

Congress of the United States
Washington, DC 20515

January 14, 2020

Christi A. Grimm
Principal Deputy Inspector General
Office of Inspector General
U.S. Department of Health and Human Services
200 Independence Avenue SW
Washington, DC 20201

Dear Ms. Grimm:

We are writing to request your assistance regarding the state of Tennessee's section 1115 waiver proposal to block grant its Medicaid program. We are deeply concerned that Tennessee's proposal would threaten access to care for 1.4 million vulnerable Tennesseans, especially children, low-income parents, seniors, and people with disabilities. While the Secretary of Health and Human Services (HHS) does not have the legal authority to approve a waiver that would convert Medicaid's financing to a block grant, the Administration continues to encourage states to apply for these illegal waivers. We are deeply troubled by this, and by provisions in Tennessee's section 1115 waiver proposal that, if approved, would lead to significant program integrity vulnerabilities.

Tennessee's waiver proposal would cap the amount of federal Medicaid funding the state receives to finance care for beneficiaries, including low-income children, seniors and individuals with disabilities. Tennessee would be solely responsible for Medicaid expenditures in excess of the cap. If the state spends less than the full cap amount on Medicaid such as through cutting benefits or coverage, it would retain half of the unspent amount. The waiver asks for broad authority to spend these funds with little oversight and accountability.

Equally troubling, the proposal also requests exemptions from critical beneficiary protections intended to ensure access and quality for Medicaid beneficiaries. Tennessee's proposal requests an exemption from the 42 Code of Federal Regulations Part 438, which includes many of the federal program integrity and beneficiary protection standards for Medicaid managed care plans. As the Office of Inspector General is the independent watchdog responsible for overseeing HHS, we urge you to closely monitor the Center for Medicare & Medicaid Services' (CMS) approach to this waiver and others like it to ensure that Medicaid funds are used for their statutory purpose of furnishing medical assistance to low-income individuals.

The current Administration has expressed interest in state section 1115 waiver requests that would convert state Medicaid programs into a block grant.¹ As a threshold matter, section

¹ Rachana Pradhan and Dan Diamond, *Trump wants to bypass Congress on Medicaid Plan*, Politico (Jan. 11, 2019).

1115 of the Social Security Act does not give the Secretary the legal authority to approve these waivers. Regrettably, the Trump Administration is encouraging states to apply for these illegal waivers in its ongoing effort to fundamentally alter and weaken Medicaid's financing structure.²

Approval of Tennessee's proposal would require the Secretary to waive a provision in section 1903 of the Social Security Act, which governs how Medicaid is financed and requires the federal government to pay states a fixed percentage of the amount the state spends to provide health care services to eligible beneficiaries. Under federal law, the Secretary cannot grant waivers of section 1903 and therefore cannot approve waivers that alter Medicaid's basic financing structure. Such an approval would be in violation of the plain language of the statute and clear Congressional intent.

CMS recently acknowledged that it lacks the legal authority to change the federal Medicaid matching rate in a letter to North Carolina, stating:

"Section 1115(a)(i) waiver authority extends only to provisions of section 1902 of the Act, and does not extend to provisions of section 1905 of the Act, such as section 1905(b). Nor is CMS able to grant the state's request by providing expenditure authority under section 1115(a)(2)(A) of the Act. Section 1115(a)(2)(A) only permits state expenditures to be regarded as federally matchable. *It does not allow applicable federal match rates to be altered.*"³ [emphasis added]

If the Administration decides to ignore the statutory restrictions on waivers in section 1115 and approve the Tennessee proposal as drafted, it would permit the state, through the waiver's shared savings proposal, to receive federal Medicaid funds without providing the state share, as is required by statute. In addition, as proposed by the state, Tennessee would not be required to spend the federal Medicaid funds it retains through the shared savings provision on items and services related to Medicaid.⁴ In short, if Tennessee did not spend its full block grant amount, it would keep a portion of the unspent funds to be used for whatever purpose it saw fit. This creates a financial incentive for the state to under-invest on health care for its Medicaid population, while simultaneously allowing the state to repurpose federal Medicaid funds for non-Medicaid purposes with no apparent federal oversight or accountability.

² Centers for Medicare & Medicaid Services, *CMS Administrator Seema Verma's Speech to the National Association of Medicaid Directors* (Nov. 12, 2019) (press release),

³ Letter from Seema Verma, Administrator, Centers for Medicare & Medicaid Services, to Dave Richard, Deputy Secretary for Medical Assistance, North Carolina Department of Health and Human Services (Oct. 19, 2018) (accessed at www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/nc/Medicaid-Reform/nc-medicaid-reform-demo-demo-appvl-20181019.pdf).

