PUBLIC INTEREST LAW
CENTER OF PHILADELPHIA
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Submitted Via Email

The Honorable Kathleen Sebelius
Secretary of Health and Human Services
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Dear Secretary Sebelius:

My name is Benjamin Geffen. I am a staff attorney at the Public Interest Law Center of Philadelphia. The Law Center has worked for decades to ensure that low-income children and others receive comprehensive medical and dental care as required by the "early periodic screening, diagnosis, and treatment" provisions of the Medicaid Act. Our work has included litigating federal class-action lawsuits under the Medicaid Act's "equal access" and "reasonable promptness" guarantees in Pennsylvania, Michigan, California, Oklahoma, and Florida.

I urge you to deny Pennsylvania's *Healthy Pennsylvania* Section 1115 Demonstration waiver application. There are abundant grounds for denying the application, and my comments will focus on two: first, the program is not in any sense an "experimental, pilot or demonstration project" and is therefore ineligible for a waiver under Section 1115 as a matter of law; and second, many components of the program—especially the work-search requirement—would violate the "simplicity of administration" and "likely to assist in promoting the objectives" requirements of federal law.

A. *Healthy Pennsylvania* is not a Section 1115 demonstration project.

Pennsylvania has characterized the *Healthy Pennsylvania* proposal as a "Section 1115 Demonstration." Saying this does not make it so. Section 1115 allows the Secretary of Health and Human Services to waive certain requirements of the Medicaid Act, but only for an "experimental, pilot, or demonstration project." 42 U.S.C. § 1315(a). The *Healthy Pennsylvania* proposal purports to be a "demonstration" project that will test certain "hypotheses," but it is at best pseudoscientific, and it is at worst a benefits cut for existing Medicaid enrollees masquerading as an experiment. Approval of *Healthy Pennsylvania* would, as a matter of law, be beyond the discretion permitted by Section 1115.

Among the supposed experiments in *Healthy Pennsylvania* is the imposition of a new monthly premium on families making over 100% of the federal poverty level, beginning in Year 2 of the program. Pennsylvania claims that charging such families extra for healthcare "will prepare these individuals for health coverage financial obligations" if and when their Medicaid eligibility ends. Application at 12. If Pennsylvania sincerely meant to test this hypothesis, it could, for example, create an ***experimental*** or ***treatment group*** that would have to pay the new premium, and a ***control group*** that would continue to operate under traditional Medicaid rules, as in the highly regarded Oregon Medicaid health experiment. Indeed, the proposal alludes to control groups to test certain hypotheses. *Id.* at 15-17. But the proposal is structured so as not to make true use of controls, confounding the interpretation of outcomes by applying multiple simultaneous changes to Pennsylvania's Medicaid program.

It is not only the premiums that would be implemented so as to rule out meaningful data analysis. For example, beneficiaries in the Medicaid expansion population (i.e., people at

up to 133% of the federal poverty level) would all have to enroll with private insurers instead of enrolling through the Medicaid managed-care organizations of Pennsylvania's existing Medicaid program. *Id.* at 8-10. There are fatal deficiencies in the "potential methodology, metrics, and data sources" listed in *Healthy Pennsylvania* as the ways by which Pennsylvania will test various hypotheses about this private-coverage component of the program. These hypotheses include:

- "*Healthy Pennsylvania* Private Coverage Option participants will have adequate provider access"
- "*Healthy Pennsylvania* Private Coverage Option will reduce overall premium costs in the Commonwealth"
- "Average per capita uncompensated care costs will decrease as a result of fewer numbers of uninsured"

See id. at 15-16. There would be no control groups. Nor would it be possible to compare the experiences of those just over 138% of FPL with those just under 138% of FPL, because most members of the former group would be transitioning not from traditional Medicaid to private coverage but from no coverage to private coverage.

Other hypotheses in the program cannot be confirmed or disproved, because there will be too many free variables, i.e., too many components will be changing at the same time to isolate the effects of any single change. For instance, *Healthy Pennsylvania* would split the current benefit program into a two-tiered program with high- and low-risk benefit plans, and enrollees moved to either of the new tiers would experience a long list of benefit cuts. *Id.* at 41, 44-49. Pennsylvania hypothesizes that the new high- and low-risk benefit plans will "sufficiently meet[] the needs of the participants placed in [them] by the health screening." *Id.* at 18. At the same time, a new $10 copayment would be imposed on many categories of adults for non-emergent use of an emergency room. *Id.* at 21, 59, 103-08. (Pennsylvania has not even bothered to list a hypothesis or analytical methodology specific to this change.) Furthermore,

Pennsylvania would be imposing a new work-search requirement on many categories of Medicaid participants, as discussed in Section B below. These changes would all take effect at the same time as Pennsylvania implements the other changes listed above.

