

# JUSTICE IN AGING

FIGHTING SENIOR POVERTY THROUGH LAW

February 7, 2019

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

## **Re: TennCare II Demonstration Amendment 38**

Justice in Aging appreciates the opportunity to comment on Tennessee's proposal to amend its TennCare II Demonstration under section 1115 of the Social Security Act.

Justice in Aging is an advocacy organization with the mission of improving the lives of low-income older adults. We use the power of law to fight senior poverty by securing access to affordable health care, economic security and the courts for older adults with limited resources. We have decades of experience with Medicare and Medicaid, with a focus on the needs of low-income beneficiaries and populations that have traditionally lacked legal protection such as women, people of color, LGBTQ individuals, and people with limited English proficiency. Justice in Aging conducts trainings and engages in advocacy regarding Medicare and Medicaid, provides technical assistance to attorneys and others from across the country on how to address problems that arise under these programs, and advocates for strong consumer protections at both the state and federal level.

We urge the Department of Health and Human Services (HHS) to reject Tennessee's proposal to take away Medicaid coverage by requiring low-income parents to perform "workforce participation and community engagement" activities. These proposals will greatly harm older adults and family caregivers and cause thousands of low-income Tennesseans to lose Medicaid coverage.

We have cited research demonstrating the harms of these proposals and we respectfully request that HHS review each of the sources cited and made available to the agency through active hyperlinks. We further request that the full text of each of the sources cited, along with the full text of our comments, be considered part of the administrative record in this matter for purposes of the Administrative Procedure Act.

### **A. Work Requirements Will Take Away Coverage from Many Older Adults, People with Serious Health Conditions & Family Caregivers**

Tennessee's proposal to take Medicaid coverage away from people who fail to meet "work or community engagement" requirements will harm an estimated 68,000 TennCare enrollees across

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demographic groups,<sup>1</sup> including older adult parents and grandparents who are raising grandchildren. Among the nearly 75,000 grandparents in Tennessee who are responsible for their grandchildren, over 1 in 5 live below the poverty line.<sup>2</sup> Work requirements will be particularly harmful to older adults under age 65 who are not eligible for Medicare and people with serious health conditions and functional limitations because they face additional challenges in meeting such requirements, and the health consequences of losing Medicaid coverage are likely to be especially severe.

### **1. Older Adults and People with Serious Health Conditions will Lose Coverage**

The coverage restrictions in the waiver amendment will take away coverage from people in their 50s and 60s and those with chronic conditions or functional limitations who qualify for TennCare. These individuals are not eligible for Medicare because they are not 65 years of age and (in most cases) do not meet the strict Social Security definitions of “disabled,” but they are relatively more likely than other adults to be facing significant health problems that compromise their ability to work.

Although Tennessee proposes to exempt individuals from the work requirements who have a short- or long-term disability, “an acute medical condition validated by a medical professional that would prevent them from complying,” are “physically or mentally incapable of work, as certified by an appropriate medical professional,” or who are “medically frail,” it will require most of these individuals to document and report their exemptions. Moreover, many people who have chronic illnesses or health-related limitations will still be required to work and to report their work on a monthly basis.

Medicaid eligibility rules classify a person as “disabled” or “not disabled,” but in real life, disability is a continuum. A Medicaid beneficiary may not be formally “disabled” under Medicaid law, but nonetheless face significant health-related challenges. Data from the National Center for Health Statistics shows that approximately 40% of working-age Medicaid beneficiaries “have broadly defined disabilities, most of whom are not readily identified as such through administrative records.”<sup>3</sup> Similarly, data from the March 2017 Current Population Survey (reflecting 2016 health insurance coverage) show

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<sup>1</sup> Joan Alker & Olivia Pham, Georgetown Center for Children and Families, “Work Reporting Requirement for Tennessee Parents Would Harm Low-Income Families With Children” (Jan. 30, 2019), *available at* <https://ccf.georgetown.edu/2019/01/30/work-reporting-requirement-for-tennessee-parents-would-harm-low-income-families-with-children/>.

