JUSTICE IN AGING

FIGHTING SENIOR POVERTY THROUGH LAW

January 17, 2020

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

Submitted electronically

Re: Section 1115 Heritage Health Adult Plan Expansion Demonstration

Justice in Aging appreciates the opportunity to comment on Nebraska's proposed Section 1115 Heritage Health Adult Plan Expansion Demonstration. For the reasons discussed below, we oppose the proposal to create a tiered benefit system that requires individuals to meet work reporting and other requirements in order to be eligible for dental, vision, and over-the-counter medication coverage and the proposal to eliminate retroactive coverage.

Justice in Aging is an advocacy organization with the mission of improving the lives of low-income older Nebraskans and older adults nationwide. 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, particularly populations that have traditionally lacked legal protection such as women, people of color, LGBTQ individuals, and people with limited English proficiency. We have decades of experience with Medicare and Medicaid and have worked extensively with advocates who represent low-income older Nebraskans. Justice in Aging conducts trainings and engages in advocacy regarding Medicare and Medicaid, provides technical assistance to attorneys in Nebraska and 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 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.

I. A Tiered Benefit System and Work Requirements Will Harm Older Adults, People with Serious Health Conditions & Family Caregivers

Nebraska is proposing to implement a tiered benefit system that will withhold dental, vision, and over-the-counter drug coverage from an estimated one-third of Nebraskans eligible for Medicaid expansion. In order to receive these benefits, Heritage Health enrollees would have to qualify for Prime coverage by meeting nine "wellness, personal responsibility, and community engagement" requirements, including reporting 80 hours of work.

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A. Work Reporting Requirements Are Particularly Harmful to Older Adults & People with Disabilities

Withholding important benefits from people who fail to meet work reporting requirements will be particularly harmful to older adults, persons with serious health conditions and functional limitations, and family caregivers because they face additional challenges in meeting such requirements and the health consequences of losing or being denied access to full Medicaid coverage are likely to be especially severe. Although Medicaid eligibility rules classify a person as "disabled" or "aged", disability and health challenges that accompany age are a continuum. A Heritage Health enrollee may not be "disabled" under Medicaid law or over age 65, 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."[1] Similarly, data from the March 2017 Current Population Survey (reflecting 2016 health insurance coverage) show that, among Nebraska's non-elderly Medicaid population not receiving Supplemental Security Income due to disability, 40% cited being ill or disabled as the reason for not being employed.[2] Moreover, prevalence of chronic conditions, including both physical and mental health conditions, increases significantly with age. For example, a study by AARP analyzed data for the age 50–64 population, finding that 72.5% have at least one chronic condition, and almost 20% suffer from a mental illness.[3]

All these data demonstrate how older, low-income Nebraskans who qualify for Medicaid—along with younger low-income beneficiaries with chronic conditions or functional limitations —are at risk of not being eligible for the full scope of coverage under the proposal. Although the state proposes to exempt individuals from the work requirements who are 60 and older, medically frail, or who have a serious mental illness or chronic substance use disorder, these exemptions will certainly not reach all individuals with health-related challenges and functional limitations that limit their ability to work and comply with reporting requirements. Moreover, people eligible for health-related exemptions may not know they are exempt to begin with.

Furthermore, these individuals' health will be seriously compromised by lack of coverage for the benefits that would be withheld from enrollees who do not meet the reporting or exemption requirements. For example, as of 2015, 13% of nonelderly adults in Nebraska reported poor condition of mouth/teeth.[4] Without access to oral health care, these individuals' health and the health of many other low-income Nebraskans who do not currently have poor oral health will be harmed as they age

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[1] H. Stephen Kaye, Community Living Policy Ctr., How Do Disability and Poor Health Impact Proposed Medicaid Work Requirements? 2 (Feb. 2018), https://clpc.ucsf.edu/sites/clpc.ucsf.edu/files/reports/Disability%20%26%20Medicaid%20Work%20Requirements.pdf.

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

[3] AARP Public Policy Institute, Chronic Care: A Call to Action for Health Reform 11–12, 16 (March 2009), www.aarp.org/health/medicare-insurance/info-03-2009/beyond_50_hcr.html.

