NATIONAL WOMEN'S LAW CENTER
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Administrator Seema Verma
Department of Health and Human Services
Centers for Medicare and Medicaid Services
200 Independence Avenue, SW
Washington, DC 20201

November 26, 2019

Re: National Women's Law Center Comments on Idaho's § 1115 Demonstration Application

Dear Administrator Verma:

The National Women's Law Center (the Law Center) is writing to comment on the Idaho §1115 demonstration application related to family planning referrals. Since 1972, the Law Center has worked to protect and advance the progress of women and their families in core aspects of their lives, including employment, income security, education, and health and reproductive rights, with an emphasis on the needs of low-income women and those who face multiple and intersecting forms of discrimination.

The Department of Health and Human Services must reject the Idaho demonstration application which would require Medicaid beneficiaries to get a referral from a primary care provider to a family planning provider in order to obtain coverage of services from that family planning provider. The proposal does not comply with the requirements of § 1115 of the Social Security Act, would be harmful to people who need Medicaid coverage to obtain family planning services, and offers no legitimate experimental purpose. It would be especially harmful to women in Idaho who are more likely to rely on Medicaid for health coverage that enables them to stay healthy, care for their families, and retain economic security.

I. HHS Authority and § 1115.

As the Department is aware, the purpose of Medicaid is to enable states to furnish medical assistance to individuals who are unable to meet the costs of necessary medical care and to furnish such assistance and services to help these individuals attain or retain the capacity for independence and self-care.[1] Although § 1115 of the Social Security Act allows states to apply for waivers of Medicaid's statutory requirements, such waivers must:

- propose an "experiment[], pilot or demonstration;"
- waive compliance only with requirements in 42 U.S.C. § 1396a;
- be likely to promote the objectives of the Medicaid Act; and

[1] 42 U.S.C. § 1396a-1.

- be approved only "to the extent and for the period necessary" to carry out the experiment.[2]

As explained in further detail below, the Department cannot approve Idaho's proposal related to family planning because it is inconsistent with the provisions of § 1115.

II. The Proposal Would Restrict Access to Family Planning in Violation of the Medicaid Statute.

A. Requiring a Referral for Family Planning Care Is Contrary to the Purposes of Medicaid.

The referral requirement Idaho proposes is not likely to promote the program's objectives. In fact it will do the opposite. At its core, Medicaid exists to provide health coverage to low-income people who cannot otherwise afford it.[3] Specifically, access to family planning services through Medicaid helps women to determine if, and when, they become pregnant, and achieve other goals such as finding and holding steady employment.[4] By preventing Idaho residents from accessing Medicaid coverage of family planning or delaying access to that coverage, the referral requirement will undermine their ability to achieve their family planning goals, maintain their health and jobs, and improve their economic circumstances. The majority of adult Medicaid beneficiaries are women and in their sexual relationships they bear most of the burden of preventing pregnancy.[5] As a result, Idaho's proposed Medicaid waiver would disproportionately impact low-income women's access to family planning.

B. Requiring a Referral for Family Planning Creates a Cost Barrier Not Allowed under the Medicaid Statute.

The Law Center is deeply concerned that the proposed waiver would require Medicaid enrollees to pay out-of-pockets costs in order to access family planning care, in violation of the Medicaid statute. Federal law recognizes the need to provide unimpeded access to family planning care, requiring states to cover family planning services and supplies[6] and stipulating that family planning services and supplies must be free from cost-sharing requirements.[7] Although Idaho insists in its waiver proposal that it "will not impose any new cost-sharing on beneficiaries