<sup>2</sup> U.S. Census Bureau, 2017 American Community Survey 1-Year Estimates, [https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS\\_14\\_1YR\\_B10059&prodType=table](https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_14_1YR_B10059&prodType=table) Calculation: 16,167 (grandparents responsible for own grandchildren under 18 with income in the past 12 months below poverty level) / 74,792 (total grandparents responsible for own grandchildren under 18)

<sup>3</sup> H. Stephen Kaye, Community Living Policy Ctr., How Do Disability and Poor Health Impact Proposed Medicaid Work Requirements? 2 (Feb. 2018), *available at* <https://clpc.ucsf.edu/sites/clpc.ucsf.edu/files/reports/Disability%20%26%20Medicaid%20Work%20Requirements.pdf>.

that, among Tennessee’s non-elderly Medicaid population not receiving Supplemental Security Income due to disability, 41% cited being ill or disabled as the reason for not being employed.<sup>4</sup>

Likewise, Medicaid law classifies a beneficiary as either “aged”—age 65 or older—or not aged. But in reality some beneficiaries in their 50s or early 60s face many of the same health-related challenges that confront beneficiaries who are formally classified as “aged.” Prevalence of chronic conditions, including both physical and mental health conditions, increases significantly with age. Reviewing health care expense data, the Agency for Healthcare Research and Quality found that 57% of persons from ages 55 through 64 have at least two chronic conditions.<sup>5</sup> An additional 20.3% of these persons have one chronic condition, and only 22.7% have no chronic condition.<sup>6</sup> AARP came to similar conclusions in an analysis of data for the age 50–64 population, finding that 72.5% have at least one chronic condition, and almost 20% suffer from some sort of mental illness.<sup>7</sup> The National Institute on Aging and National Institutes of Health reached similar results based on surveys of tens of thousands of respondents. Sixty percent of respondents from the age of 55 to 64 reported at least one health problem, with 25% reporting at least two problems (for the purposes of this study, a “problem” was defined as being related to one of six categories: hypertension, diabetes, cancer, bronchitis/emphysema, heart condition, and stroke).<sup>8</sup>

All these data demonstrate how low-income people in their 50s and 60s who qualify for TennCare—along with younger low-income beneficiaries with chronic conditions or functional limitations—are threatened by the restrictions imposed by the waiver. Lost months of Medicaid coverage have a human cost: less preventive care, greater decline, and avoidable deterioration in physical and mental health.

## **2. Family Caregivers will Lose Coverage**

Work requirements would also greatly harm the health of many Medicaid beneficiaries who care for family members or other individuals who cannot live independently. Many family caregivers leave the workforce or reduce their hours to provide informal care to seniors and others who need it. Therefore,

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<sup>4</sup> Rachel Garfield, *et al.*, Kaiser Family Foundation, Understanding the Intersection of Medicaid and Work 10 (Appendix Table 2) (Jan. 2018), available at <http://files.kff.org/attachment/Issue-Brief-Understanding-the-Intersection-of-Medicaid-and-Work>.

<sup>5</sup> Steven Machlin, *et al.*, Agency for Healthcare Research and Quality, Statistical Brief #203: Health Care Expenses for Adults with Chronic Conditions, 2005, at 1–2, 5 (Figure 1) (May 2008), available at [www.meps.ahrq.gov/mepsweb/data\\_files/publications/st203/stat203.pdf](http://www.meps.ahrq.gov/mepsweb/data_files/publications/st203/stat203.pdf).

<sup>6</sup> *Id.*

<sup>7</sup> AARP Public Policy Institute, Chronic Care: A Call to Action for Health Reform 11–12, 16 (March 2009), available at [www.aarp.org/health/medicare-insurance/info-03-2009/beyond\\_50\\_hcr.html](http://www.aarp.org/health/medicare-insurance/info-03-2009/beyond_50_hcr.html).

<sup>8</sup> Nat’l Institute on Aging and Nat’l Institutes of Health, Growing Older in America: The Health & Retirement Study 23 (March 2007), available at [www.nia.nih.gov/sites/default/files/2017-06/health\\_and\\_retirement\\_study\\_0.pdf](http://www.nia.nih.gov/sites/default/files/2017-06/health_and_retirement_study_0.pdf).

these caregivers are likely to be low-income and unlikely to have access to health insurance through a job or spouse.<sup>9</sup>

Tennessee proposes to exempt “Individuals who are providing caregiver services for a household member (child or adult) with a disability or incapacitation, or with a medical frailty that prevents the caretaker from fulfilling the community engagement requirement.”<sup>10</sup> However, it is not clear what caregiving responsibilities would qualify an individual for the exemption. As discussed above, many people who have health-related challenges requiring the assistance of a family caregiver may not meet strict definitions of “disability,” and the terms “incapacitation” and “medical frailty” are not defined. Moreover, these restrictions fail to recognize the realities of family caregiving. Most family caregivers are not providing care because a doctor told them it was necessary. Even if a medical professional did consider the care necessary, most people would not have documentation to show that. In addition, limiting the exemption for caregivers to a “household member” ignores that many individuals do not have family to care for them or may need help from multiple caregivers, some of whom may not be related or living in the same household.<sup>11</sup>

