



July 13, 2017

Administrator Seema Verma
Centers for Medicare & Medicaid Services

Re: Proposed Changes to Wisconsin BadgerCare Program for Childless Adults

Dear Administrator Verma,

The Wisconsin Alliance for Women's Health (WAWH) appreciates the opportunity to provide comments and feedback on the proposed Section 1115 demonstration waiver submitted to the Center on Medicare and Medicaid Services (CMS) by the Wisconsin Department of Health Services (DHS) that would affect "childless adult" participants in Wisconsin's "BadgerCare" program.¹ As an organization that advocates for policies that promote the optimal health, safety, and economic security of women and girls in Wisconsin, WAWH has serious concerns that DHS's proposed waiver will undermine the health and wellbeing of those who rely on BadgerCare for health insurance.

WAWH took the opportunity to submit comments to DHS in May in opposition to these proposed changes to BadgerCare that will likely lead to significant hardship for low-income and vulnerable Wisconsinites who rely on BadgerCare for health insurance coverage. After reviewing the 1,050 public comments that were submitted to DHS regarding these proposed changes, it appears that only seven commenters were unreservedly in favor of these changes. WAWH sincerely hoped that DHS would significantly alter its waiver request as a result of the overwhelmingly negative feedback it received from health care providers, health care policy experts, religious groups, and members of the general public regarding the adverse impact this proposal would have on access to care and health delivery systems in Wisconsin. Unfortunately, it appears that DHS has done little to address these concerns in its final application waiver.

Just as important as the substantive policy concerns WAWH has regarding the waiver proposal, WAWH believes this proposal runs contrary to the requirements of Section 1115 of the Social Security Act regarding how demonstrative projects must promote the objectives of the federal Medicaid statute.

Finally, WAWH also believes that the Department's proposal to require participants to submit to suspiciousness drug screening and testing in order to qualify for BadgerCare raises serious Constitutional concerns under the Fourth Amendment. The DHS attempt to remedy these concerns in its amended waiver by forgoing testing for those that enter into treatment does not address these Constitutional concerns.

By creating unnecessary and counterproductive administrative hurdles for the low-income adults that rely on BadgerCare for health insurance coverage, these proposed changes will likely reduce the number of Wisconsin residents that are covered by health insurance and generate substantial administrative costs that will fall to Wisconsin taxpayers. While the stated goals of the waiver include providing "access to affordable health insurance" and "improved health care value", the likely outcome of the waiver is contrary to these goals.² Instead, the proposed waiver would adversely affect thousands of childless adults in Wisconsin who rely on BadgerCare for health insurance and who will likely lose their access to health care services if these changes are approved.

Require Monthly Premiums for Majority of Childless Adults Enrolled in BadgerCare

The first stated objective of this waiver is to “[e]nsure that every Wisconsin resident has access to affordable health insurance and reduce the state’s uninsured rate.”³ The proposition that requiring an economically vulnerable population to pay a monthly premium will increase the number of Wisconsin residents with access to affordable health insurance is counterintuitive. Even small premiums will likely lower participation in BadgerCare.⁴ Childless adults with incomes as low as \$513 a month would have to a premium or lose coverage. As recent experience and research in Indiana has demonstrated, premium requirements on this population will reduce enrollment and access to care.⁵ By definition, childless adults on BadgerCare earn wages below the poverty line. The introduction of even small premiums potentially represents both a financial and administrative barrier to those remaining eligible for BadgerCare that will prove insurmountable for many enrollees. While the Department responded to this concern by replacing a four-tiered premium system with a single premium tier of \$8 for participants earning between 51-100% of the federal poverty line, the above-mentioned concerns are still applicable to the enrollees who will be subjected to premium requirements.⁶ The proposed sanctioning of enrollees, with periods of ineligibility for those that fail to pay monthly premiums, will still increase the number of Wisconsin residents that are uninsured.

Another foreseeable result that should be expected from a lower participation in BadgerCare is a higher number of uninsured Wisconsin residents who will rely on emergency room visits instead of preventive or primary care visits that would have been covered by BadgerCare.⁷ This not only increases long-term costs for Wisconsin in the form of more expensive and often uncompensated care, but also leads to worse health outcomes for those in our communities who often most need access to health care.

