

Report to the Social Services Appropriations Subcommittee

Supreme Court of the United States
Status of Azar v. Gresham

Community Engagement/Work Requirements
In Medicaid

Prepared by the Division of Medicaid and Health Financing

March 26, 2021



EXECUTIVE SUMMARY

This report is submitted in response to the following intent language passed during the 2021 General Session of the Utah Legislature.

“The Legislature intends that the Department of Health report to the Social Services Appropriations Subcommittee within two weeks of any U.S. Supreme Court ruling on the viability of work requirements in Medicaid and its implication on work requirement options for Utah Medicaid populations.”

Based on recent actions by the Supreme Court of the United States (SCOTUS) and the Centers for Medicare and Medicaid (CMS), placing a work requirement on Medicaid members as a condition of continued eligibility for Medicaid will likely not be allowed for the Adult Expansion population or any other Medicaid eligibility group.

Recent Action by the SCOTUS

On Thursday, **March 11, 2021**, the SCOTUS announced that it will no longer hear oral arguments that were set to occur on March 2, 2021, over D.C. Circuit Court of Appeals rulings striking down Medicaid work requirement programs in Arkansas and New Hampshire. The announcement comes after a motion filed by the current Department of Justice (DOJ) requesting the hearing be taken off calendar, that the lower court rulings be vacated, and that the issue be remanded back to HHS to further investigate its prior approvals of the Medicaid work requirement programs.

The announcement came without any issued comment or ruling, making it uncertain whether the Supreme Court will hear the case at a later date, or whether the Court will take any action with regards to the appellate court decisions. The removal of this case from the March calendar reflects the latest in a series of cases before the high court that were dismissed or put on hold while the new administration reviews and reconsiders policies established under the prior administration.

Actions by the Centers for Medicare and Medicaid (CMS)

On **December 14, 2020** at 12:30 PM (MST), CMS Administrator, Seema Verma held a call with a number of states to discuss the cases of **Azar v. Gresham, U.S., No. 20-37** and **Arkansas v. Gresham, U.S., No. 20-38** that the U.S. Supreme Court agreed to hear in **June 2021**. Both the State of Arkansas and the Health and Human Services Secretary Alex Azar petitioned the U.S. Supreme Court to review the U.S. Court of Appeals for the District of Columbia Circuit’s decision that held that HHS unlawfully approved Arkansas’s Medicaid work requirement through an 1115 waiver because this requirement is contrary to the purpose of the Medicaid program as stated in federal law.

Administrator Verma stated that if the U.S. Supreme Court rules against HHS on this issue, this will not only limit their authority to approve work requirements, but will also limit the ability to approve other waivers to allow collection of premiums, waiver of retro eligibility, etc.

She encouraged states to submit Amicus Briefs to the court in support of the Secretary's position. Amicus Briefs were due to the court by January 26, 2021.

The Solicitor General, Office of Attorney General prepared and submitted an Amicus Brief on behalf of the Utah to the United States Supreme Court on **January 26, 2021**.

On **February 12, 2021**, CMS notified the State regarding their concerns about the provision in Utah's 1115 demonstration waiver which authorizes the state to require some beneficiaries ages 19 through 59, with certain exceptions, to participate in and timely document and report completion of specified work supporting activities within a three-month period, as a condition of continued Medicaid eligibility. In part CMS stated, ***"CMS has serious concerns about testing policies that create a risk of a substantial loss of health care coverage in the near term. . . Taking into account the totality of circumstances, CMS has preliminarily determined that allowing work and other community engagement requirements to take effect in Utah would not promote the objectives of the Medicaid program." Therefore, CMS is providing the state notice that CMS is commencing a process of determining whether to withdraw the authorities approved in the PCN demonstration that permit the state to require work and other community engagement activities as a condition of Medicaid eligibility."***

CMS provided Utah 30 days to provide any additional information that in the state's view warrants not withdrawing those authorities."

On **March 12, 2021**, UDOH responded to CMS with justification as to why the community engagement requirement in Utah's 1115 should be retained. As of March 26, 2021, Utah has not received any further communication from CMS on this matter.