Finally, imposing a work requirement puts an enormous and unnecessary burden on family caregivers to obtain documentation, and understand and comply with reporting requirements in the midst of their caregiving and other responsibilities.<sup>12</sup> Given these realities, many family caregivers who qualify for TennCare would be forced to choose between providing care for their loved ones and maintaining their own health.<sup>13</sup>

### **3. Burdensome Reporting Requirements Will Cause Medicaid Eligible Individuals to Lose Coverage**

Tennessee residents who are eligible for Medicaid are at risk of losing coverage because they do not or cannot complete the necessary documentation to show they met the work requirement. Requiring individuals to complete paperwork and submit documentation has been shown to reduce Medicaid enrollment across populations.<sup>14</sup> And Arkansas’ experience with implementing work requirements is further proving this to be true. In December, only 1 out of 5 beneficiaries whom Arkansas required to

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<sup>9</sup> Justice in Aging, *Medicaid Work Requirements: The Impact on Family Caregivers and Older Adults* (Nov. 2018), available at <http://www.justiceinaging.org/wp-content/uploads/2018/11/JusticeInAging-Medicaid-IssueBrief-November19-11am-2018.pdf>.

<sup>10</sup> Division of TennCare, *TennCare II Demonstration (No. 11-W-00151/4) Amendment 38 (Dec. 28, 2018) 3*, available at [www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/tn/tn-tenncare-ii-pa6.pdf](http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/tn/tn-tenncare-ii-pa6.pdf).

<sup>11</sup> See Justice in Aging, *supra* note 9; see also AARP New Hampshire, *Testimony on SB 313* (Feb. 20, 2018), available at <https://states.aarp.org/aarp-testifies-new-hampshire-granite-advantage-program/>.

<sup>12</sup> Paperwork requirements have been shown to reduce Medicaid enrollment across populations. See Margot Sanger-Katz, “Hate Paperwork? Medicaid Recipients Will Be Drowning in It,” *The New York Times*, January 18, 2018, [www.nytimes.com/2018/01/18/upshot/medicaid-enrollment-obstacles-kentucky-work-requirement.html](http://www.nytimes.com/2018/01/18/upshot/medicaid-enrollment-obstacles-kentucky-work-requirement.html).

<sup>13</sup> See Justice in Aging, *supra* note 9.

<sup>14</sup> Sanger-Katz, *supra* note 12.

report work activities had successfully done so.<sup>15</sup> This number is in line with the previous months, indicating the vast majority of Arkansas were either unaware of the reporting requirement or unable to navigate it.<sup>16</sup>

Furthermore, research on the Temporary Assistance for Needy Families (TANF) program found that beneficiaries with disabilities and poor health are more likely to lose benefits due to an inability to navigate the system.<sup>17</sup> This research indicates that the existence of exemptions does not necessarily ameliorate problems, since a beneficiary may likely have difficulty understanding and obtaining the exemption. In a similar vein, a recent nationwide report from the U.S. Department of Agriculture found that implementing work requirements for the Supplemental Nutrition Assistance Program (SNAP) was an “administrative nightmare” that was “error prone” in multiple states.<sup>18</sup> In several instances, the Department found that the state was terminating beneficiaries’ SNAP benefits even though the beneficiary qualified for an exemption.<sup>19</sup> Likewise, TennCare is likely to take improper actions, and beneficiaries with chronic conditions or functional limitations have less ability to contest those improper actions or apply for an exemption to keep their coverage.

#### **4. Work Requirements Could Actually Impede Individuals’ Ability to Find or Maintain a Job**

This policy would also be counterproductive, as taking away coverage from low-income Tennesseans for not reporting work could cause their health to deteriorate, which in turn will make it harder for them to become or remain employed.<sup>20</sup> Recent reports show that Medicaid can reduce health barriers to finding or holding a job for beneficiaries who are not working.<sup>21</sup> For example, in Michigan, 55% of those who were out of work said Medicaid coverage made them better able to look for a job while 69% of those who had jobs said they did better at work once they got coverage.<sup>22</sup> Ohio Medicaid enrollees

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<sup>15</sup> Jennifer Wagner, Center on Budget & Policy Priorities, “Medicaid Coverage Losses Mounting in Arkansas from Work reporting requirement” (Jan.17, 2019), available at [www.cbpp.org/blog/medicaid-coverage-losses-mounting-in-arkansas-from-work-requirement](http://www.cbpp.org/blog/medicaid-coverage-losses-mounting-in-arkansas-from-work-requirement).