Finally, these changes will also have a high administrative cost to both state and local governments. These costs will include complicated tasks such as tracking each individual on BadgerCare based on their status in regard to their compliance with applicable premium requirements and disenrolling participants based on their failure to comply.⁸ Additional costs can be anticipated from implementing accessible payment methods for enrollees, as many enrollees may not have credit cards or bank accounts. As a result, the proposed premiums will become not only a financial burden, but also another administrative hurdle that will only serve as a means to reduce the number of people enrolled in Badgercare, many of whom are already struggling to balance the daily demands of their lives while living in poverty.

While the Department has restructured the system to be less complicated, that does not equate to addressing the glaring issue of imposing premiums on those earning under the poverty line. Charging even the proposed \$8 premium will have series implications for Wisconsin and more importantly for those that cannot afford to comply with this cost.

Eligibility Limit of 48-Months

The waiver request also proposes a 48-month limit on eligibility for BadgerCare for some enrollees who are not working or participating in job training. This unprecedented change would eliminate access to health insurance after an arbitrary amount of time and likely take away the health care safety net from those who need it most. A BadgerCare member will not be eligible for any health care benefits for six months if they fail to meet the applicable employment or job training requirements.⁹ While the time limit eligibility

includes exceptions, patients that suffer from chronic conditions and substance abuse disorders could lose coverage

at a time when that coverage is critical to accessing treatment and remaining in the work force. It would be counter-productive to put a hard limit on eligibility and deny access to BadgerCare for a group of people that most likely will have no other option for accessing health insurance coverage in order to receive care for serious health issues.

A time constraint of this type does not support the goals that the Department purports to achieve with the proposed waiver. Enforcing a sanction of ineligibility for six months, in which an enrollee cannot receive health insurance through BadgerCare, ensures that many of the affected low-income adults will have no access to health insurance for that time. This will only serve to undermine health outcomes in Wisconsin and force these former enrollees to rely on emergency hospital visits for access to care.

Required Substance Abuse Screening/Testing

The requirement that childless adults be subjected to suspicion less drug screening, and subsequently submit to drug testing if the screen is positive, will lead to results that are contrary to the stated goals of the waiver. Forcing treatment on individuals has repeatedly been shown to be ineffective.¹⁰ Requiring drug testing would not only decrease the willingness of Wisconsin residents to enroll in BadgerCare, but is a counterproductive approach to the problem of substance abuse disorders (SUD's).¹¹ Wisconsin already has a waiting list of residents that are seeking and need SUD treatment. This requirement will only serve to add residents to the waiting list without providing adequate resources to ensure that those suffering from these SUD's have access to treatment. While DHS apparently tried to improve the waiver request by allowing those without a positive test to still enter treatment, this does not solve the problem of existing waiting lists that will only grow with this change.

WAWH is also under the impression that these proposed drug screening and testing processes are a violation of the Fourth Amendment to the United States Constitution. Requiring Wisconsin residents to submit to universal, suspicion less drug screening is likely a violation of the Constitutional rights of Wisconsin citizens who wish to participate in BadgerCare.¹² The penalty of not submitting to these drug screenings and tests are severe, as those who refuse to submit would be ineligible for likely the only form of health insurance they could feasibly afford. DHS responded to these concerns by removing the six-month restrictive enrollment period, but that is only applicable to those individuals that submit to state-mandated treatment. This is not an improvement that adequately addresses the significant due process concerns submitted to DHS by many commenters.

The proposed screening and testing processes are also vague and unclear.¹³ There are troubling, unanswered questions about the proposed system, such as uncertainty as to how affected BadgerCare enrollees could appeal the results of a positive test. DHS did not adequately address these concerns in their response to comments. Such questions will still need to be answered in order to fully understand the required screening and testing processes, along with whether they pass Constitutional muster. The State argues that a BadgerCare applicant's or participant's answers to DHS' proposed drug use risk questionnaire provides them with adequate "reason" to mandate drug testing of a participant, but this does not pass the Constitutional bar set for a legal search.¹⁴ The legality of this testing regime is highly questionable.

The enforcement of this drug policy would also be an inefficient solution to addressing SUD's due to the high administrative cost that it would require in comparison to the benefits that would accrue if the policy were implemented. The waiver does not specify how much the testing will cost, who will pay for the testing, or

how the testing will be administered. All of these costly screening and testing processes will only lead to putting Wisconsin residents on a waiting list for treatment. A better allocation of resources would be to simply fund the existing treatment programs, for which there is already significant demand and inadequate supply.

