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Commentary: Administration Can't Justify Re-Approving Waiver Taking Coverage Away from Kentuckians

By Judith Solomon

After a federal court vacated the Trump Administration's approval of Kentucky's Medicaid demonstration project (or "waiver") to impose onerous new requirements on most beneficiaries because it failed to consider the proposal's impact on coverage, the Administration opened a new 30-day comment period on the proposal. Yet even before that comment period ended on August 18, Administration officials signaled their intent to again approve Kentucky's proposal,[1] despite comments mostly in opposition to the plan filed by over 11,000 individuals and organizations. The Administration should reconsider, given the overwhelming evidence in favor of rejecting the proposal.[2]

Section 1115 of the Social Security Act gives the Secretary of the Department of Health and Human Services (HHS) authority to approve demonstration projects that promote the objectives of Medicaid. HHS' approval of Kentucky's waiver proposal was "arbitrary and capricious," the court found, because providing affordable coverage to people who would otherwise be uninsured is a "central objective" of the Medicaid program, and HHS failed to consider the proposal's impact on coverage. In signaling their intent to re-approve the waiver, Administration officials reportedly said "they could sidestep the ruling by providing a better explanation of the rationale for work requirements," and "by compiling a fuller record and showing that they have thoroughly reviewed the evidence."[3]

It's not that simple. In vacating HHS' approval of the waiver, the district court judge noted that an agency's action is arbitrary and capricious if it "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency

[1] Robert Pear, "A Judge Blocked a Medicaid Work Requirement. The White House Is Undeterred," *New York Times*, August 11, 2018, https://www.nytimes.com/2018/08/11/us/politics/medicaid-work-requirement.html.

[2] Judith Solomon, "Kentucky Waiver Will Harm Medicaid Beneficiaries," Center on Budget and Policy Priorities, January 16, 2018, https://www.cbpp.org/research/health/kentucky-waiver-will-harm-medicaid-beneficiaries.

[3] Pear, 2018.

expertise."[4] That's not a standard the Administration can sidestep. HHS can't get around the substantial evidence that large numbers of Kentuckians — including many who should remain eligible under the proposal — would lose coverage and become uninsured under the state's plan.

Kentucky's own estimate is that the waiver would lead to 1.14 million lost coverage months, equivalent to a 15 percent drop in adult Medicaid enrollment, by the fifth year. These lost coverage months are equivalent to 95,000 people losing coverage in a typical month, meaning that well over this number would likely lose coverage for some part of the year due to lockouts for failing to meet work requirements, pay premiums, or report changes or renew coverage in a timely manner. Early evidence from Arkansas, which began implementing its work requirement in June, suggests the coverage loss in Kentucky could be even greater.[5]

The substantial loss of coverage that would result from Kentucky's plan to take Medicaid coverage away from those not meeting work or other program requirements can't be minimized, and it can't be excused or justified by claims that those affected will get other coverage or benefit in some other way from approval of Kentucky's waiver. Whatever rationale the Trump Administration tries to advance, it can't overcome or legitimize the substantial loss of coverage and resulting harm Kentucky's proposal would cause.

Substantial Numbers of Medicaid Beneficiaries Would Lose Coverage, Become Uninsured

The percentage of uninsured Kentuckians with incomes under 138 percent of the poverty line dropped from 40 percent in 2013 to 7.4 percent at the end of 2016. Much of that reduction was driven by large coverage increases under the Affordable Care Act (ACA) in high-poverty areas, which eliminated pre-ACA disparities in uninsured rates across these areas.[6] And coverage mattered to those who obtained it. A multi-year study comparing Kentucky and Arkansas, which expanded Medicaid under the ACA, to Texas, which hasn't, found that by the end of 2016, low-income adults in Kentucky and Arkansas received more primary and preventive care, visited emergency departments less often, and reported better health than low-income adults in Texas. They also saw big savings in out-of-pocket medical costs.[7]

Implementation of Kentucky's waiver proposal would lead to a sharp reversal of the state's progress in reducing uninsurance and improving the health of poor and low-income Kentuckians. Our conservative estimate, relying on research by the Kaiser Family Foundation and the Urban

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[4] Memorandum Opinion, *Stewart v. Azar,* United States District Court for the District of Columbia, Civil Action No. 18-152 (JEB), June 29, 2018.