Pennsylvania characterizes this jumble as unavoidable: "[T]he *Healthy Pennsylvania* plan proposes covering all eligible individuals under 133% FPL so establishing a control group will be difficult." *Id.* at 195. This statement is premised on a misunderstanding of the structure of a bona fide experiment. There are innumerable ways Pennsylvania might have opted to create a control group. To give just one example, Pennsylvania might have excluded people born on Mondays from the premium requirement. Then, a random sample of individuals—totaling of 1/7 of the pool—would operate under rules that differed in only one way from the rest of the pool, making it possible to compare costs, health outcomes, etc., of the control group (i.e., those born on Mondays) and the experimental group (i.e., those born on other days of the week). Such an approach would not interfere with "covering all eligible individuals."

As another example of a successful controlled experiment: the Carolina Abecedarian Project studied the effects of high-quality early childhood education by comparing the experiences of disadvantaged children randomly assigned to treatment groups (receiving interventions) or control groups (no interventions). Conducted in the 1970s, that study has continued to bear fruit. Indeed, just two weeks ago a group of researchers, including Nobel laureate James J. Heckman, published a watershed analysis based on follow-up examination of study participants over a thirty-year period. Francis Campbell, Gabriella Conti, James J. Heckman, Seon Hyeok Moon, Rodrigo Pinto, Elizabeth Pungello & Yi Pan, *Early Childhood Investments Substantially Boost Adult Health*, 343 SCIENCE 1478 (2014); *see also id.* at 1481

("[T]he children who attended the child care center in the first 5 years of their lives enjoy better physical health in their mid-30s, with significant markers indicating better future health."). Pennsylvania, by rejecting any sort of scientific approach with controls or permitting meaningful historical comparisons, has made it hopelessly complicated to measure whether forcing the working poor to spend more of their income on healthcare will improve their health or empower them to climb out of poverty.[1]

A thoroughgoing overhaul of the Medicaid program that lacks even the pretense of testable hypotheses is ineligible for a Section 1115 wavier as a matter of law. Section 1115 allows waivers for an "experimental, pilot, or demonstration project." 42 U.S.C. § 1315(a). The intent of this provision is to permit "experimental projects designed to test out new ideas and ways of dealing with the problems of public welfare recipients." S. Rep. No. 87-1589 (1962), reprinted in 1962 U.S.C.C.A.N. 1943, 1961. The United States Court of Appeals for the Ninth Circuit comprehensively addressed this issue in *Beno v. Shalala*, 30 F.3d 1057 (9th Cir. 1994), which concerned the former Aid to Families with Dependent Children ("AFDC") program, from which Section 1115 waivers were also permitted. California's "Demonstration Project," *id.* at 1060, would have "aim[ed] to encourage AFDC recipients to find work by decreasing benefits and allowing recipients to keep more of their earned income," *id.* at 1061. The waiver program would have applied statewide, but randomly selected control groups would have been created in four counties, and comparison analyses would have been conducted of the control and

[1] The Department of Health and Human Services has recently granted more modest Section 1115 waivers allowing Arkansas and Iowa to roll back certain protections for Medicaid enrollees while expanding Medicaid eligibility. These other programs also fail to meet the standards of Section 1115 as they, too, are not well designed as experiments. The fact that they have been approved does not bear on whether they are legally valid as they have not yet been scrutinized by the federal courts.

experimental groups in those four counties. *Id.* The Secretary of Health and Human Services granted California's waiver request, *id.* at 1062, but the Ninth Circuit vacated the waiver, as it was "unable to explain how it would advance social science to cut benefits to recipients who are not even included in the study," *id.* at 1073; *see also id.* ("Amici accurately observe that such a design is 'methodologically indefensible' in that it exposes a large number of subjects to potential harm, yet studies only a few."). The Ninth Circuit explained the general principle as follows:

> the Secretary must make some judgment that the project has a research or a demonstration value. A simple benefits cut, which might save money, but has no research or experimental goal, would not satisfy this requirement. Rather, the "experimental or demonstration project" language strongly implies that the Secretary must make at least some inquiry into the merits of the experiment—she must determine that the project is likely to yield useful information or demonstrate a novel approach to program administration.