Referral to Treatment Program

Under the proposed changes, a positive drug test would result in referral to a SUD treatment program. It is important to note that SUD treatment experts believe that a positive drug test alone is not sufficient basis on which to diagnose a SUD that would require such a referral to a treatment program.¹⁵ In addition, refusal to participate in an SUD treatment program would result in a six-month ineligibility period unless the participant is willing to comply with state-mandated treatment. Much like the sanction for failure to pay premiums or the job training/work requirements, this approach is completely counterproductive. Wisconsin residents who struggle with substance abuse and participate consistently in the work force are a group that acutely relies on the benefits associated with having access to the safety net of BadgerCare coverage. It is hard to reconcile the Department's stated objective of ensuring that a sustainable "health care safety net is available to those who need it most" with enforcing an ineligibility sanction that would completely remove that safety net for six months to this vulnerable population.¹⁶

Emergency Room Copayments

The State is also attempting to implement an \$8 co-payment charge for emergency department visits for all affected participants. The Department's rationale for this policy is to provide incentive for low-income, childless adults to be "mindful of health care value" and "promote appropriate use of health care services".¹⁷ This rationale is not only based on an unfair stereotype that low-income people are somehow less aware of "health care value" than the rest of the population and need to be taught how to appropriately utilize health insurance, but also introduces a significantly higher co-payment for such care than is traditionally allowed under Medicaid. This proposal is completely counterproductive for those earning under the poverty line who are often forced to choose between seeking urgent and necessary medical care and being able to buy food or pay rent.

Health Risk Assessment

The proposed waiver includes a health risk assessment (HRA), which is a questionnaire that is supposed to identify behavior that is associated with increased health risks. Until the HRA is completed, members will pay the full standard premium for their coverage they earn between 51-100% of the federal poverty line. Sanctions like those proposed elsewhere in the waiver have been tried in other states with unsuccessful results and have high enforcement costs.¹⁸ Withholding premium reductions for incompleteness of HRA's will simply lead to lower enrollment by adding unnecessary administrative costs and hurdles to the BadgerCare program that do nothing to promote the purposes of Medicaid.¹⁹ These same assessments have also not yielded positive long-term results in the private sector.²⁰

DHS made one of their “largest changes” regarding the HRA provision. They will now use this HRA to replace health needs assessments. This avoids duplicate assessments and eliminates some confusion, but these changes do little to address the concerns voiced by many commenters regarding HRA’s.

Legal Requirement Guidelines for Section 1115 Waivers

Section 1115 of the Social Security Act allows for waivers to Medicaid under certain conditions and for certain provisions of Medicaid. Under 42 U.S.C. § 1396a, the waiver must be an “experimental, demonstration, or pilot” project that will likely promote the goals of the Medicaid Act.²¹ The waiver can also only last a specific amount of time. Failure to comply with these guidelines can result in judicial intervention and the loss of federal funds.²² The waiver must provide some type of healthcare innovation, and cannot only be implemented for cost cutting purposes.²³ Based on the overwhelming evidence from similar initiatives in other states, the most likely result of this waiver request will be a reduction of enrollment in BadgerCare with no commensurate expansion of eligibility or improvement in Medicaid services through unique policy or health care delivery innovations.

The federal statutes and relevant case law clearly state that Section 1115 is not intended “to enable states to save money or to evade federal requirements but to test out new ideas and ways of dealing with the problems of public welfare recipients ... A simple benefits cut, which might save money, but has no research or experimental goal, would not satisfy this requirement.”²⁴ Based on the evidentiary record that was submitted to DHS during the state comment period, it is clear that the proposed waiver request fails this test.