[4] Elizabeth Hinton & Julia Paradise, Kaiser Family Foundation, Access to Dental Care in Medicaid: Spotlight on Nonelderly Adults (Mar. 2016), http://files.kff.org/attachment/issue-brief-access-to-dental-care-in-medicaid-spotlight-on-nonelderly-adults.

because of compounding effects. According to the CDC, over 13% of Nebraska seniors age 65+ have lost all of their natural teeth due to decay or gum disease. Providing access to routine oral health care to all non-elderly adults on Medicaid holds the potential to greatly decrease this statistic by preventing and treating decay and gum disease.[5]

B. Work Reporting Requirements Harm Family Caregivers & the People They Care For

Work reporting requirements would also jeopardize the health of 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, these caregivers are likely to be Medicaid eligible because they are low-income and unlikely to have access to health insurance through a job or spouse. Nationwide, 30% of non-elderly Medicaid enrollees not receiving SSI cite caretaking as their reason for not engaging in the type of work activities the state is proposing to require of them.[6] When family caregivers' own health is compromised or they are forced to choose work over caregiving to keep their health coverage, the harm is two-fold because it endangers the health and well-being of the people they care for. The care recipients are at risk of their needs not being met and having to move to institutions against their wishes.

While Nebraska proposes to credit hours spent caregiving for "an elderly or disabled relative" or "a dependent child," many types of caregiving responsibilities do not fall neatly into those categories. Importantly, this approach provides no flexibility for caring for people who are not "relatives" nor for shared caregiving responsibilities. Frequently, caregiving is round-the-clock and so necessitates shared responsibility.[7] Shared caregiving is also often necessary for individuals who do not have family to care for them.[8]

Additionally, imposing a work requirement puts an enormous and unnecessary burden on family caregivers to track their hours, maintain documentation, and understand and comply with reporting requirements in the midst of their caregiving and other responsibilities.[9] Given these realities, many family caregivers who qualify for Medicaid would be forced to compromise their own health because they would not be eligible for Prime coverage.[10]

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[5] CDC, Oral Health Data by Topic, https://nccd.cdc.gov/oralhealthdata/rdPage.aspx?rdReport=DOH_DATA.ExploreByTopic&islYear=2016&islTopic=ADT&go=GO.

[6] Rachel Garfield, *et al.*, Kaiser Family Foundation, Understanding the Intersection of Medicaid and Work 10 (Appendix Table 2) (Jan. 2018), http://files.kff.org/attachment/Issue-Brief-Understanding-the-Intersection-of-Medicaid-and-Work.

[7] 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.

[8] *See id.*; *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/.

[9] 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.

[10] *See* Justice in Aging, *supra* note 7.

C. Complex & Burdensome Requirements Will Cause Medicaid Eligible Individuals to Lose Benefits

Nebraskans who are eligible for Medicaid are at risk of not having access to or losing Prime coverage because they do not or cannot complete the necessary documentation to show they met the nine requirements. Nebraska's proposed tiered benefit system adds another layer of complexity that makes it difficult for enrollees to navigate and less likely to incentivize compliance with the requirements. The first barrier is enrollees not understanding the requirements or the program structure. For example, a 2016 evaluation of the Healthy Indiana program, which required enrollees with incomes below the poverty line to pay premiums into a "POWER" account to receive an enhanced benefit package, revealed that less than half of enrollees knew they had a POWER account.[11]

Additionally, requiring individuals to complete paperwork and submit documentation has been shown to reduce Medicaid enrollment across populations.[12] Arkansas' experiences with implementing work requirements has further proved this to be true. For example, in the sixth month of implementation, only 1 out of 5 beneficiaries whom Arkansas required to report work activities had successfully done so.[13] 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.[14] 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.

A second barrier is administrative burden. Research shows that states that created complex incentives programs experienced difficulties identifying and engaging beneficiaries to participate due to inaccurate contact information, as well as changes in beneficiaries' eligibility or health status.[15] Similarly, the state of New Hampshire delayed implementation of its work requirements citing its unsuccessful outreach efforts to affected enrollees.[16]

Additionally, 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

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[11] The Lewin Group, "Indiana Healthy Indiana Plan 2.0: Interim Evaluation Report," July 6, 2016, https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/in/Healthy-Indiana-Plan-2/in-healthy-indiana-plan-support-20-interim-evl-rpt-07062016.pdf.

[12] Sanger-Katz, *supra* note 11.

[13] Jennifer Wagner, Center on Budget & Policy Priorities, "Medicaid Coverage Losses Mounting in Arkansas from Work reporting requirement" (Jan.17, 2019), www.cbpp.org/blog/medicaid-coverage-losses-mounting-in-arkansas-from-work-requirement.

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

[15] Melinda Buntin, John Graves, and Nikki Viverette, "Cost Sharing, Payment Enforcement, and Healthy Behavior Programs in Medicaid: Lessons from Pioneering States," Vanderbilt University, June 2017.

[16] State of New Hampshire Dept. of Health, "Re: Determinations and Findings Relative to Granite Health Program" (Jul. 8, 2019), https://www.dhhs.nh.gov/medicaid/granite/documents/ga-ce-findings.pdf.