Beno v. Shalala, 30 F.3d 1057, 1069 (9th Cir. 1994) (footnote omitted); *see also id.* at 1069 n.30 ("[A] simple statewide benefits cut is not, in and of itself, an experiment designed to determine whether the AFDC program might be run more efficiently. The immediate fiscal impact of reducing benefits is obvious, and such a benefits cut does not constitute an experiment unless data is collected, some other reform is implemented, or the program has some legitimate research component.").

The program in *Beno* at least purported to have a research methodology. Here, by contrast, Pennsylvania is selling a pig in a poke: "the Department has outlined possible research methods and control groups to use in the evaluation section in the application and will develop a more robust research method once the Demonstration is approved by CMS." Application at 195; *see also id.* ("The technical methodology will be decided upon, with input from CMS, after

approval of the waiver application."). That is precisely backward. In a recent decision following *Beno*, the Ninth Circuit held that the Secretary of Health and Human Services had improperly granted a waiver allowing Arizona to implement a "demonstration project" that would increase certain Medicaid enrollees' cost-sharing burdens, where there was "little, if any, evidence that the Secretary considered the factors § 1315 requires her to consider before granting Arizona's waiver." *Newton-Nations v. Betlach*, 660 F.3d 370, 381 (9th Cir. 2011). It is not possible to consider the required factors with respect to Pennsylvania's plan, when Pennsylvania has not even developed researched methods yet. As in *Newton-Nations*, a decision to grant a waiver would be "arbitrary and capricious within the meaning of the [Administrative Procedure Act] insofar as it entirely failed to consider an important aspect of the problem." *Id.* at 381-82 (internal quotation marks and citation omitted).

The situation here contrasts with that in *C.K. v. New Jersey Department of Health & Human Services*, 92 F.3d 171 (3d Cir. 1996). That decision upheld a waiver for a program "whereby families subject to the provisions of the [program] would be randomly assigned to either a treatment group whose eligibility will be determined based on [program] provisions, or to a nontreatment (or control) group for whom eligibility will be determined based on existing program provisions." *Id.* at 180 (internal quotation marks and citation omitted).

Pennsylvania has not explained any meaningful research methodology that will allow for analysis of the successes or failures of *Healthy Pennsylvania*. This is because *Healthy Pennsylvania* is not an "experimental, pilot, or demonstration project" at all. Accordingly, it does not qualify for a waiver under Section 1115, and the granting of a waiver would be a legally flawed error.

B. *Healthy Pennsylvania* violates the "simplicity of administration" requirement of the Medicaid Act and is not "likely to assist in promoting the objectives" of the Act.

Many of the changes in the *Healthy Pennsylvania* proposal are illegal because they erect such powerful bureaucratic barriers as to violate the statutorily required "simplicity of administration" for Medicaid programs. 42 U.S.C. § 1396a(a)(19). To give one example, the new criteria for determining which individuals are "medically frail" are at once so nebulous as to defy consistent application and so stingy as to exclude people who have had a kidney transplant (while including people who receive dialysis). *See* Application at 110-11. Many of the changes also are not "likely to assist in promoting the objectives" of the Medicaid Act. 42 U.S.C. § 1315(a). For example, the benefit cuts that accompany the shift to a two-tier coverage model will ax a long list of benefits with the sole objective of saving money. *See* Application at 44-49.

These legal violations pervade *Healthy Pennsylvania*, and surely the Department will receive comments from many affected individuals (and groups representing them) highlighting examples of the proposal's complexity and cheeseparing. The Department should scrutinize all these problems under both § 1396a(a)(19) and § 1315(a). The violations of those laws are perhaps most glaring in the case of Pennsylvania's unprecedented work-search requirement, which would apply to many categories of Medicaid enrollees. Accordingly, this section will detail how the work-search requirement runs afoul of both statutory provisions.

1. Overview of the work-search requirement

The work-search requirement would apply, for instance, to a family with two parents and two young children, in which the father works full-time for minimum wage at a small employer that does not provide health insurance, and the mother is a full-time caregiver for the

children. *Healthy Pennsylvania* would force this mother to try to enter the workforce—and presumably, to use most or all of her earnings to pay for child care—in order to access affordable health insurance. This would occur under the guise of "helping able-bodied Pennsylvanians [to] have a renewed start in life that is both prosperous and self-sustaining." Letter of Gov. Tom Corbett to Secretary Kathleen Sebelius, dated Mar. 5, 2014, at 2.