⁴ TennCare II Demonstration, Amendment 42, Division of TennCare, September 2019, www.tn.gov/content/dam/tn/tenncare/documents2/TennCareAmendment42.pdf.

Furthermore, this past April the Government Accountability Office found weaknesses in HHS policies for ensuring transparency of proposals for Medicaid demonstrations, including the failure to explore the full impact of amendments to existing demonstrations.⁵ Tennessee submitted its proposal to fundamentally alter its Medicaid program as an amendment to its current TennCare demonstration. The proposal is vague and lacks a full description of the impact it would have on beneficiaries. Yet, HHS deemed the proposal complete and posted it for public comment on November 27.

This staggering program integrity vulnerability included in a rushed waiver amendment could divert critical resources from Medicaid beneficiaries. Moreover, approval of this aspect of the proposal would conflict with the Administration's stated goals and written policies related to waivers and federal Medicaid costs, in two areas.

First, the Administration recently issued guidance aiming to tighten budget neutrality standards for Medicaid waivers. Longstanding federal policy requires that Medicaid waivers be budget neutral to the federal government: they cannot cost the federal government more than it would have spent without the waiver. Recent CMS guidance claims that past practices for assessing budget neutrality led, "to increased federal Medicaid spending and [put] the fiscal integrity of the program at risk." The new guidance commits to "strengthen[ing] accountability and prevent[ing] the federal government's exposure to excessive expenditures under [waivers]."⁶ The TennCare proposal violates this principle by substantially increasing the amount and share of funds that TennCare could receive.

Second, CMS recently proposed to change federal policy on Medicaid waivers to prevent states from drawing down federal Medicaid funds for state spending on non-Medicaid programs, known as "designated state health programs," or DSHP. Prior to 2017, states could sometimes claim federal Medicaid funds to offset costs on programs that offered some benefit to Medicaid enrollees, such as breast and cervical cancer screening for low-income women (including, but not exclusively for, Medicaid enrollees). In 2017, CMS released guidance changing this practice, noting that "...federal DSHP funding frees up state dollars that the state can expend to obtain additional federal match. This, in effect, results in increased federal expenditures without a comparable increase in the state's investment in its demonstration."⁷

Tennessee's proposal to use Medicaid funds for non-Medicaid purposes not only conflicts directly with the current Administration's policy but would also constitute a dramatic

⁵ Government Accountability Office, *Medicaid Demonstrations, Approvals of Major Changes Need Increased Transparency* (April 2019) (GAO-19-315).

⁶ Letter from Timothy B. Hill, Acting Director, Centers for Medicare & Medicaid Services, to State Medicaid Director (Aug. 22, 2018) (accessed at www.medicaid.gov/federal-policy-guidance/downloads/smd18009.pdf).

⁷ Letter from Brian Neale, Director, Centers for Medicare and Medicaid Services, to State Medicaid Directors (Dec. 15, 2017) (accessed at www.medicaid.gov/federal-policy-guidance/downloads/smd17005.pdf).

and unprecedented expansion of any prior allowance of the practice and lead to inflated federal expenditures well above what federal law provides.

Medicaid is a lifeline for some of the most vulnerable populations in the country. In exchange for receiving substantial federal financial support, states must agree to operate their Medicaid programs in accordance with the broad parameters of federal law. This ensures that beneficiaries receive the care and services they need, and that states are good stewards of scarce federal resources. The scheme promoted by the Administration and embodied in the Tennessee waiver proposal would threaten beneficiary access to care in many ways, including all but ensuring that Medicaid dollars are diverted for purposes not allowed under federal law. We strongly encourage you to exercise vigorous oversight of this and other Medicaid waiver requests that if approved would provide states vast sums of federal dollars with no accountability. We also request a briefing for our staffs on your current work plan to oversee state 1115 waivers for program integrity vulnerabilities.

Sincerely,

A handwritten signature in blue ink that reads "Frank Pallone, Jr." with a stylized flourish at the end.

Frank Pallone, Jr.
Chairman
Committee on Energy and Commerce

A handwritten signature in blue ink that reads "Ron Wyden" in a cursive style.

Ron Wyden
Ranking Member
Committee on Finance

Ms. Christi A. Grimm

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cc: The Honorable Greg Walden
Ranking Member
Committee on Energy and Commerce

The Honorable Charles E. Grassley
Chairman
Committee on Finance

The Honorable Alex Azar
Secretary
Department of Health and Human Services

The Honorable Seema Verma
Administrator
Centers for Medicare & Medicaid Services