<sup>16</sup> See Jennifer Wagner, Center on Budget & Policy Priorities, “Eligible Arkansas Medicaid Beneficiaries Still Struggling to Meet Rigid Work Requirements,” (Aug. 21, 2018), [www.cbpp.org/blog/eligible-arkansas-medicaid-beneficiaries-still-struggling-to-meet-rigid-work-requirements](http://www.cbpp.org/blog/eligible-arkansas-medicaid-beneficiaries-still-struggling-to-meet-rigid-work-requirements).

<sup>17</sup> Yeheskel Hasenfeld, *et al.*, Social Service Review, The Logic of Sanctioning Welfare Recipients: An Empirical Assessment 304, 306–07 (June 2004), available at [https://repository.upenn.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1028&context=spp\\_papers](https://repository.upenn.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1028&context=spp_papers).

<sup>18</sup> 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), available at [www.usda.gov/oig/webdocs/27601-0002-31.pdf](http://www.usda.gov/oig/webdocs/27601-0002-31.pdf).

<sup>19</sup> *Id.*

<sup>20</sup> Coverage interruptions could lead to increased emergency room visits and hospitalizations, admissions to mental health facilities, and health care costs, research has shown. Leighton Ku & Erika Steinmetz, Association for Community Affiliated Plans, “Bridging the Gap: Continuity and Quality of Coverage in Medicaid,” (Sept. 10, 2013), available at [www.communityplans.net/Portals/0/Policy/Medicaid/GW%20Continuity%20Report%209-10-13.pdf](http://www.communityplans.net/Portals/0/Policy/Medicaid/GW%20Continuity%20Report%209-10-13.pdf).

<sup>21</sup> Larisa Antonisse & Rachel Garfield, Kaiser Family Foundation, “The Relationship between Work and Health: Findings from a Literature Review” (Aug. 7, 2018), available at [www.kff.org/medicaid/issue-brief/the-relationship-between-work-and-health-findings-from-a-literature-review/](http://www.kff.org/medicaid/issue-brief/the-relationship-between-work-and-health-findings-from-a-literature-review/).

<sup>22</sup> Kara Gavin, “Medicaid Expansion Helped Enrollees Do Better at Work or in Job Searches,” University of Michigan Health Lab, June 27, 2017, <http://labblog.uofmhealth.org/industry-dx/medicaid-expansion-helped-enrollees-do-better-at-work-or-job-searches>.

reported similarly that Medicaid coverage made it easier to both seek employment and continue working.<sup>23</sup> For many individuals, access to health services could be the pathway to employment; if blocked from Medicaid coverage, they could find it much more difficult to find and hold a job.

As another example, a recent Urban Institute analysis estimates that among Kentucky Medicaid beneficiaries who are working and do not qualify for a student or caregiver exemption, 55,000 are at risk of losing Medicaid coverage at some point during the year because they do not work enough hours or may not work consistently enough to satisfy the work requirement each month.<sup>24</sup> The same is likely true for Tennessee residents who are eligible for Medicaid and working, but not consistently enough to meet the 20-80 hour work requirement each month. This data demonstrates that adding work requirements is likely to provide little actual assistance and put an already burdened population in greater danger of losing health insurance and even their jobs.

Additionally, issues with finding and maintaining steady jobs in a volatile job market<sup>25</sup> are even more profound for older adults who also face employment discrimination based on their age.<sup>26</sup> Take for example and a 60-year old woman who is raising her teenage grandchild and caring for an aging parent who lives nearby, but not in her household. As her caregiving obligations grew, she was laid off because she could not work the consistent hours her employer asked her to. She is not yet eligible for Medicare and will have a difficult time finding employment given her age and constraints on her time. She is at risk of losing TennCare, her only source of health coverage, if work requirements are implemented.

## **B. Work Requirements Do Not Promote the Objectives of the Medicaid Program**

Section 1115 of the Social Security Act requires an “experimental, pilot, or demonstration project ... [that] is likely to assist in promoting the objectives” of the Medicaid program.<sup>27</sup> As confirmed by the court in *Stewart v. Azar*,<sup>28</sup> Medicaid’s primary objective is to furnish medical assistance to low-income persons.<sup>29</sup> Tennessee’s proposal to take away Medicaid coverage by requiring low-income adults to meet work requirements does not promote that objective. In fact, it would terminate or reduce coverage for thousands of low-income Tennesseans.