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[2] 42 U.S.C. § 1315(a).
[3] 42 U.S.C. §1396 et seq.
[4] Adam Sonfield, *What women already know: documenting the social and economic benefits of family planning* 16 GUTTMACHER POLICY REVIEW 8 (2013), https://www.guttmacher.org/gpr/2013/03/what-women-already-know-documenting-social-and-economic-benefits-family-planning.
[5] In Idaho, Medicaid is an essential source of health coverage for women; in 2015, there were 52,980 women ages 18-64 covered by Medicaid. Nat'l Women's L. Ctr, *Affordable Care Act Repeal and Changes to Medicaid Threaten the Health and Economic Security of 3.9 Million Women Who Recently Gained Medicaid Coverage* (Feb. 2017), *available at* https://nwlc.org/wp-content/uploads/2017/02/Medicaid-Coverage-by-State-2.pdf. Medicaid is an essential source of health coverage for women of reproductive age, covering 21% of U.S. women ages 15–44 in 2017 and 15% in Idaho. Guttmacher Inst., Gains in Insurance Coverage for Reproductive-Age Women at a Crossroads (Dec. 2018) *available at* https://www.guttmacher.org/article/2018/12/gains-insurance-coverage-reproductive-age-women-crossroads. Medicaid is particularly important for women struggling to make ends meet, covering 50% of U.S. reproductive-age women with incomes below the federal poverty line. Medicaid accounts for 75% of all public dollars spent on family planning in the United States. Hasstedt K, Sonfield A and Gold RB, Public Funding for Family Planning and Abortion Services, FY 1980–2015, New York: Guttmacher Institute, 2017, *available at* https://www.guttmacher.org/report/public-funding-family-planning-abortion-services-fy-1980-2015.
[6] 42 U.S.C. §§ 1396a(a)(10)(A), 1396d(a)(4)(C).
[7] *Id*. §§ 1396o(a)(2)(D), 1396o(b)(2)(D), 1396o-1(b)(3)(B)(vii); 42 C.F.R. § 447.53(b)(5).

seeking family planning services,"[8] this is simply untrue. The system created by the referral requirement puts a cost barrier – the $3.65 copayment for a primary care visit – between an enrollee and their family planning. This may not be cost sharing for family planning *in name*, in that the $3.65 does not offset a portion of the cost of the family planning service itself, but it is cost sharing in effect.[9] And it violates the Medicaid statute. To impose such a charge, Idaho would need to request a waiver under § 1396o(f) of the Medicaid statute, which it has not done and which would not be approvable.[10]

Furthermore, there is evidence that the primary care provider copayment for family planning referral would be a significant barrier to obtaining care for Idaho Medicaid recipients. Even relatively small amounts of cost-sharing ($1-$5) are associated with reduced use of care, including necessary services.[11] And cost-sharing can decrease medication adherence among people with low incomes and deter people from seeking care altogether. [12] As a result of the primary care provider copayment for referral, Medicaid enrollees would likely experience the very barriers to care the Medicaid statute seeks to prevent through its protections on family planning. The copayment, and even the referral itself, would prevent people from seeking out care, leading them to rely on more limited and less effective over-the-counter contraceptive options or on subsidized care from safety-net providers that have very limited grant funding, or to go without contraception and family planning services altogether.

C. The Proposal Runs Counter to the Principles of Freedom of Choice and Direct Access.

Federal law has long recognized the importance of timely access to family planning services and supplies. The Medicaid statute requires states to allow Medicaid beneficiaries to receive family planning services from any qualified Medicaid provider, even if that provider is outside of their Medicaid managed care network; this principle is referred to as "freedom of choice."[13] Another key protection under Medicaid is the requirement that managed care organizations provide enrollees with direct access to a women's health specialist.[14] Idaho's proposed waiver would run directly counter to these principles, imposing a gatekeeper to family planning care.

Section 1396a(a)(23) ensures that Medicaid patients can receive medical services "from any institution, agency, community pharmacy, or person, qualified to perform the service or services . . . who undertakes to provide . . . such services."[15] The statute includes a general exception for patients enrolled in certain Medicaid managed care plans. However, recognizing the value of

[8] Idaho Department of Health and Welfare, Division of Medicaid, "Idaho Family Planning Referrals, Section 1115 Medicaid Waiver Demonstration Project Application," October 18, 2019, page 18.
[9] The cost sharing also violates the Affordable Care Act's preventive services requirement as to beneficiaries eligible for coverage through the Medicaid expansion. The preventive services, including coverage of birth control without cost sharing, are part of the Essential Health Benefits which Medicaid expansion must cover. 45 C.F.R. § 156.115(4) (2019). The $3.65 copayment would violate the requirement for Medicaid expansion enrollees to have birth control coverage without cost sharing.
[10] The proposed project does not, and cannot, meet the conditions set forth in 42 U.S.C. § 1396o(f).
[11] *See* Samantha Artiga, Petry Ubri, and Julia Zur, *The Effects of Premiums and Cost Sharing on Low-Income Populations: Updated Review of Research Findings* ((Washington, DC: Kaiser Family Foundation, June 2017), *available at* https://www.kff.org/medicaid/issue-brief/the-effects-of-premiums-and-cost-sharing-on-low-income-populations-updated-review-of-research-findings/.
[12] Powell, V., Saloner, B., & Sabik, L. M. (2016). Cost Sharing in Medicaid: Assumptions, Evidence, and Future Directions. *Medical care research and review : MCRR, 73*(4), 383–409. doi:10.1177/1077558715617381
[13] 42 U.S.C. § 1396a(a)(23); 42 U.S.C. § 1396n(b).
[14] 42 C.F.R. § 438.206(b)(2).
[15] 42 U.S.C. § 1396a(a)(23).