Does state law, require Utah's 1115 waiver for Adult Medicaid expansion to include community engagement (work requirement) as a condition of eligibility for members in this population?

Based on a legal review by the Section Director, Health Section, Office of Attorney General, full Medicaid Expansion for adults age 19-64 in Utah is not contingent on a Medicaid waiver allowing work activities as part of eligibility requirements.

February 12, 2021

Nate Checketts
Director
Division of Medicaid and Health Financing
Utah Department of Health
PO Box 143101
Salt Lake City, UT 84114-3101

Dear Mr. Checketts:

On March 29, 2019, the Centers for Medicare & Medicaid Services (CMS) approved Utah's request for an amendment to its section 1115 demonstration project, entitled "Primary Care Network (PCN)" (Project Numbers 11-W-00145/8 and 21-W-00054/8) in accordance with section 1115(a) of the Social Security Act (the Act). Among other things, that amendment authorized the state to require some PCN beneficiaries ages 19 through 59, with certain exceptions, to participate in and timely document and report completion of specified work supporting activities within a three-month period, as a condition of continued Medicaid eligibility. These activities include registering for work through the state system, completing an assessment of employment training needs, applying for employment, and completing the job training modules. By its terms, the approval of that amendment will expire on June 30, 2022.

Under section 1115 and implementing regulations, CMS has the authority and responsibility to maintain continued oversight of demonstration projects in order to ensure that they are currently likely to assist in promoting the objectives of Medicaid, and CMS may withdraw waivers or expenditure authorities if it "find[s] that [a] demonstration project is not likely to achieve the statutory purposes." 42 C.F.R. 431.420(d); see 42 U.S.C. 1315(d)(2)(D).

The PCN community engagement requirement is not in effect. Although implementation began in January 2020, it was paused in March 2020 due to the COVID-19 public health emergency. The COVID-19 pandemic has made community engagement infeasible. In addition, implementation of the community engagement requirement is currently prohibited by the Families First Coronavirus Response Act (FFCRA), Pub. L. No. 116-127, Div. F, § 6008(a) and (b), 134 Stat. 208 (2020), which conditioned a state's receipt of an increase in federal Medicaid funding during the pandemic on the state's maintenance of its existing Medicaid parameters. Utah has chosen to claim the 6.2 percentage point FFCRA Federal Medical Assistance Percentage (FMAP) increase, and therefore must maintain the enrollment of beneficiaries who were enrolled as of, or after, March 18, 2020. Although that statutory bar will expire after the COVID-19 public health emergency ends, CMS has serious concerns about testing policies that create a risk of a substantial loss of health care coverage in the near term. The COVID-19 pandemic has had a significant impact on the health of Medicaid beneficiaries. Uncertainty regarding the current crisis and the pandemic's aftermath, and the potential impact on economic opportunities (including job skills training and other activities used to satisfy community

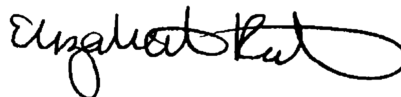
engagement requirements, i.e., work and other similar activities), access to transportation and to affordable child care have greatly increased the risk that implementation of the community engagement requirement approved in this demonstration will result in unintended coverage loss. In addition, the uncertainty regarding the lingering health consequences of COVID-19 infections further exacerbates the harms of coverage loss for Medicaid beneficiaries.

Taking into account the totality of circumstances, CMS has preliminarily determined that allowing work and other community engagement requirements to take effect in Utah would not promote the objectives of the Medicaid program. Therefore, CMS is providing the state notice that CMS is commencing a process of determining whether to withdraw the authorities approved in the PCN demonstration that permit the state to require work and other community engagement activities as a condition of Medicaid eligibility. See Special Terms & Conditions ¶ 12. If the state wishes to submit to CMS any additional information that in the state's view may warrant not withdrawing those authorities, such information should be submitted to CMS within 30 days. If CMS ultimately determines to withdraw those authorities, it "will promptly notify the State in writing of the determination and the reasons for the amendment and withdrawal, together with the effective date, and afford the State an opportunity to request a hearing to challenge CMS' determination prior to the effective date." *Id.*

The Utah PCN demonstration project also includes various other authorities that CMS approved in the demonstration. CMS will also review those other authorities and will follow up with the state when that review is complete.