[5] Jennifer Wagner, "Eligible Arkansas Medicaid Beneficiaries Still Struggling to Meet Rigid Work Requirements," Center on Budget and Policy Priorities, August 21, 2018, https://www.cbpp.org/blog/eligible-arkansas-medicaid-beneficiaries-still-struggling-to-meet-rigid-work-requirements.

[6] Joseph A. Benitez, E. Kathleen Adams, and Eric E. Seiber, "Did Health Care Reform Help Kentucky Address Disparities in Coverage and Access to Care among the Poor?" *Health Services Research,* June 2018, abstract at https://onlinelibrary.wiley.com/doi/full/10.1111/1475-6773.12699.

[7] Benjamin D. Sommers, *et al.*, "Three-Year Impacts of the Affordable Care Act: Improved Medical Care and Health Among Low-Income Adults," *Health Affairs,* June 2017, https://www.healthaffairs.org/doi/10.1377/hlthaff.2017.0293.

Institute, is that the work requirement would cause between 45,000 and 103,000 enrollees to lose coverage well before the fifth year of implementation, with most of them likely becoming uninsured.[8] This estimate does not take into account coverage loss from the lockouts that the proposal would impose on people who don't pay premiums, renew their coverage on time, or report changes that affect their eligibility.

Work Requirements Would Cause Substantial Numbers to Lose Coverage

Increased red tape would cause many working people and those qualified for an exemption to lose coverage. People would have to report their hours by phone or through an online portal, but 19 percent of adult enrollees in Kentucky lack any internet access, and 41 percent don't have broadband access, according to an Urban Institute analysis.[9] Many people who should qualify for an exemption likely won't get one. For example, families sanctioned due to noncompliance with requirements under the Temporary Assistance for Needy Families (TANF) program were more likely than other families receiving TANF to have barriers that kept them from working and that should have made them exempt from the requirements, including having a child with a chronic illness or disability.[10]

Claiming an exemption from the work requirement would be particularly difficult for people with mental illness. As Harvard Medical School Professor Richard Frank explains, "The burden of proving medical frailty in the Kentucky waiver program will generally fall on the recipient. In this case, that means it falls on a person with an illness that interferes with cognition, executive function and mood."[11] People with substance use disorders, many of whom should be exempt, would also have compliance problems, because they often have significant privacy concerns and may not trust Medicaid eligibility staff with information about their current or past substance use. People may also fear criminal ramifications if they are using illegal substances.[12]

Moreover, many working people won't be able to meet the 80-hour-a-month requirement every month. About a third of the 165,000 Kentucky adults receiving Medicaid who are working and not eligible for an exemption as a student or caregiver would be at risk of experiencing gaps in Medicaid

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[8] Aviva Aron-Dine, "Eligibility Restrictions in Recent Medicaid Waivers Would Cause Many Thousands of People to Become Uninsured," Center on Budget and Policy Priorities, August 9, 2018, https://www.cbpp.org/research/health/eligibility-restrictions-in-recent-medicaid-waivers-would-cause-many-thousands-of.

[9] Anuj Gangopadhyaya and Genevieve M. Kenney, "Updated: Who Could Be Affected by Kentucky's Medicaid Work Requirements, and What Do We Know About Them?" Urban Institute, March 2018, https://www.urban.org/sites/default/files/publication/96576/3.26-ky-updates_finalized_1.pdf.

[10] Hannah Katch, Jennifer Wagner, and Aviva Aron-Dine, "Taking Medicaid Coverage Away From People Not Meeting Work Requirements Will Reduce Low-Income Families' Access to Care and Worsen Health Outcomes," Center on Budget and Policy Priorities, updated August 13, 2018, https://www.cbpp.org/research/health/taking-medicaid-coverage-away-from-people-not-meeting-work-requirements-will-reduce.