family planning services and supplies and the importance of specialized, trusted providers and patient choice in receiving family planning services, Congress explicitly protected the right of managed care enrollees to receive family planning services from any qualified Medicaid provider, even if the provider is outside of their plan's provider network.[16] The "freedom of choice" of provider provision is vital for ensuring access to trusted community providers.[17] Indeed, CMS has previously noted that a waiver seeking to circumvent Medicaid's freedom of choice protections for family planning cannot be approved.[18] Idaho's proposed waiver of freedom of choice, requiring Medicaid participants to obtain a referral from their primary care provider prior to obtaining coverage of family planning services from any other provider, would at minimum delay, if not effectively eliminate, the ability of some Medicaid beneficiaries' to receive family planning services.

Idaho's proposed waiver of freedom of choice is, in fact, a thinly veiled attempt to exclude health care providers who include abortion among the services they offer from their state Medicaid programs. The state proposed this waiver as a result of the enactment S.B. 1204. Several members of the state legislature made clear during debate of the bill that its intent was to prevent Medicaid enrollees from accessing services at Planned Parenthood.[19] The bill also received public support from several opponents of Planned Parenthood,[20] and the waiver has received similar support from anti-abortion activists as it moved through the public comment period.[21] Taken together, these statements make clear this legislation and waiver is not only intended to have the effect of preventing Planned Parenthood from participating in the Idaho Medicaid program, but also is presumed that it will have that effect.

Additionally, the proposal undermines the important principle that Medicaid beneficiaries have direct access to a women's health provider. The state justifies its proposal to require involvement by primary care providers in Medicaid enrollees' access to family planning services by saying it would increase interactions between enrollees and primary care providers and give primary care providers "increased visibility into the whole-person care." There is ample evidence showing that prohibiting low-income women from receiving family planning services from the qualified

[16] 42 U.S.C. §§ 1396a(a)(23)(B), 1396n(b).
[17] 42 U.S.C. § 1396a(a)(23) (2016).
[18] In denying a 2011 waiver request from Texas, CMS rightly further stated, "In light of the specific Congressional interest in assuring free choice of family planning providers, and the absence of any Medicaid purpose for the proposed restrictions, we have concluded, after consultation with the Secretary, that nonapplication of this provision to the Demonstration is not likely to assist in promoting the statutory purposes. Letter from Cindy Mann, Dir., Ctr. for Medicaid & CHIP Servs., Ctrs. for Medicare & Medicaid Servs., to Billy Millwee, Deputy Exec. Comm'r, Tex. Health & Human Servs. Comm'n (Dec. 12, 2011).
[19] In a House Committee hearing, Rep. Ilana Rubel (D-18) questioned one of the sponsors of the bill, "This legislation...aims to force them away from using Planned Parenthood…If the goal is to allow people to stay with their preferred providers…[why is] this portion that forces people away from Planned Parenthood when that is their preferred provider?" H. 277, Idaho Health & Welfare Committee Audio (Mar. 21, 2019), available at https://legislature.idaho.gov/sessioninfo/2019/standingcommittees/HHEA/. In a Senate Committee hearing Sen. Maryanne Jordan (D-17) reiterated that lawmakers had been "getting a huge number of phone calls and emails saying that people want us to support this bill [SB 1204] because this language will defund Planned Parenthood." H. 277, Idaho Senate Health & Welfare Committee Audio (Mar. 27, 2019), available at https://legislature.idaho.gov/sessioninfo/2019/standingcommittees/SHW/.
[20] Former Rep. Ron Nate expressed support for the bill, which "diverts money from Planned Parenthood abortion centers and redirects it to true family care centers who favor protecting life rather than murdering innocent babies." Nate, Ron, "Disappointed in Raybould," Post Register (Apr. 3, 2019), available at https://www.postregister.com/opinion/columns/disappointed-in-raybould/article_bb5e4949-fb10-560e-91d0-b7c9b134a41c.html.
[21] David Ripley, director of Idaho Chooses Life, stated that he is "not aware of any other viable strategy for states to sever their...partnership with Planned Parenthood." Fischer, Bryan, "A novel way to defund Planned Parenthood," ONE News Now (Oct. 31, 2019), available at https://onenewsnow.com/perspectives/bryan-fischer/2019/10/31/a-novel-way-to-defund-planned-parenthood.

provider of their choice reduces access to health care and places women's health at risk.[22] The state's proposal plainly ignores this body of evidence that supports direct access to women's health providers.

