¹ The premium assistance provided would cover health insurance premiums "up to PMPM associated with TMB coverage in the previous federal fiscal year" and anyone who did not use the full amount of premium assistance provided to them could use the remainder "to assist them with co-payments, co-insurance, and deductibles."²² For the 2018 federal fiscal year, that amount is \$400.09,²³ which would likely only be enough in most cases to cover a bronze plan.²⁴ Deductibles for bronze plans average about \$6,000.²⁵ Even in the unlikely scenario that an individual making less than the federal poverty level could afford to pay the difference between the amount they receive in premium assistance and the cost of a silver plan, they would still face a deductible of about \$4,000 on average.²⁶ These high deductibles would likely be prohibitive for most people receiving premium assistance, denying them access to needed care.

Given that providing health care is fundamentally the purpose of Medicaid, CMS cannot approve as consistent with the objectives of Medicaid a waiver that will cause individuals to lose coverage, and South Dakota's proposal should be rejected on this basis as well.

¹⁹ Judith Solomon and Aviva Aron-Dine, Center on Budget and Policy Priorities, *Non-Expansion States Can't Fix "Catch-22" in Their Proposals to Take Medicaid Coverage Away From Parents Not Meeting Work Requirements* (June 2018), <https://www.cbpp.org/research/health/non-expansion-states-cant-fix-catch-22-in-their-proposals-to-take-medicaid-coverage>.

²⁰ SOUTH DAKOTA WAIVER APPLICATION 8-9 (Aug. 10, 2018).

²¹ *Id.* at 9.

²² *Id.*

²³ *Id.* at 31.

²⁴ *Non-Expansion States Can't Fix "Catch-22"*, *supra* note 12.

²⁵ Kaiser Family Foundation, *Cost-Sharing for Plans Offered in the Federal Marketplace for 2018* (Nov. 2017), <https://www.kff.org/health-reform/fact-sheet/cost-sharing-for-plans-offered-in-the-federal-marketplace-for-2018>.

²⁶ *Id.*

South Dakota's proposal is not an experiment, pilot, or demonstration of the sort contemplated by the Medicaid statute

1115 Waiver and Demonstration programs are intended to contain clearly defined goals, identify a specific problem that is being addressed, have a reasonable basis to achieve that the demonstration is likely to address the problem effectively and without harm, and put measures in place to ensure that individuals are not harmed.

As discussed above, it is unclear how the proposed work requirement helps achieve these goals. Additionally, the proposal does not describe the problem that the waiver is attempting to solve. For instance, South Dakota does not detail the number of individuals who are not working or provide any information about why these individuals are not working. These are crucial components for approving this type of demonstration, pilot, or experiment, particularly in light of the evidence above concerning the ineffectiveness of work requirements in enabling individuals to obtain jobs.

While the Bazelon Center agrees with the goals of increasing employment and encouraging involvement in the community, it is utterly unclear how implementing work requirements that will likely result in massive loss of health care coverage solves these concerns. Losing health care will make it harder, not easier, for people with mental health needs who are unemployed and facing challenges securing work to get and keep a job. The proposal, which lacks any evidence to the contrary, should be rejected.

2. South Dakota's proposal will have a harmful impact on people with disabilities.

In addition, South Dakota's proposal is troubling for people with disabilities, particularly those with serious mental illness. While the waiver application proposes specific exemptions for "[i]ndividuals whose eligibility has been determined on the basis of disability or who have been determined disabled by the Social Security Administration" and "[m]edically frail individuals (e.g. individuals unable to work due to cancer or other serious or terminal illness)" these categories do not capture all people with disabilities that interfere with work.²⁷ Indeed, SSA's test excludes anyone who could do work that exists in the national economy, regardless of what job opportunities exist in South Dakota. While South Dakota states that those who "do not meet this standard may qualify for a different exemption such as the medically frail exemption or the 'good cause' exemption,"²⁸ it is far from clear that those exemptions will be applied to all participants with disabilities at risk of losing coverage who are not deemed to meet the SSA definition.

The overwhelming majority of people with disabilities want to and can work, but many are not working as a result of attitudinal barriers among employers, the need for reasonable accommodations that have not been provided, the need for supported employment services that are scarcely available, or the lack of reliable, accessible transportation. South Dakota's proposal does not provide assurances that people with disabilities who can work will have access to supported employment services or other assistive services that they might need to work. In fact, the proposal only mentions that enrollees will be "evaluated by DLR for Workforce Innovation and Opportunity Act (WIOA) support services, including:

²⁷ SOUTH DAKOTA WAIVER APPLICATION 10 (Aug. 10, 2018).

²⁸ *Id.* at 18.

