



## Alliance For Health Policy Briefing on Medicaid § 1115 Waivers

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## 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 demonstraton 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 (*Benov v. Shalala*, 9<sup>th</sup> Cir. 1994; *Newton-Nations v. Betlach*, 9<sup>th</sup> 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)



## Trump Administration Waiver Policy

- 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)



## Trump Administration Waiver Policy (Cont'd.)

- 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.