D. The Proposal Will Entrench Barriers to Care Due to Health Care Refusals and Amplify Their Impact.

Access to family planning providers without a referral is critical to ensuring Medicaid enrollees are not denied care due to providers' or institutions' objections. The proliferation of health care institutions in Idaho that may not provide or refer for family planning services means that many individuals seeking family planning care already face challenges accessing it.[23] The state's proposed waiver will exacerbate that problem because people will not be able to get a referral from many institutions or providers in the state.[24] The options for seeking family planning care or referrals in Idaho are already limited because of this market saturation, and a referral requirement will mean that some Medicaid enrollees may not receive the care they need, either in a timely manner or at all.

The state defends its proposal by pointing out that Medicaid enrollees can switch primary care providers at any time if the primary care provider limits treatment options on moral or religious grounds. While important, this protection is not enough. Medicaid enrollees seeking family planning care should never face a delay or denial of care, particularly for a time-sensitive service like family planning. Moreover, Medicaid enrollees in Idaho likely will have difficulty determining which primary care providers do not provide, and refuse to refer for, family planning care. Low-income women seeking care are less likely than other women to be able to identify that a health care institution is religiously-affiliated or the restrictions on reproductive health care that result from that affiliation.[25] Thus, they are less likely to avoid those institutions altogether and more likely to be refused care, including referrals. Faced with yet another barrier

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[22] *See* Tex. Health & Human Servs. Comm'n, *Final Report of the Former Texas Women's Health Program: Fiscal Year 2015 Savings and Performance* (2017), *available at* https://hhs.texas.gov/reports/2017/03/former-texas-womens-health-program-fiscal-year-2015-savings-performance; Kinsey Hasstedt and Adam Sonfield, *At It Again: Texas Continues to Undercut Access to Reproductive Health*, HEALTH AFFAIRS BLOG, (July 18, 2017) (citing analysis included in Letter from Stacey Pogue, Senior Policy Analyst, Ctr. for Pub. Policy Priorities, to Jami Snyder, Assoc. Comm'r, Medicaid & CHIP Servs., Tex. Health & Human Servs. Comm'n (June 12, 2017), *available at* https://forabettertexas.org/images/CPPP_comments_on_HTW_draft_waiver_application.pdf); Amanda Stevenson et al., *Effect of Removal of Planned Parenthood from the Texas Women's Health Program*, 374 NEJM 853 (2016); C. Junda Woo et al., *Women's Experiences After Planned Parenthood's Exclusion from a Family Planning Program in Texas*, 93 CONTRACEPTION 298 (2016).

[23] Health care providers invoke personal beliefs to deny access to health insurance and an increasingly broad range of health care services, including birth control and sterilization. *See, e.g., Health Care Refusals Harm Patients: The Threat to Reproductive Health Care*, Nat'l Women's Law Ctr. (May 2014), *available at* http://www.nwlc.org/sites/default/files/pdfs/refusals_harm_patients_repro_factsheet_5-30-14.pdf.; *see also Health Care Denied*, Am. Civil Liberties Union (May 2016), *available at* https://www.aclu.org/sites/default/files/field_document/healthcaredenied.pdf.

[24] For example, Catholic-affiliated institutions have already saturated the hospital industry in Idaho. Over a quarter of all hospital beds in Idaho are at Catholic-affiliated institutions. In the Lewiston, ID area, St. Joseph Regional Medical Center is the sole community hospital, but it restricts access to family planning. Lois Uttley and Christine Khaikin, MergerWatch, *Growth of Catholic Hospitals and Health Systems: 2016 Update of the Miscarriage of Medicine Report*, *available at* http://static1.1.sqspcdn.com/static/f/816571/27061007/1465224862580/MW_Update-2016-MiscarrOfMedicine-report.pdf?token=l4u%2BGse9t2XPa0Z5MXTLiHhGNmI%3D. Similar trends have been increasing among private health care practices affiliating with large Catholic health care entities and ceasing to provider family planning services.