[11] Richard G. Frank, "Medicaid Work Requirements Will Reduce Care for Mentally Ill," *The Hill,* February 3, 2018, http://thehill.com/opinion/healthcare/372181-medicaid-work-requirements-will-reduce-care-for-mentally-ill.

[12] Center on Budget and Policy Priorities, "Harm to People With Substance Use Disorders From Taking Away Medicaid for Not Meeting Work Requirements," updated May 9, 2018, https://www.cbpp.org/research/health/harm-to-people-with-substance-use-disorders-from-taking-away-medicaid-for-not.

coverage, because they don't work enough hours or don't work consistently enough throughout the year, according to the Urban Institute.[13]

Premiums and Lockouts Would Also Cause Coverage Loss

Other provisions of the proposal have an even broader reach than work requirements, putting coverage at risk for parents and students who are exempt from the work requirement. Almost all adults would have to pay monthly premiums as high as 4 percent of monthly income. If people with incomes below the poverty line don't pay their premiums within 60 days, they would be enrolled in Medicaid, but they would have to pay copayments for most health care services. People with incomes above the poverty line who don't pay would not be enrolled and would remain uninsured. And people with incomes above the poverty line who do make a first payment will lose coverage for at least six months if they miss a premium payment and don't pay it within 60 days.

Extensive research shows that premiums significantly reduce low-income people's participation in health coverage programs.[14] These studies show that the lower a person's income, the less likely they are to enroll and the more likely they are to drop coverage due to premium obligations. People who lose coverage most often end up uninsured and unable to obtain needed health care services. Kentucky's proposal is modeled on the Healthy Indiana Plan, where the state's own evaluation shows premiums have kept large numbers of people from becoming eligible and caused others to lose coverage for non-payment.[15]

Locking people out of coverage for six months if they don't complete their annual eligibility renewal or don't report changes in income or other factors affecting eligibility within the required timeframe would also cause Kentuckians to lose coverage. Renewal can be a confusing process, and beneficiaries often don't receive notice that they are due for renewal and often have difficulty understanding what documents need to be turned in to complete the process.[16] Similarly, Medicaid eligibility is complicated, and beneficiaries, particularly those with volatile work schedules, often do not understand when they must report a change in circumstances, or they may have difficulty reaching a caseworker or accessing an online portal.

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[13] Anuj Gangopadhyaya *et al.*, "Kentucky Medicaid Work Requirements: What Are the Coverage Risks for Working Enrollees?" Urban Institute, August 2018, https://www.urban.org/sites/default/files/publication/98893/2001948_kentucky-medicaid-work-requirements-what-are-the-coverage-risks-for-working-enrollees_1.pdf.

[14] Samantha Artiga, Petry Ubri, and Julia Zur, "The Effects of Premiums and Cost-Sharing on Low-Income Populations: Updated Review of Research Findings," Kaiser Family Foundation, June 2017, http://files.kff.org/attachment/Issue-Brief-The-Effects-of-Premiums-and-Cost-Sharing-on-Low-Income-Populations.

[15] 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.

[16] See Benjamin Hardy, "Scrubbed from the system: Why Medicaid enrollment has dropped by almost 60,000 people in 18 months," *Arkansas Times*, August 9, 2018, https://www.arktimes.com/arkansas/scrubbed-from-the-system/Content?oid=21285998.

Most Losing Coverage Will Become Uninsured

There's little evidence that work requirements will meaningfully increase employment, and even less to support claims by Kentucky — or by the Centers for Medicare & Medicaid Services (CMS) in the initial approval letter — that work requirements would cause large numbers of enrollees to gain good jobs with health insurance. And CMS doesn't even claim that those losing coverage when they don't pay premiums or renew their coverage or report changes on time would obtain other coverage.