"administrative nightmare" that was "error prone" in multiple states.[17] In several instances, the Department found that the state was terminating beneficiaries' SNAP benefits even though the beneficiary qualified for an exemption.[18] Likewise, Nebraska Medicaid is likely to take improper actions, and enrollees with chronic conditions or functional limitations have less ability to contest those improper actions or apply for an exemption to keep their Prime coverage.

D. Work Requirements Could Impede Individuals' Ability to Find or Maintain a Job

This policy would be counterproductive, as limiting coverage to low-income Nebraskans for not reporting work could cause their health to deteriorate, which in turn will make it harder for them to become or remain employed.[19] In addition, nearly 30% of adults eligible for Medicaid expansion report that the appearance of their mouth and teeth affects their ability to interview for a job.[20] These issues are even more profound for older adults in a volatile job market[21] who also face employment discrimination based on their age.[22] Take for example a 55-year old woman living in rural Nebraska who is caring for an aging friend who lives several miles away. As her caregiving obligations grew, she was laid off her paid job 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 being denied full Medicaid coverage if work requirements are implemented.

II. Eliminating Retroactive Coverage Will Deprive Low-Income Nebraskans of Needed Coverage

We oppose Nebraska's proposal to limit retroactive coverage to the first day of the month of application for all Medicaid populations except pregnant women, children under 18, beneficiaries dually eligible for Medicare and beneficiaries residing in nursing facilities. Eliminating Medicaid's three-month retroactive coverage protection will harm the health and financial well-being of Nebraskans who are eligible for Medicaid, and harm providers, the state, and all Nebraskans by increasing the uncompensated care burden.

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[17] 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.

[18] *Id*.

[19] 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, Assn. 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.

[20] American Dental Association, Oral Health and Well-Being in the United States (2015), https://www.ada.org/~/media/ADA/Science%20and%20Research/HPI/OralHealthWell-Being-StateFacts/US-Oral-Health-Well-Being.pdf?la=en; *see also* Austin Frakt, New York Times, How Dental Inequality Hurts Americans (Feb. 19, 2018), https://www.nytimes.com/2018/02/19/upshot/how-dental-inequality-hurts-americans.html.

[21] *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.

[22] *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.

Congress designed the retroactive coverage protection to help Medicaid meet the unique needs and circumstances of low-income, uninsured individuals. In many instances, a person who needs health care cannot be expected to apply for Medicaid coverage at the exact moment they become eligible: they may be hospitalized after an accident or unforeseen medical emergency; they may be struggling to cope with the shock of a diagnosis or sudden decline in functional ability; they may also be unfamiliar with Medicaid, or unsure about when their declining financial resources might fall within the Medicaid eligibility threshold. Medicaid's three-month retroactivity window is a rational and humane response to these concerns. We emphasize that retroactive eligibility is only available to persons who would have met the Medicaid eligibility standards for the month[s] in question had they applied sooner.[23]

This vital protection enables access to necessary care and treatment by giving providers assurance that Medicaid will reimburse them, and it can be the difference between financial ruin and being able to recover from an unexpected health emergency. Under Nebraska's proposal, however, a person could be hit by an uninsured driver on the evening of January 30th and be liable for thousands of dollars of hospital expenses due to the "failure" to file a Medicaid application within 36 hours, when January becomes February.

In addition to preventing access to necessary care and exposing people who, by definition, cannot afford and are not eligible for other health coverage to crushing debt, eliminating retroactive coverage is bad policy because it is costlier for providers and the state.[24] Eliminating retroactive coverage increases uncompensated care, jeopardizing the ability of providers, especially rural hospitals, to continue to serve their communities.[25] In turn, this decreases access to care for all Medicaid enrollees and, in the case of medically underserved areas, all Nebraskans, leading to poorer health and necessitating costlier care.

III. Nebraska's Proposals Do Not Promote the Medicaid Program's Objectives

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.[26] As confirmed by the court multiple times,[27] Medicaid's primary objective is to furnish medical assistance to low-income persons.[28] Nebraska's proposals to condition dental, vision, and over-the-counter medication coverage

[23] 42 U.S.C. § 1396a(a)(34).
[24] Justice in Aging, Medicaid Retroactive Coverage: What's at Stake for Older Adults When States Eliminate this Protection? (Sept. 2019), https://www.justiceinaging.org/wp-content/uploads/2019/09/Medicaid-Retroactive-Coverage-Issue-Brief.pdf?eType=EmailBlastContent&eId=a7bb9cdd-1ce1-4012-b154-7981533a4875.
[25] *Id.*
[26] 42 U.S.C. § 1315(a).
[27] *Stewart v. Azar*, 313 F. Supp. 3d 237 (D.D.C. 2018); *Stewart v. Azar*, 366 F. Supp. 3d 125 (D.D.C. 2019); *Gresham v. Azar*, 363 F. Supp. 3d 165 (D.D.C. 2019); *Philbrick v. Azar*, Civil Action No. 19-773 (JEB) (D.D.C. Jul. 29, 2019).
[28] *See* 42 U.S.C. § 1396-1.

on meeting work and other requirements and to eliminate retroactive coverage do not promote that objective. In fact, these proposals would reduce coverage for thousands of low-income Nebraskans.