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<sup>23</sup> Ohio Department of Medicaid, Ohio Medicaid Group VIII Assessment: A Report to the Ohio General Assembly (Jan. 2017), available at <http://medicaid.ohio.gov/portals/0/resources/reports/annual/group-viii-assessment.pdf>.

<sup>24</sup> Anuj Gangopadhyaya, et al., Urban Institute, Kentucky Medicaid Work Requirements: What Are the Coverage Risks for Working Enrollees? 3 (Aug. 2018), available at [www.urban.org/sites/default/files/publication/98893/2001948\\_kentucky-medicaid-work-requirements-what-are-the-coverage-risks-for-working-enrollees.pdf](http://www.urban.org/sites/default/files/publication/98893/2001948_kentucky-medicaid-work-requirements-what-are-the-coverage-risks-for-working-enrollees.pdf).

<sup>25</sup> See Brynne Keith-Jennings, Center on Budget & Policy Priorities, Policy Brief: Labor Market Facing SNAP and Medicaid Participants Offers Low-Paying, Volatile Jobs (July 24, 2018), available at <https://www.cbpp.org/research/poverty-and-inequality/policy-brief-labor-market-facing-snap-and-medicaid-participants>.

<sup>26</sup> See Julia Angwin, “Dozens of Companies Are Using Facebook to Exclude Older Workers from Job Ads,” (Dec. 20, 2017), [www.propublica.org/article/facebook-ads-age-discrimination-targeting](http://www.propublica.org/article/facebook-ads-age-discrimination-targeting).

<sup>27</sup> 42 U.S.C. § 1315(a).

<sup>28</sup> Memorandum Opinion, *Stewart v. Azar*, Civil Action No. 1:18-cv-152 (JEB), filed June 29, 2018.

<sup>29</sup> See 42 U.S.C. § 1396-1.

Tennessee states that the goal of this proposed amendment is “to promote improved health outcomes for TennCare members, and to support member efforts to achieve independence and potentially facilitate their transition off of the TennCare program and into private insurance”<sup>30</sup> Not only is there is no evidence that requiring beneficiaries to report their work would achieve Tennessee’s stated goals, these objectives of improving health outcomes and achieving independence do not assist in providing Medicaid coverage. In fact, as demonstrated above, work requirements would end coverage for thousands of Medicaid eligible adults and increase the number of uninsured Tennesseans. Given that coverage is a central objective of the Medicaid program, HHS should reject the application for Tennessee’s failure to provide an estimate of the impact of the proposal on enrollment or the number of people who qualify for TennCare who will lose coverage as the result of the proposed work reporting requirement. Nonetheless, even without this critical information from the state, it is clear from Arkansas’ experience that imposing work requirements will take away Medicaid coverage from thousands of eligible individuals.<sup>31</sup>

### C. Conclusion

Tennessee’s proposal to take away Medicaid coverage by requiring low-income adults to perform and report work and community engagement activities does not meet the statutory standards for waiver under Section 1115 and would cause great harm to low-income older adults, caregivers and other Tennesseans. Therefore, we urge HHS to reject these proposals.

Thank you for consideration of our comments. If any questions arise concerning this submission, please contact Natalie Kean, Senior Staff Attorney, at [nkean@justiceinaging.org](mailto:nkean@justiceinaging.org).

Sincerely,



Jennifer Goldberg  
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<sup>30</sup> Tennessee, *supra* note 10 at 2.

<sup>31</sup> See Judith Solomon, Center on Budget & Policy Priorities, “Commentary: Administration Can’t Justify Re-Approving Waiver Taking Coverage Away from Kentuckians,” (Aug. 23, 2018), available at [www.cbpp.org/health/commentary-administration-cant-justify-re-approving-waiver-taking-coverage-away-from](http://www.cbpp.org/health/commentary-administration-cant-justify-re-approving-waiver-taking-coverage-away-from); Sara Rosenbaum, *et al.*, The State Fund, “State 1115 Proposals to Reduce Medicaid Eligibility: Assessing Their Scope and Projected Impact,” (Jan. 11, 2018), available at [www.Statefund.org/blog/2018/state-1115-proposals-reduce-medicaid-eligibility-assessing-their-scope-and-projected?redirect\\_source=/publications/blog/2018/jan/state-1115-proposals-to-reduce-medicaid-eligibility](http://www.Statefund.org/blog/2018/state-1115-proposals-reduce-medicaid-eligibility-assessing-their-scope-and-projected?redirect_source=/publications/blog/2018/jan/state-1115-proposals-to-reduce-medicaid-eligibility); Jennifer Wagner, *supra* note 16.