Studies of work requirements in federal cash assistance programs —TANF and its precursor, Aid to Families with Dependent Children — find that employment increases for those subject to work requirements are generally modest, fade over time, and don't move many families out of poverty.[17] Cash assistance programs generally provide at least some (albeit inadequate) resources for the supportive services that many low-income adults need to work, such as child care, job training, and transportation assistance. In contrast, the Administration's Medicaid work requirements guidance says that states imposing these requirements need not offer any new work supports and may not use federal funding for such supports.[18]

Moreover, even if some enrollees do find jobs because of work requirements, these will probably be mostly low-wage jobs. Such jobs are unlikely to boost enrollees' incomes enough for them to shift from Medicaid into subsidized individual market coverage, and the large majority of such jobs do not offer affordable health insurance — meaning most enrollees would still need Medicaid. According to Labor Department data, among workers with earnings in the bottom quartile of the wage distribution, only 37 percent are offered health coverage, and less than a quarter actually obtain coverage, presumably in large part because required employee premium contributions are often higher than low-wage workers can afford.[19] Similarly, only 37 percent of full-time workers with family incomes below the poverty line (and only 13 percent of such part-time workers) are even offered coverage.[20] Consistent with these data, in Medicaid expansion states, 42 percent of workers with family incomes below 138 percent of the poverty line (the income limit for Medicaid in these

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[17] See LaDonna Pavetti, "Work Requirements Don't Work," Center on Budget and Policy Priorities, January 10, 2018, https://www.cbpp.org/blog/work-requirements-dont-work; LaDonna Pavetti, "Work Requirements Don't Cut Poverty, Evidence Shows," Center on Budget and Policy Priorities, updated June 7, 2016, https://www.cbpp.org/research/poverty-and-inequality/work-requirements-dont-cut-poverty-evidence-shows; and LaDonna Pavetti, "Evidence Doesn't Support Claims of Success of TANF Work Requirements," Center on Budget and Policy Priorities, April 3, 2018, https://www.cbpp.org/research/family-income-support/evidence-doesnt-support-claims-of-success-of-tanf-work-requirements. See also Ed Dolan, "Do We Really Want Expanded Work Requirements in Non-Cash Welfare Programs?" Niskanen Center, July 23, 2018, https://niskanencenter.org/blog/expanded-work-requirements-in-non-cash-welfare-programs/.

[18] Centers for Medicare & Medicaid Services letter to state Medicaid directors (18-002), January 11, 2018, https://www.medicaid.gov/federal-policy-guidance/downloads/smd18002.pdf.

[19] Bureau of Labor Statistics, Healthcare benefits: Access, participation, and take-up rates, https://www.bls.gov/ncs/ebs/benefits/2017/ownership/civilian/table09a.htm.

[20] Michelle Long *et al.,* "Trends in Employer-Sponsored Insurance Offer and Coverage Rates, 1999-2014," Kaiser Family Foundation, March 21, 2016, https://www.kff.org/private-insurance/issue-brief/trends-in-employer-sponsored-insurance-offer-and-coverage-rates-1999-2014/.

states) obtain health insurance through Medicaid, more than twice the share that obtain insurance through an employer.[21]

Taking Coverage Away, Leaving People Uninsured Is Contrary to Medicaid's Objectives

As a rationale for approving policies that take health coverage away from people who don't meet a work requirement, HHS has claimed that "work [will] promote health and well-being," but this argument doesn't support a claim that Kentucky's waiver is consistent with the primary objective of Medicaid to provide coverage. While improving health and well-being are proper objectives of Medicaid, they are *outcomes* of having coverage rather than a result of taking coverage away from people who don't work, pay premiums, or renew their coverage or report changes on time, which worsens health and well-being.