Women of Childbearing Age without Children

WAWH also has concerns about the impact that the proposed waiver would have on women of childbearing age who do not have children. Women already live in poverty in higher rates than men, and are less likely to have employer-provided health insurance plans that are registered under their own name.²⁵ Limiting access to healthcare for women of childbearing age will also adversely affect overall state Medicaid spending. The average first-year medical costs of a preterm infant is ten times greater than the average costs for a full-term infant. Improving the health of childbearing age women would reduce preterm infants and save millions of Medicaid dollars.²⁶

Women that are of childbearing age rely on health insurance in order to prevent unintended pregnancies and maintain access to adequate preconception care in the event that a pregnancy occurs. The lack of preconception care not only affects maternal health outcomes, but also birth outcomes. The greatest opportunities to improve health in children and mothers occur before the mother becomes pregnant.²⁷ The proposed waiver would limit the ability for low-income Wisconsin women to have access to healthcare in these situations.²⁸

Conclusion

The proposed Section 1115 waiver that would affect childless adults participating in the BadgerCare program seeks to introduce numerous policies that would raise administrative costs for taxpayers, reduce the insured rate, and lead to worse health outcomes in Wisconsin. While the stated goals of the waiver

claim that the waiver intends to create more overall access to affordable health insurance, the design of project tells another story.

In addition to these substantive policy concerns, WAWH is of the opinion that this application raises serious Constitutional concerns and runs afoul of federal law that governs Section 1115 waivers. The proposal

would reduce access to BadgerCare and create unnecessary hurdles to participation for current enrollees. BadgerCare is critical to the health of hundreds-of-thousands of Wisconsin citizens, and needlessly restricting access to the program would lead to worse health outcomes in our state and increase overall health care costs in the state in the form of uncompensated emergency care.

As a result of the many concerns articulated above regarding this waiver proposal, we respectfully request that CMS reject DHS's proposal.

Thank you for the opportunity to comment on these important issues.

Sincerely,



Sara Finger
Executive Director
Wisconsin Alliance for Women's Health

¹ See, Medicaid, "1115 Transparency Requirements," accessed at <https://www.medicaid.gov/medicaid/section-1115-demo/transparency/index.html>.

² See, Wisconsin Department of Health Services, "BadgerCare Reform Demonstration Project Waiver Amendment," (April 25, 2017) accessed at <https://www.dhs.wisconsin.gov/badgercareplus/waivers-cla.htm>.

³ See, Wisconsin Department of Health Services, "BadgerCare Reform Demonstration Project Waiver Amendment," (April 25, 2017) accessed at <https://www.dhs.wisconsin.gov/badgercareplus/waivers-cla.htm>.

⁴ See, The Wisconsin Council on Children and Families, "DHS Proposes New Impediments to BadgerCare Participation," (April 19, 2017) accessed at <http://www.wccf.org/dhs-proposes-new-impediments-badgercare-participation/>.

⁵ See, MaryBeth Musumeci, Robin Rudowitz, Petry Ubri, and Elizabeth Hinton, An Early Look at Medicaid Expansion Waiver Implementation in Michigan and Indiana, Kaiser Family Foundation, January 2017, <http://files.kff.org/attachment/Issue-Brief-An-Early-Look-at-Medicaid-Expansion-Waiver-Implementation-in-Michigan-and-Indiana>. Lower-income recipients could opt to pay a premium in order to receive an enhanced package of benefits

⁶ See, State of Wisconsin Department of Health Services, "Coverage of adults Without Dependent Children with Income at or Below 100 percent of Federal Poverty Level," (June 7, 2017) accessed at <https://www.dhs.wisconsin.gov/badgercareplus/clawaiver-finalapp.pdf>.

⁷ See, The Wisconsin Council on Children and Families, "DHS Proposes New Impediments to BadgerCare Participation," (April 19, 2017) accessed at <http://www.wccf.org/dhs-proposes-new-impediments-badgercare-participation/>.

⁸ See, National Women's Law Center, "The Stealth Attack on Women's Health: Medicaid Work Requirements Would Reduce Access to Care for Women Without Increasing Employment," (April 18, 2017) accessed at <https://nwlc.org/resources/the-stealth-attack-on-womens-health-medicaid-work-requirements-would-reduce-access-to-care-for-women-without-increasing-employment/>.

⁹ See, State of Wisconsin Department of Health Services, "Request to Amend Wisconsin's Section 1115 BadgerCare Reform Demonstration Project", accessed at <https://www.dhs.wisconsin.gov/badgercareplus/clawaiver-finalapp.pdf>