If you have any questions, please contact Judith Cash, Acting Deputy Director, Center for Medicaid and CHIP Services, at (410) 786-9686.

Sincerely,

A handwritten signature in black ink, appearing to read "Elizabeth Richter", with a large, stylized flourish at the end.

Elizabeth Richter
Acting Administrator

cc: Mandy Strom, State Monitoring Lead, Medicaid and CHIP Operations Group



State of Utah

SPENCER J. COX
Governor

DEIDRE M. HENDERSON
Lieutenant Governor

**Utah Department of Health
Division of Medicaid and Health Financing**

Richard G. Saunders
Executive Director, Department of Health

Nate Checketts
Director, Division of Medicaid and Health Financing

March 12, 2021

Elizabeth Richter
Acting Administrator
Department of Health and Human Services
Centers for Medicare and Medicaid
7500 Security Boulevard
Baltimore, MD 21244-1850

Dear Administrator Richter:

I am writing in response to your letter dated February 12, 2021. In your letter you state that the Centers for Medicare and Medicaid Services (CMS) has serious concerns about testing policies that create a risk of a substantial loss of health care coverage in the near term. You further state that CMS has preliminarily determined that allowing work and other community engagement requirements to take effect in Utah would not promote the objectives of the Medicaid program. We appreciate the opportunity to submit additional information that supports continuing the authorities that CMS has already approved for Utah's community engagement initiative.

The Social Security Act authorizes the appropriation of funds to "enable each State, as far as practicable under the conditions in such 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." Act § 1901.

In addition, for decades courts and state and federal Medicaid officials have understood that Section 1115 affords the Secretary broad discretion in evaluating the "objectives" of the Social Security Act and determining whether a waiver program "is likely to assist in promoting" those objectives. Demonstration authority under section 1115(a)(2) of the Act allows CMS to offer federal matching funds to states in ways that provide flexibility to experiment with different means of achieving the program's objectives. Demonstration projects that give states expenditure authority to provide additional benefits or services, or cover new populations, can advance multiple objectives of the Medicaid program, including providing coverage for medical services and allowing states to maintain the long-term fiscal sustainability of their Medicaid programs.

These demonstration projects will necessarily mean a change to the status quo. They may have associated costs, particularly at the initial stage, and Section 1115 acknowledges that demonstrations may “result in an impact on eligibility, enrollment, benefits, cost-sharing, or financing.” Act § 1115(d)(1). But in the long term, they may create incentives and opportunities that help states provide coverage while maintaining financial feasibility for the program and the state.

These demonstration projects present an opportunity for states to experiment with reforms that go beyond routine medical care. They can focus on interventions that drive better health outcomes and quality of life improvements, and may increase beneficiaries’ financial independence all while providing coverage in a financially feasible manner. Such policies may include those designed to address certain health determinants and those that encourage beneficiaries to engage in health-promoting behaviors and to strengthen engagement by beneficiaries in their personal health care and overall well-being.

Utah’s community engagement initiative seeks to help certain Medicaid members find employment. This initiative advances the program’s objectives by improving the health and wellness of these individuals and by reducing their long-term reliance on the program. Many studies have concluded that employed individuals have better physical and mental health. Recognizing the connection between employment and health, Utah believes that community engagement through employment increases an individual’s health and well-being, increases an individual’s sense of purpose, helps to build a healthy lifestyle, and increases the financial stability of Medicaid beneficiaries who are able to seek and find employment.

Encouraging community engagement under a Section 1115 demonstration project also provides an opportunity for Utah to test policies that ensure the fiscal sustainability of the Medicaid program. An initiative that reduces long term reliance on the program meets the purpose of the program by “enabling each state, as far as practicable under the conditions in such state” to furnish medical assistance, Act § 1901, while making it more practicable for Utah to furnish medical assistance to a broader range of persons in need.

Initiatives that have the effect of helping individuals secure employer-sponsored insurance and transition from Medicaid eligibility may decrease the number of individuals who need financial assistance, including medical assistance, from the state. These initiatives enable Utah to stretch its resources further and enhance its ability to provide medical assistance to a broader range of persons in need, including by expanding the services and populations covered. By the same token, such initiatives also help preserve Utah’s ability to continue to provide the optional services and coverage it already has in place.