The evidence HHS cites on how work affects health is murky, since no studies in this area prove whether work improves health or if it's simply that people in better health are more able to work. As noted in a recent comprehensive review of the literature conducted by the Kaiser Family Foundation, "There is strong evidence of an association between unemployment and poorer health outcomes, but authors caution against using these findings to infer that the opposite relationship (work causing improved health) exists."[22] The author of one study (which HHS nevertheless cited) clearly states: "Importantly, these findings do not necessarily imply that income has a *causal* effect on life expectancy…. [W]e caution that this correlational analysis does not uncover causal mechanisms."[23] And a brief in the Kentucky court case submitted by experts in health law, health policy, and health services research stated that "there is no such research" supporting the assertion that employment leads to improved health outcomes.[24]

On the other hand, the evidence on how health coverage has a positive benefit for health is clear. A large and growing body of research on the ACA's Medicaid expansion finds that coverage gains are generating large gains in access to care and financial security.[25] And a new survey of Ohio

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[21] CBPP calculations from Current Population Survey data for 2016.

[22] Larisa Antonisse and Rachel Garfield, "The Relationship Between Work and Health: Findings from a Literature Review," Kaiser Family Foundation, August 2018, https://www.kff.org/medicaid/issue-brief/the-relationship-between-work-and-health-findings-from-a-literature-review/.

[23] Raj Chetty *et al.,* "The Association Between Income and Life Expectancy in the United States, 2001-2014: Executive Summary," April 2016, http://www.equality-of-opportunity.org/assets/documents/healthineq_summary.pdf; see also Raj Chetty *et al.,* "The Association Between Income and Life Expectancy in the United States, 2001-2014," *Journal of the American Medical Association*, May 13, 2016, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4866586/.

[24] Brief for Deans, Chairs and Scholars as *Amici Curiae* in Support of Plaintiffs, *Stewart v. Azar,* United States District Court for the District of Columbia, Civil Action No. 1:18-cv-152 (JEB), April 6, 2018.

[25] See Sommers *et al.*, *op. cit.*; Antonisse *et al.*, *op. cit.*; Olena Mazurenko *et al.*, "The Effects of Medicaid Expansion Under the ACA: A Systematic Review," *Health Affairs*, June 2018, https://www.healthaffairs.org/doi/10.1377/hlthaff.2017.1491; and Hefei Wen, Benjamin Druss, and Janet Cummings, "Effect of Medicaid Expansions on Health Insurance Coverage and Access to Care Among Low-Income Adults with Behavioral Health Conditions," Health Services Research, December 2015, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4693853/.

enrollees who gained coverage under Medicaid expansion confirms earlier research in Ohio and Michigan finding that having Medicaid makes it easier for workers to work and for unemployed enrollees to look for a job.[26] Taking coverage away and leaving people uninsured would move in the opposite direction.

Another way Kentucky tries to justify its waiver as a proper demonstration under section 1115 is by claiming that it would provide Medicaid beneficiaries the "tools" they need to successfully transition from Medicaid to commercial coverage. These "tools" include requiring premium payments, locking individuals out of coverage for nonpayment of premiums or for not complying with the work requirement, imposing deductibles, and using a health savings account to "purchase" additional benefits such as dental and vision. The objective of Medicaid is to provide medical assistance, or coverage — not to "train" low-income adults how to use commercial coverage. Moreover, neither Kentucky nor CMS provides *any* evidence that imposing premiums and other barriers to coverage in Medicaid would help Medicaid enrollees subsequently obtain, maintain, or use commercial coverage. Such evidence likely doesn't exist, just as there is no evidence that taking coverage away from Kentuckians who don't meet a work requirement would improve their health.

[26] "2018 Ohio Medicaid Group VIII Assessment, Executive Summary," Ohio Department of Medicaid, August 2018, http://medicaid.ohio.gov/Portals/0/Resources/Reports/Annual/Group-VIII-Executive-Summary.pdf; see also Kara Gavin, "Medicaid Expansion Helped Enrollees Do Better at Work or in Job Searches," University of Michigan Health Lab, June 27, 2017, http://labblog.uofmhealth.org/industry-dx/medicaid-expansion-helped-enrollees-do-better-at-work-or-job-searches.