ARKANSAS DEPARTMENT OF HUMAN SERVICES

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Elizabeth Richter

Acting Administrator

Centers for Medicare & Medicaid Services

7500 Security Boulevard

Baltimore, Maryland 21244-1850

Dear Ms. Richter:

We have received your February 12, 2021 letter notifying the state that you are "commencing a process of determining whether to withdraw the authorities approved in the Arkansas Works demonstration that permit the state to require work and other community engagement activities as a condition of Medicaid eligibility." As CMS is aware, the community engagement requirement is not currently in effect due to litigation that is currently pending before the U.S. Supreme Court. Additionally, administration of the work and community engagement requirement is temporarily inapplicable during the COVID-19 pandemic pursuant to the maintenance-of-effort (MOE) provision of the Families First Coronavirus Response Act (FFCRA).

CMS's recent actions raise several issues and questions. First, Arkansas is greatly concerned—as other states no doubt are—that CMS will establish a dangerous precedent by seeking to modify key parts of an existing Section 1115 Demonstration Project, before that project's agreed expiration date. Under decades of settled practice, even when new administrations have policy disagreements with existing waivers, those waivers are generally allowed to run their five-year course and preferred policy changes are implemented only when a new waiver is negotiated. Eschewing that precedent will have ramifications that go beyond Arkansas's work and community engagement provision. States rely on certainty and predictability in crafting policies to implement cooperative federal-state programs like Medicaid. Simply re-opening any provision of an existing demonstration project—including those that could impact State budgets for years to come—will pour cold water on future partnerships. Arkansas therefore believes this action is inappropriate, and we encourage CMS to reconsider.

Second, your letter outlines a process for reconsidering Arkansas's approved project that conflicts with the signed agreement that CMS and Arkansas executed on January 4, 2021. As you know, that agreement requires CMS to give Arkansas at least nine months' notice before terminating an existing project and sets forth a detailed briefing schedule that is carefully crafted to ensure that all issues are adequately considered. Although you have purported to unilaterally revoke that agreement, we believe the January 4 agreement is valid. Our attorneys advise us that CMS lacks the legal authority to revoke that agreement (and even if it had such authority, the procedure that CMS utilized to do so here is

unlawful). We respectfully request that you adhere to the procedures to which CMS and the State previously agreed.

Third, CMS's new assessment of the Arkansas Works demonstration project is misguided. Despite recognizing that the FFCRA MOE provision has temporarily limited States from adhering to normal Medicaid disenrollment procedures, CMS appears to rely on the pandemic to assert the existence of "near term" consequences in justifying recission of the demonstration project. Arkansas welcomes the opportunity to demonstrate how community-engagement promotes the objectives of the Medicaid program—well beyond the public health emergency. For example, according to *Healthy People 2020*, "… researchers agree that there is a clear and established relationship between poverty, socioeconomic status, and health outcomes—including increased risk for disease and premature death."[1]

As the Secretary of the Department of Health and Human Services (HHS) and CMS have long recognized, Medicaid's core objective is promoting health—including, reducing the risk of disease and premature deaths among those most at risk of long-term poverty. Utilizing community engagement to create opportunities that will assist non-elderly, non-disabled adults escape poverty is thus squarely within Medicaid's objectives. Moreover, since implementation of Arkansas's program is currently suspended, there does not appear to be an immediate basis for beginning the reconsideration process at this time.

Work itself should not be a matter of controversy, for the majority of the adult population covered through the Arkansas demonstration. For example, the Center for American Progress recognizes that, "[w]ork, whether a paid job or unpaid work in the home, as a caregiver, or in a volunteer capacity is fundamental to human nature and its expression. This connection between work and human dignity lies at the core of progressive values."[2]

Fourth, as CMS has requested, we will submit additional information to support why the authority to include community engagement is appropriate and should not be withdrawn. However, we respectfully request this period be extended to not less than 90 days to review our enrollment data in the time periods prior to the implementation of the work and community engagement requirement until the administration of it ceased due to litigation. In particular, while your letter references "… 18,000 beneficiaries who lost coverage for not reporting the number of hours …," you are very familiar with the significant amount of "churn" among the Medicaid population. It is vitally important that we be permitted sufficient time to conduct data matches and comparative analyses from May 2018 when the first group of individuals were notified they were subject to the new work requirement in June through December 2019. As you know, individuals whose eligibility ended at the end of December 2018 could have re-applied for Medicaid at anytime for coverage to begin again January 1, 2019 and at any time after that. The litigation put a halt to conducting a valid evaluation.

Indeed, many states have experienced declines in enrollment in the past two years that cannot be attributed to work requirements or changes in the economy. For example, the Center for Budget and Policy Priorities (CBPP) found that Medicaid and CHIP enrollment rose in 14 states between March 2017 and March 2019 but fell in 37 states. CBPP further indicates that 13 states (including Arkansas,

[1] https://www.healthypeople.gov/2020/topics-objectives/topic/social-determinants-health/interventions-resources/poverty

[2] https://www.americanprogress.org/issues/religion/news/2009/02/24/5614/progressive-fundamentals-the-dignity-of-work/

Colorado, Massachusetts, Vermont, and Washington) had "sharp" declines, that is, declines of 7 percent or more. Enrollment among children fell as well as for adults. While the prior Administration attributed the declines to an improved economy, CBPP concluded: "[w]e did that analysis, and it leaves us skeptical that economic conditions can explain the full decline, or the especially sharp declines in some states … ".[3] "Our findings suggest that the reason behind the recent Medicaid and CHIP enrollment declines are more complicated and warrant concern and further investigation."[4]

Researchers have long observed there is significant "churn" among people enrolled in Medicaid. In its report, "Reducing lapses in healthcare coverage in the Individual and Medicaid markets," McKinsey found that "… roughly one-third of the Medicaid expansion enrollees in our data set, and about half of the individual market enrollees, left their original coverage type within one year …". [5]

While several articles have been written about individuals' experience with the Arkansas program, there are severe flaws to drawing any conclusions based on telephone surveys and limited time periods. Without sufficient time to conduct data matches on the 18,000 individuals referenced in your letter, it would be inaccurate to conclude that the reduction in coverage was solely attributed to the work and community engagement requirements. A 90-day period to respond to the federal government's inquiry will assist Arkansas in ensuring the Administration has access to the most pertinent information before it makes a decision with such long-lasting impacts on the nature of federal-state cooperation in Medicaid demonstration projects. Indeed, absent this additional time, any review will ultimately rest on incomplete data. Our attorneys advise that without sufficient time to properly respond, any corresponding decision by CMS would be arbitrary, capricious, and otherwise not in accordance with the law.

Thank you for your consideration and we look forward to a favorable reply. If you have any questions, please do not hesitate to contact me at Dawn.Stehle@dhs.arkansas.gov.

Sincerely,

Dawn Stehle

Deputy Director for Health and Medicaid Director

[3] https://www.cbpp.org/sites/default/files/atoms/files/7-17-19health.pdf p. 2.
[4] Ibid. p. 3
[5] https://healthcare.mckinsey.com/wp-content/uploads/2020/02/Reducing-lapses-in-healthcare-coverage-in-the-Individual-and-Medicaid-markets.pdf