First, by requiring Heritage Health enrollees to meet "wellness, personal responsibility, and community engagement" requirements, the state is by its own calculations going to withhold coverage of important benefits from one-third of Nebraskans eligible for Medicaid expansion. This is the opposite of furnishing medical assistance. Nebraska says the goals of this proposal are to improve health outcomes and improve financial security among beneficiaries. However, these objectives are not the primary objectives of Medicaid. Moreover, these goals are not experimental as substantial evidence shows that Medicaid coverage itself improves health outcomes and financial security. For example, a recent study found Medicaid expansion has saved the lives of at least 19,200 older adults aged 55-64.[29] Other research shows that Medicaid expansion has reduced medical debt of individuals gaining coverage by $1,140 per person[30] and has reduced evictions.[31]

Second, eliminating the three-month retroactive coverage period is also taking away medical assistance from individuals who are eligible for Medicaid. Nebraska's stated reason for eliminating retroactive coverage is "to promote early and continuous enrollment, improve health outcomes, and reduce the per-capita costs of healthcare." While promoting early and continuous enrollment does clearly support Medicaid's main objective, taking away retroactive coverage will not achieve this goal. This is because the vast majority of people who are eligible for Medicaid but not enrolled are not aware that they are eligible, much less aware that Medicaid has retroactive coverage protections. In other words, no one is choosing not to enroll in premium-free Medicaid because they are relying on retroactive coverage should they experience a health care emergency. The state should focus on Medicaid outreach and enrollment to achieve this goal. Taking away this important protection will not help.

The state also cites that waiving retroactive coverage and beginning benefits on the first day of the application month would "allow for consistency with the commercial market and federal Marketplace policies." However, this rationale makes little sense, given the substantial differences between Medicaid and commercial insurance. A principal difference is the fact that commercial insurance relies on premium payments, while Medicaid coverage is based upon a determination that a person has limited financial resources and thus cannot afford private coverage. Retroactive coverage is not allowed in commercial insurance because the program's financing relies on premium payments in advance, before a person knows the medical services that they may require in any particular month. The same is not true in Medicaid. This rationale is even less applicable to people eligible for home- and community-based services (HCBS) because commercial health insurance does not cover HCBS.

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[29] Ctr. on Budget & Policy Priorities, Medicaid Expansion Has Saved at Least 19,000 Lives, New Research Finds (Nov. 6, 2019), https://www.cbpp.org/research/health/medicaid-expansion-has-saved-at-least-19000-lives-new-research-finds.
[30] Luojia Hu, *et al.*, "The Effect of the Affordable Care Act Medicaid Expansions on Financial Wellbeing," *Journal of Public Economics* (May 2018), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6208351/.
[31] Heidi Allen, *et al.*, "Can Medicaid Expansion Prevent Housing Evictions?," *Health Affairs* (Sept. 2019), https://www.healthaffairs.org/doi/full/10.1377/hlthaff.2018.05071.

Additionally, an individual is only eligible for Medicaid HCBS if they meet the functional eligibility criteria, which generally means they require an institutional level of care. In other words, it is impossible to enroll in Medicaid HCBS coverage before needing it. Thus, denying retroactive coverage to people eligible for HCBS is effectively cutting the HCBS benefit.

Finally, reducing per-capita costs of health care does not promote the objectives of the Medicaid program. While reducing Medicaid expenditures may be attractive to the state, that reduction is accomplished by denying health care coverage to people who desperately need it. As described above, cutting Medicaid expenditures in this way only shifts those costs elsewhere in the system. Waivers should be used to improve coverage, not to leave individuals who are eligible for Medicaid without coverage when they need it the most.

IV. Conclusion

Thank you for consideration of our comments. We urge HHS to reject this proposal and work with Nebraska to fully expand Medicaid without barriers to coverage. If any questions arise concerning this submission, please contact Natalie Kean, Senior Staff Attorney, at nkean@justiceinaging.org.

Sincerely,

Jennifer Goldberg
Deputy Director