The work-search requirement is just that—a ***requirement***—notwithstanding Pennsylvania's post-application rhetorical flourishes. By letter dated March 5, 2014, Governor Corbett modified the work-search requirement, recharacterizing it as "a voluntary, one-year pilot program." Corbett Letter at 2. The modified proposal is no more "voluntary" than the original version. Under the original proposal, there was a work-search program, and a sanction for noncompliance with that program: termination of Medicaid eligibility. Under the modified proposal, there is still a work-search program, and there is a reduced but still severe sanction for noncompliance with the work-search program: a hike of up to 67% in premiums or co-payments.[2] In other words, the modified proposal still ***requires*** fulfillment of the work-search rules, just with a less-drastic sanction for noncompliance.

2. "Simplicity of administration"

The work-search requirement would impose bureaucratic burdens that are not only pointless but also illegal. The Medicaid Act requires states to "provide such safeguards as may be necessary to assure that eligibility for care and services under the plan will be determined, and such care and services will be provided, in a manner consistent with ***simplicity of***

[2] Pennsylvania frames the modified proposal as allowing people who fulfill the rules of the "Encouraging Employment" program to claim cost-sharing discounts of 15% to 40%. Corbett Letter at 3. This is mathematically identical to saying that people who do not fulfill those rules will have their cost-sharing burden increased by 17% to 67%.

administration and the best interests of the recipients." 42 U.S.C. § 1396a(a)(19) (emphasis added); *accord* 42 C.F.R. § 435.902. As the United States Court of Appeals for the Third Circuit has explained, "[t]he legislative history of this provision establishes that Congress added it to ensure that states would not impose bureaucratic and complicated mechanisms for determining eligibility that would deter recipients from obtaining care." *Elizabeth Blackwell Health Ctr. for Women v. Knoll*, 61 F.3d 170, 180 n.7 (3d Cir. 1995). The blizzard of paperwork to be created by *Healthy Pennsylvania* would "deter recipients from obtaining care," and it would be a violation of discretion under the Administrative Procedure Act to approve the proposal.

The *Healthy Pennsylvania* proposal stints on details of how the work-search requirement will function.[3] We do have a preview, however. In August, Pennsylvania imposed convoluted new work-search requirements for unemployment compensation. 43 Pa. Bull. 4730 (Aug. 17, 2013). This new set of rules imposes cumbersome recordkeeping requirements on participants and strictly limits the eligible types of work-search activities. *See* 34 Pa. Code § 65.11. Similarly, under *Healthy Pennsylvania*, Medicaid enrollees subject to the work-search requirement would have to complete an average of "12 approved job training or employment-related activities per month"; over the course of a year, 144 such activities would be required. Application at 36. Participants would be required to use the JobGateway computer program, *id.*, which is available only to computer users and only in English and Spanish. *Compare* JobGateway website, http://www.jobgateway.pa.gov (providing English and Spanish options),

[3] It also implies, without providing any specifics, that the work-search requirement may be modified at some point during or after Demonstration Year 2. Application at 56. The Department of Health and Human Services cannot, consistent with its Section 1115 authority, approve a proposal that leaves open so many questions about its future operation.

with Pennsylvania's Medicaid enrollment website, http://www.compass.state.pa.us (providing English and Spanish, plus instructions for obtaining assistance in four additional languages).

Pennsylvania apparently believes that creating a tangle of red tape for people who are unemployed and who have a tenuous grasp on health insurance will promote "reduced depression and anxiety," Application at 17. This recycles stereotypes about low-income people and is not grounded in any research findings. Nor is it credible that requiring low-income stay-at-home parents to find affordable daycare or face skyrocketing premiums will "instill a sense of personal responsibility into the program," *id.* at 90.