Again, we appreciate the opportunity to share our position on this issue. We strongly encourage CMS to continue supporting its prior approval of Utah's community engagement initiative as a key component of Utah's overall Medicaid coverage expansion, which seeks to have a positive impact on the lives of those who obtain coverage while protecting the overall feasibility of the Medicaid expansion in Utah.

Respectfully,

Nate Checketts

Nate Checketts, Director
Division of Medicaid and Health Financing
Utah Department of Health

CENTERS FOR MEDICARE & MEDICAID SERVICES

PROCEDURES FOR WITHDRAWING OR MODIFYING A SECTION 1115 DEMONSTRATION

CMS regulations state that each Section 1115 demonstration's Terms and Conditions "will detail any notice and appeal rights for the State for a termination, suspension or withdrawal of waivers or expenditure authorities." 42 CFR § 431.420(d) (3). While the precise language in each demonstration's Terms and Conditions varies slightly, these documents set forth only a general outline of the procedure to apply, for example: "CMS will promptly notify the State in writing of the determination and the reasons for the amendment and withdrawal, together with the effective date, and afford the State an opportunity to request a hearing to challenge CMS' determination prior to the effective date." This letter agreement sets forth the procedures that CMS commits to applying prior to the effective date of any amendment or withdrawal of a demonstration.

If CMS determines that it will either (1) suspend or terminate a demonstration in whole or in part because the State has materially failed to comply with the terms of the demonstration project, or (2) withdraw waivers or expenditure authorities based on a finding that the demonstration project is not likely to achieve the statutory purposes, see 42 CFR § 431.420(d)(1)–(2), CMS will promptly notify the affected State in writing of its determination and the reasons for the suspension, termination, amendment, or withdrawal. CMS will also provide an effective date for its determination and a schedule for a hearing to challenge CMS' determination.

In order to ensure that affected states have adequate notice and opportunity to be heard, CMS shall make the effective date for its determination no sooner than 9 months after the date on which CMS transmits its determination to the affected State. The hearing and associated briefing shall adhere to the following schedule:

- Within 15 days of the date of CMS' determination, the affected State shall provide notice in writing to CMS that it disagrees with CMS' determination and plans to invoke its right to a hearing as part of a preliminary appeal.
- Within 90 days of the date of CMS' determination, the affected State shall submit a written brief to CMS outlining the bases for its disagreement.
- Within 90 days of the date the State submits its written brief, CMS shall send a written response to the affected State responding to the major arguments raised by the State.
- Within 60 days of the date that CMS sends its written response, the State shall submit a written rebuttal responding to the major arguments raised by CMS.
- Within 45 days of the date that the State sends its written rebuttal, CMS shall hold a hearing and provide the State with an opportunity to be heard regarding its disagreement with CMS' determination.
- Following the hearing, CMS shall issue a written decision either modifying or finalizing its initial determination.

The decision resulting from this preliminary appeals process shall be appealable to the Departmental Appeals Board using the procedures at 45 CFR Part 16. *See* Appendix A to 45 CFR Part 16, C. (b). Monetary damages cannot remedy a breach of this preliminary appeals process. Any breach constitutes irreparable harm and final agency action.

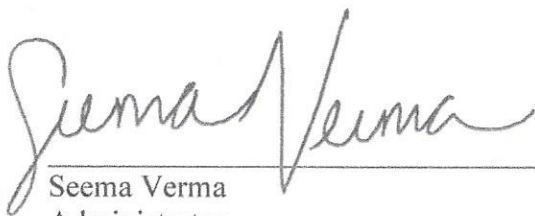
The preliminary appeals process set forth above applies to the following demonstration:

Utah Primary Care Network



Nathan Checketts
Director, Division of Medicaid and Health Financing
Utah Department of Health
State of Utah

Date: 1/19/21



Seema Verma
Administrator
Centers for Medicare & Medicaid Services
U.S. Department of Health & Human Services
Date: January 4, 2021