[t]ransportation; [c]lothing; and [r]ent assistance” and that DLR will create a resources team to “facilitate referrals to community and support services including vocational rehabilitation services.”²⁹ However, those services are not funded through the state’s Medicaid program, and the proposal makes no assurance that they will be furnished to all participants who need them to avoid losing Medicaid coverage due to the work requirement.³⁰ An investigation conducted by the Department of Justice in 2016 into South Dakota’s use of nursing facilities to serve individuals with disabilities, however, indicates that existing services would not be sufficient to meet the needs of people with disabilities in South Dakota who are subject to the work requirement. For example, the investigation found that for people with mental illness “South Dakota does offer some of the necessary community-based mental health services for people with mental illness. . . . But these services are sparse and are not sufficiently reaching people who need them.”³¹ Without those community services available, many people with mental illness may struggle to maintain employment, making them more likely to be sanctioned for failure to comply with the work requirement.

Because of the issues detailed above, the employment rate of people with disabilities has remained far lower than that of any other group tracked by the Bureau of Labor Statistics. Among working age adults, the employment rate of people with disabilities is less than half of that for people without disabilities.³² For people with serious mental illness, the employment rate is even lower; it has been estimated over time at about 22%, with approximately 12% working full-time.³³ Dr. Gary Bond, then Professor of Psychiatry at Dartmouth Psychiatric Research Center, testified that the reason for the dramatic gap between the desire of people with serious mental illness to work and their low employment rates is not an inability to work, but rather “attitudinal, service, and system barriers” such as stigma and discrimination, inadequate treatment, and lack of employment services.³⁴

Additionally, many people with disabilities who are working may be working part-time schedules of fewer than 80 hours/month as an accommodation, or may have seasonal, temporary, or contractor work, which would potentially lead to loss of coverage between work opportunities or even while working. In other programs that have implemented work requirements, participants with physical and mental health issues were more likely to be sanctioned for not completing the work requirement.³⁵ Even

²⁹ *Id.* at 8.

³⁰ *Id.*

³¹ U.S. Department of Justice, *United States' Investigation, Pursuant to the Americans with Disabilities Act, of South Dakota's Use of Nursing Facilities to Serve Individuals with Disabilities* 15 (May 2, 2016).

³² U.S. Department of Labor, Bureau of Labor Statistics, *Persons with a Disability: Labor Force Characteristics Summary* (June 21, 2017) (among persons age 16 to 64, the employment-population ratio in 2016 for people with disabilities was 27.7 percent, in contrast to 72.8 percent for people without disabilities).

³³ U.S. Department of Health and Human Services, Office of the Assistant Secretary for Planning and Evaluation, Office of Disability, Aging and Long-Term Care Policy, Federal Financing of Supported Employment and Customized Employment for People with Mental Illness: Final Report vii (Feb., 2011) <http://aspe.hhs.gov/daltcp/reports/2011/supempFR.pdf>.

³⁴ Written Testimony of Dr. Gary Bond, *U.S. Equal Employment Opportunity Commission public meeting on Employment of People with Mental Disabilities* (March 15, 2011) <https://www.eeoc.gov/eeoc/meetings/3-15-11/bond.cfm>.

³⁵ See, e.g., Yeheskel Hasenfeld et al., *The Logic of Sanctioning Welfare Recipients: An Empirical Assessment Departmental Paper*, University of Pennsylvania School of Social Policy and Practice (2004), http://repository.upenn.edu/spp_papers/88.

when there is an explicit exemption for individuals unable to comply due to health conditions, in practice, those exemption processes have failed, leaving individuals with disabilities more likely than other individuals to lose benefits.³⁶ South Dakota states in its proposal that “designed ... to allow anyone making a good faith effort to comply with the program to not lose coverage due to non-compliance.”³⁷ However, what constitutes a “good faith effort” remains undefined and such statements provide little assurance that people with disabilities will fare better under South Dakota’s Career Connector program than they have in other work requirement programs.

We appreciate the opportunity to provide comments on South Dakota’s application. Our comments include citations to supporting research, including direct links for the benefit of HHS in reviewing our comments. We direct HHS to the studies cited and made available to the agency through active hyperlinks, and we request that the full text of each of the studies cited, along with the full text of our comments, be considered part of the administrative record in this matter for purposes of the Administrative Procedures Act.

Respectfully submitted,

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³⁶ See, e.g., Andrew J. Cherlin et. al., *Operating within the Rules: Welfare Recipients’ Experiences with Sanctions and Case Closings*, 76 Soc. Serv. Rev. 387, 398 (finding that individuals in “poor” or “fair” health were more likely to lose TANF benefits than those in “good,” “very good,” or “excellent health”); Vicki Lens, *Welfare and Work Sanctions: Examining Discretion on the Front Lines*, 82 Soc. Serv. Review 199 (2008).

³⁷ SOUTH DAKOTA WAIVER APPLICATION 10 (Aug. 10, 2018).