Alliance For Health Policy  
Briefing on Medicaid § 1115 Waivers  

Thomas R. Barker  
Partner  
Foley Hoag, LLP

---

Section 1115 of the Social Security Act

- Grants broad power to the Secretary of HHS to waive “any of the requirements” of Medicaid § 1902 if, in the judgment of the Secretary, doing so would “promot[e] the objectives of” Medicaid.
  - Section 1902 contains the broad operating requirements of Medicaid:
    - Benefits available statewide
    - Benefits made available “with reasonable promptness”
    - Free choice of provider
    - Payment rates set through public hearing process and sufficient to enlist enough providers

- Section 1115 also allows the Secretary to fund the costs of a Medicaid demonstration program not otherwise allowable as an authorized expenditure.
Great judicial deference to the Secretary

- In general, the courts, going back at least to the 1970s, have historically granted broad deference to the Secretary’s “judgment” in granting a waiver.
- Courts generally do not see it as their role to second-guess a grant of a waiver.
- Yet, there is some case law that suggests that the failure of the state to provide at least some cursory level of review to a waiver request (Beno v. Shalala, 9th Cir. 1994; Newton-Nations v. Betlach, 9th Cir. 2011) can invalidate the grant of a waiver.
- And as we will soon discuss, the failure of a state to consider whether a waiver “promot[es] the objective of Medicaid” can also be fatal.

Waivers Cross Political Boundaries

- Waivers have historically been granted by Administrations of both political parties dating back at least to the Carter Administration:
  - Increased cost sharing (Carter)
  - “Katie Beckett” waivers (Reagan)
  - Oregon waiver (Clinton)
  - Florida waiver; Rhode Island and Vermont cost cap waivers (Bush II)
  - ACA expansion waivers; delivery system reform waivers (Obama)
The Trump Administration has broadly announced its desire for increased flexibility in waivers
- Price/Verma letter to Governors (April, 2017)
  - "New era" in Medicaid
  - Priority given to waivers that focus on improving program management; community engagement; aligning Medicaid and private insurance for non-disabled adults; reasonable timelines for HCBS waivers; additional tools to address opioid epidemic.
- Information Bulletin to states (November, 2017)
  - Revised “objectives” of Medicaid
  - Attempt to simplify waiver process
- New guidance on “community engagement” requirements (January, 2018)
- Verma announcement at Medicaid Managed Care Summit (September, 2018)

CMS more aggressive in approving “community engagement” waivers despite obvious litigation risks.
CMS also using waivers to combat opioid epidemic (e.g., IMD exclusion waivers).
Yet CMS clearly has some limits, in light of rejection of Massachusetts waiver request to permit the state to implement a closed formulary for covered outpatient drugs.