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MEMORANDUM

March 22, 2021

TO: Tribal Health Clients

FROM: Hobbs, Straus, Dean & Walker, LLP

RE: ***CMS Withdraws Approval of Work Requirements in New Hampshire and Arkansas; HHS Publishes Issue Brief on Medicaid Demonstration Projects***

I. CMS Withdraws Approval of Work Requirements in New Hampshire and Arkansas

Last week, the Centers for Medicare and Medicaid Services (CMS) notified the States of New Hampshire and Arkansas that the agency has withdrawn approval of the community engagement (i.e, work requirement) provisions of their respective Section 1115 Medicaid demonstration projects.[1] The work requirements were approved in 2018, but implementation has been halted in both States as legal challenges to the work requirements have proceeded through the courts and are now pending Supreme Court review. CMS states in both notification letters that "in light of the ongoing disruptions caused by the COVID-19 pandemic, [the State's] community engagement requirement risks significant coverage losses and harm to beneficiaries" and allowing the requirement to go into effect "would not promote the objectives of the Medicaid program" and approval of the requirement is, therefore, withdrawn.

CMS's actions are part of the agency's response to the President's Executive Order of January 28, 2021, directing the immediate review of Medicaid demonstration projects and waiver policies as part of the new Administration's focus on strengthening coverage under Medicaid and the Affordable Care Act (ACA). No other States have received rescission notices at this time, though States with approved work requirement provisions have been directed to submit documentation supporting their continued use to CMS.

New Hampshire and Arkansas may administratively appeal CMS's withdrawal decision. We are actively monitoring CMS's actions related to these and other Section 1115 demonstration waivers and will keep you apprised of developments.

II. HHS Publishes Issue Brief on Medicaid Demonstration Projects

The Department of Health and Human Services (HHS) Assistant Secretary for Planning and Evaluation's Office of Health Policy (OHP) recently released an Issue Brief on "Medicaid

[1] Copies of the CMS notification letters are available here for New Hampshire and here for Arkansas.

Demonstrations and Impacts on Health Coverage: A Review of the Evidence."[2] The Issue Brief is another agency action being taken in response to the President's Executive Order of January 28, 2021 on assessing the efficacy of existing Medicaid and ACA policies and programs. The Issue Brief focuses on four key Medicaid policies and their impacts on program coverage, namely: (1) work requirements; (2) healthy behavior incentive programs; (3) health savings account type arrangements; and (4) capped federal funding. We summarize the key points identified by the OHP in relation to each of these categories below.

Work Requirements. OHP reports that of the 23 States[3] that have submitted work requirement waivers to CMS only five—Arkansas, New Hampshire, Kentucky, Indiana, and Michigan—have obtained early data on potential enrollment effects and, further, only one—Arkansas—has proceeded far enough in the implementation process to disenroll approximately 18,000 beneficiaries for non-compliance. OHP found that the data out of Arkansas showed a "pervasive lack of awareness and confusion" about reporting requirements was the prime driver of noncompliance as more than 95% of adults subject to the work requirements were, in fact, meeting the 80 hours per month threshold. OHP states that studies in other States found similar situations of adults either already working or facing substantial barriers to employment in meeting work requirements, the latter of which has grown more acute with the pandemic.

Healthy Behavior Incentive Programs. OHP reports that 9 States have approved healthy behavior incentives, such as completing wellness exams or health risk assessments, as part of their Section 1115 demonstration waivers. The Issue Brief notes that these programs have low rates of completion due to limited public awareness, which puts beneficiaries at risk of financial penalties and/or disenrollment. OHP reports that research has found financial incentives can increase rates of preventive care visits, but was inconclusive as to improving chronic condition management or reducing emergency care visits. Disenrollment, however, had significant negative effects with impacted beneficiaries reporting delays in medical care and filling prescriptions.

Health Savings Account Type Arrangements. The Issue Brief reports that 5 States have approved health savings account type arrangements in their Medicaid programs; however, beneficiary confusion and lack of awareness on requirements contribute to limited participation. OHP states that in at least one State—Indiana—awareness of the program was significantly lower among Latinos, men and those with less education and that Black beneficiaries experienced a higher likelihood of disenrollment compared to White beneficiaries.

Capped Federal Funding. OHS reports that there is no evidence to date on the impact of a capped federal funding model for Medicaid as only two States have proposed cap-based models and neither has gone into effect. Oklahoma had proposed a demonstration under the Healthy Adult Opportunity initiative that would have limited federal funding in exchange for certain program waivers; however, that proposal was withdrawn after Oklahoma adopted Medicaid expansion last

[2] The Issue Brief is available at: https://aspe.hhs.gov/system/files/pdf/265161/medicaid-waiver-evidence-review.pdf.
[3] Alabama, Idaho, Mississippi, North Carolina, Montana, Tennessee, South Dakota, Oklahoma, Indiana, Wisconsin, Arizona, Ohio, Utah, South Carolina, Georgia, Nebraska, Kentucky, Arkansas, New Hampshire, Michigan, Maine, Kansas, and Virginia.

year. The second State—Tennessee—has an approved waiver to institute an aggregate funding cap that has broader authority on how the funding may be used but does not automatically keep pace with per-beneficiary inflation costs. OHS notes that critics of the Tennessee model are concerned that the public health emergency will negatively impact enrollment and benefits as the need for Medicaid coverage may continue to increase without a concomitant rise in State revenues. This waiver has not yet been implemented, however, so the data is still pending.

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If you have any questions or would like further information on the topics raised in this report, please do not hesitate to contact Elliott Milhollin (emilhollin@hobbsstraus.com or 202-822-8282); Geoff Strommer (gstrommer@hobbsstraus.com or 503-242-1745); or Lisa Meissner (lmeissner@hobbsstraus.com or 202-822-8282).