3. "Likely to assist in promoting the objectives" of the Medicaid Act

One of the prerequisites for a Section 1115 waiver is that a project must be "likely to assist in promoting the objectives" of the Medicaid Act. 42 U.S.C. § 1315(a). In a precedential opinion issued last week, the United States Court of Appeals for the Third Circuit noted that "a Section 1115 waiver project can be vacated if a court finds that the Secretary could not have rationally found the program likely to advance the objectives of Medicaid." *Nazareth Hosp. v. Sec'y U.S. Dep't of Health & Human Servs.*, No. 13-2627, __ F.3d __, 2014 U.S. App. LEXIS 6082, at *22 (3d Cir. Apr. 2, 2014). The core objectives of the traditional Medicaid program are "to assist pregnant women, children, needy families, the blind, the elderly, and the disabled in obtaining medical care." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2581 (2012). The objective of Medicaid expansion under the Affordable Care Act is "to cover ***all*** individuals under the age of 65 with incomes below 133 percent of the federal poverty line." *Id.* at 2601.

A demonstration project cannot be considered likely to advance those objectives if the state is unable to articulate any reason a project would accomplish some end other than saving

money. Here, the work-search requirement is founded on the dubious premise that "[p]ublished research shows that being employed results in improved physical and mental health." Application at 14; *see also id.* at 17 (stating as a "hypothesis" that "[t]he *Encouraging Employment* program will promote employment, which will result in better physical and mental health outcomes").

As Carl Sagan put it, extraordinary claims require extraordinary evidence. Pennsylvania has cited two publications that allegedly support its premise, Application at 14 n.1, but neither paper says that employment causes health improvements. Without any evidence available, it cannot be said that the work-search requirement—an unprecedented and sweeping departure from traditional Medicaid principles—is likely to advance the objectives of the law.

Even if it were true that employment ***correlates*** with improved health, the two cited papers do not demonstrate ***causation***. The first of them concludes, among other things, that "actively engaging in job-search activities is related to lower mental health for unemployed workers." Frances M. McKee-Ryan et al., *Psychological and Physical Well-Being During Unemployment: A Meta-Analytic Study*, 90 J. APPLIED PSYCHOL. 53, 68 (2005). This directly contradicts the supposed rationale for the work-search requirement. McKee et al. also emphasize that "individuals with poor physical health may encounter constraints that cause them to have difficulties searching for and obtaining employment." *Id.* at 55. This suggests that *Healthy Pennsylvania*'s premise is wrong about which way the causal arrow points, and it scarcely supports ***narrowing*** access to healthcare for unemployed people. McKee et al. conclude that although some studies have indicated a "positive relationship" between mental health and reemployment, "generalizing the impact of job loss according to particular

demographic characteristics is not appropriate. The focus should instead be on identifying sets of individuals at risk on the basis of psychological variables." *Id.* at 69. This is squarely at odds with the one-size-fits-all approach of *Healthy Pennsylvania*.

The second publication is off point. Karsten I. Paul et al., *Latent Deprivation Among People Who Are Employed, Unemployed, or Out of the Labor Force*, 143 J. PSYCHOL. 477 (2009). It begins by citing McKee et al. for the correlative proposition that "[u]nemployed people generally show higher levels of impaired mental health than do employed people," *id.* at 477, and it concludes that in countering mental health impairments "employment can be substituted at least to a certain degree," which "provides some hope to those unemployed people with weak chances for reemployment (e.g., older people with low educational attainments and who are handicapped by a physical illness), because it shows that, for example, status and social contact can—at least to some degree—be achieved by other means besides employment," *id.* at 488. This offers scant support for *Healthy Pennsylvania*'s employment-or-else requirement. Furthermore, the findings of Paul et al. have minimal applicability to Pennsylvania, as their study took place in Germany, *id.* at 481, where universal health insurance has long been a fact of life. The study participants were a poor analog for Medicaid-eligible Pennsylvanians for various other reasons as well. *See id.* at 487 (acknowledging that "the Web-based design may have contributed to the restriction of our sample to participants with [high school] or higher education, rendering our sample nonrepresentative of the German population, thus limiting generalizability"); *id.* ("Another limitation may be seen in the underrepresentation of homemakers and retirees . . . .").

In sum, the work-search requirement violates the Medicaid Act's "simplicity of administration" requirement, and it cannot be considered "likely to assist in promoting the objectives" of the Medicaid Act when Pennsylvania has cited no authorities for the counterintuitive notion that it would ***improve*** the physical or mental well-being of unemployed people to make it harder for them maintain affordable health coverage. Numerous other components of *Healthy Pennsylvania* also run afoul of these two legal requirements.

For all these reasons, and plenty more, the *Healthy Pennsylvania* application should be denied.

Sincerely,

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Cc: Cynthia Mann (via email to Cynthia.Mann@cms.hhs.gov)