- ¹⁰ See, New York Times, “Attract Patients to Addiction Treatment, Don’t Force Them into it,” (May 4, 2016) accessed at <https://www.nytimes.com/roomfordebate/2015/11/11/should-drug-addicts-be-forced-into-treatment/attract-patients-to-addiction-treatment-dont-force-them-into-it?mcubz=2>
- ¹¹ See, The Wisconsin Council on Children and Families, “The Costs of Governor Walker’s Proposed Medicaid Changes.” (April 2017) accessed at <http://www.wccf.org/assets/Costs-of-Governor-Walkers-Medicaid-Proposal.pdf>.
- ¹² See, The Wisconsin Council on Children and Families, “DHS Proposes New Impediments to BadgerCare Participation,” (April 19, 2017) accessed at <http://www.wccf.org/dhs-proposes-new-impediments-badgercare-participation/>.
- ¹³ See, Wisconsin Department of Health Services, “BadgerCare Reform Demonstration Project Waiver Amendment,” (April 25, 2017) accessed at <https://www.dhs.wisconsin.gov/badgercareplus/waivers-cla.htm>.
- ¹⁴ See, An additional question arises as to the accuracy of tests or screens: Corporations and agencies that produce screening tools themselves admit no screening measure is 100% accurate, nor does it include clinical diagnosis standards. <https://www.sassi.com/customer-support/clinical-support/screening-issues/>
- ¹⁵ See, State of Wisconsin Department of Health Services, “Request to Amend Wisconsin’s Section 1115 BadgerCare Reform Demonstration Project” 5, accessed at <https://www.dhs.wisconsin.gov/badgercareplus/clawaiver-finalapp.pdf>
- ¹⁶ See, Wisconsin Department of Health Services, “BadgerCare Reform Demonstration Project Waiver Amendment,” (April 25, 2017) accessed at <https://www.dhs.wisconsin.gov/badgercareplus/waivers-cla.htm>.
- ¹⁷ See, State of Wisconsin Department of Health Services, “Request to Amend Wisconsin’s Section 1115 BadgerCare Reform Demonstration Project”, accessed at <https://www.dhs.wisconsin.gov/badgercareplus/clawaiver-finalapp.pdf>
- ¹⁸ See, Medicaid and CHIP Payment and Access Commission, “The Use of Healthy behavior Incentives in Medicaid,” (August 2016) accessed at <https://www.macpac.gov/wp-content/uploads/2016/08/The-Use-of-Healthy-Behavior-Incentives-in-Medicaid.pdf>
- ¹⁹ See, Wisconsin Department of Health Services, “Do Incentives Work for Medicaid Members?,” (May, 2013) accessed at <https://www.dhs.wisconsin.gov/publications/p0/p00499.pdf>.
- ²⁰ See, Medicaid and CHIP Payment and Access Commission, “The Use of Healthy behavior Incentives in Medicaid,” (August 2016) accessed at <https://www.macpac.gov/wp-content/uploads/2016/08/The-Use-of-Healthy-Behavior-Incentives-in-Medicaid.pdf>
- ²¹ See, 42 U.S.C. § 1315(a) (codification of section 1115).
- ²² See, National Health Law Program, “Background to Medicaid and Section 1115 of the Social Security Act,” (April 3, 2017) accessed at <http://www.healthlaw.org/publications/browse-all-publications/background-to-medicaid-section-1115-social-security-act#.WRkwdGgrLIU>
- ²³ See, *Beno v. Shalala*, 30 F.3d 1057, 1069 (9th Cir. 1994).
- ²⁴ See, *Id.*
- ²⁵ See, Raising Women’s Voices, “Medicaid Expansion Waivers and Women’s Health,” (March 2016) accessed at <http://www.raisingwomensvoices.net/rwvoices/2016/4/7/what-do-medicaid-expansion-waivers-mean-for-womens-health.html>.
- ²⁶ See, Health Affairs Blog, “Medicaid Expansion: Benefits for Women of Childbearing Age and Their Children,” (February 22, 2013) accessed at <http://healthaffairs.org/blog/2013/02/22/medicaid-expansion-benefits-for-women-of-childbearing-age-and-their-children>.
- ²⁷ See, Health Affairs Blog, “Medicaid Expansion: Benefits for Women of Childbearing Age and Their Children,” (February 22, 2013) accessed at <http://healthaffairs.org/blog/2013/02/22/medicaid-expansion-benefits-for-women-of-childbearing-age-and-their-children>.
- ²⁸ See, 3 Eichner A, Gallagher Robbins K, "National Snapshot: Poverty Among Women & Families, 2014," National Women's Law Center, September 2015, <http://nwlc.org/wp-content/uploads/2015/08/povertysnapshot2014.pdf>.