[25] Debra B. Stulberg et al, Women's Expectation of Receiving Reproductive Health Care at Catholic and Non-Catholic Hospitals, Perspectives on Sexual and Reproductive Health (Sept. 4, 2019) *available at* https://onlinelibrary.wiley.com/doi/full/10.1363/psrh.12118.

to care, some people will be forced to delay getting a referral and the care they need or be unable to access it at all, leaving them at risk for unintended pregnancies.

Because the proposal runs afoul of both the letter of the Medicaid statute and its broader principles supporting access to family planning, the Department must reject this waiver.

III. No Experiment Is Needed to Determine that Idaho's Proposal Would Negatively Impact Women's Health and Economic Security.

Restricting access to health care providers—as Idaho's waiver proposal does—would be extremely harmful to women's health and economic security. This is especially true given that, among all sources of coverage, Medicaid disproportionately covers the poorest and sickest population of women[26] so any additional obstacles or burdens that would cause them to lose access to care will be especially harmful. In many cases, care provided by family planning safety net providers is the *only* source of health care women use. Six in ten women who obtain health care from a publicly funded family planning center consider it to be their usual source of health care.[27]

Birth control access is directly linked to a dramatic increase both in women's participation in the workforce and families' reliance on women's earnings.[28] Indeed, delaying the birth of one's first child has been widely found to contribute to a family's strengthened economic stability.[29] That is because having a child tends to decrease a woman's earnings in both the short and long term, known as the family gap.[30] More specifically, research on recent generations of women has found that having a child creates both an immediate drop in women's earnings and a long-term decrease in their earnings trajectories.[31] Decreasing access to birth control – which will be a result of Idaho's proposed waiver – will make it more difficult for women to access the health care they need that will help them achieve and maintain economic stability.

At the same time, Medicaid has played a critically important role in advancing women's economic security.[32] It keeps women and their families from medical debt and bankruptcy. Medicaid helps patients address HIV and other STIs, breast and cervical cancer, intimate partner violence, and other reproductive health–related issues. By providing health coverage to women and their families that is not tied to employment, Medicaid allows women to seek positions that may offer higher wages or better opportunities, and it also has improved the economic security of future generations. Medicaid's coverage of birth control allows women to determine whether and when to start a family, expanding their educational and career opportunities.

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[26] Kaiser Family Found., Women's Health Insurance Coverage (Oct. 21, 2016) *available at* http://www.kff.org/womens-health-policy/fact-sheet/womens-health-insurance-coverage-fact-sheet

[27] Jennifer Frost, Guttmacher Inst., U.S. Women's Use of Sexual and Reproductive Health Services: Trends, Sources of Care and Factors Associated with Use, 1995–2010, (May 2013), *available at* https://www.guttmacher.org/sites/default/files/report_pdf/sourcesof-care-2013.pdf.

[28] See, e.g., Adam Sonfield et al., Guttmacher Inst., The Social and Economic Benefits of Women's Ability to Determine Whether and When to Have Children (2013), *available at* http://www.guttmacher.org/pubs/social-economic-benefits.pdf (providing an extensive review of studies that document how controlling family timing and size contribute to educational and economic advancements).

[29] *Id*.

[30] *Id*.

[31] *Id*.

[32] Nat'l Women's L. Ctr., Medicaid Is Vital for Women's Jobs in Every Community (June 2017) *available at* https://nwlc.org/resources/medicaid-is-vital-for-womens-jobs-in-every-community/.

The importance of Medicaid to Idaho women's health and economic security sets a high bar for any proposed waivers or changes to the Medicaid program, and any review of such proposal must take the effect on women into account. As described above, Idaho's proposal to limit Medicaid enrollees' access to family planning providers would inflict devastating harm on women who rely on Medicaid coverage to obtain family planning that is critical to their health and economic well-being. The waiver Idaho seeks is explicitly prohibited by the Medicaid statute and the Department must reject it.

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Because Idaho's proposal is in conflict with the Medicaid statute and will do real harm to Idaho women who are already struggling to make ends meet, the Department must reject this demonstration application. If you require additional information about the issues raised in this letter, please contact Mara Gandal-Powers at mgandal-powers@nwlc.org.

Sincerely,

Mara K. Gandal-Powers
Director of Birth Control Access & Senior Counsel
National Women's Law Center