

MEMORANDUM

To: Greg Moody, Executive Director, OHT
Barbara Sears, Medicaid Director, ODM

From: Jim Tassie, Esq., Assistant Director, ODM
Jenelle Hoseus, Chief of Staff, ODM

Re: Medicaid Expansion Freeze

Date: June 24, 2017 (updated)

You asked us to review whether an enrollment freeze on the expansion population, as included in the current version of House Bill 49, would present any legal challenges or have other negative effects upon the Medicaid program and Ohioans. For the reasons that follow, we have concluded that a freeze would face a legal challenge in addition to detrimentally affecting several hundred thousand Ohioans.

An enrollment freeze would likely be met with a legal challenge. As you know, Medicaid is a joint program between the State and federal government. That relationship is governed by our Medicaid State Plan, which, along with the Social Security Act, places several restrictions upon our ability to arbitrarily cut off Medicaid enrollment to members of a defined eligibility group. Coverage of the expansion group (Group VIII), while considered “optional” following the U.S. Supreme Court’s ACA decision, is still subject to the State Plan requirement in section 1902(a)(10)(B) that:

...the medical assistance made available to any individual described in subparagraph (A) [which includes Group 8 enrollees]—

(i) shall not be less in amount, duration, or scope than the medical assistance made available to any other such individual, and

(ii) shall not be less in amount, duration, or scope than the medical assistance made available to individuals not described in subparagraph (A)[.]

Additionally, 42 C.F.R. 435.401(b) requires that Ohio Medicaid, when defining optional eligibility groups, must do so upon “reasonable classifications that do not result in arbitrary or inequitable treatment of individuals and groups and that are consistent with the objectives [of the Medicaid program]. Significantly, the penalty for violating the Medicaid state plan and/or other regulations can be the entire loss of federal medical assistance percentage (FMAP) for Ohio Medicaid, should the United States Department of Health and Human Services determine the violation has occurred. See 42 C.F.R. 430.35.

An eligibility freeze based upon a date certain would contravene both of these requirements. Two similarly situated people could be treated entirely differently depending upon whether they first become eligible on June 30, 2018, or July 1, 2018. Consider two people, both at 130% of the FPL, who come to the Medicaid program, one on June 30 and the other on July 1. The second person would receive no benefits (ergo, the medical assistance provided to him or her would be “less in amount, duration, or scope”), based solely upon the page in the calendar. This “classification” would be arbitrary and inequitable, and could be influenced by many factors outside the individual’s control. Additionally,

the date classification would permit eligibility for individuals with a higher income level (up to 138% of the federal poverty limit) to remain on the program as of July 1, 2018 as long as that person was on the day before, but an individual walking through the door on July 1, 2018 would only be eligible up to a significantly lower income threshold (e.g., 100% FPL).

Setting aside the clear disregard for Medicaid requirements, the arbitrary threshold could well subject the Ohio Medicaid program to protracted litigation under either or both the Equal Protection Clause or the Americans with Disabilities Act. These provisions further protect individuals against the same sort of disparate or inequitable treatment set forth in the example above. While the likelihood of success for a plaintiff group under these theories is uncertain, and perhaps even untested,¹ that uncertainty would not dissuade Disability Rights Ohio or any of the local Legal Aid offices in Ohio from filing suit to challenge the freeze.

The examples of enrollment freezes described in Representative Goodman’s June 23, 2017 memo do not apply in the case of a state covering additional lives in their Medicaid entitlement program. The memo describes two types of enrollment freezes related to (1) Children’s Health Insurance Program (CHIP) expansions (in Alabama, Arizona, Colorado, Florida, Maine, Maryland, Montana, North Carolina, and Utah) or (2) waivers that allowed an adult expansion (in Arizona and Maine). Both CHIP and waivers can have enrollment limits or caps *because federal matching funds in these programs are capped*. This is in contrast to a Medicaid entitlement program in which *federal matching funds are not capped* and, as such, states are not allowed to impose enrollment limits or caps in a Medicaid entitlement program, as described above.

It is particularly ironic that the Arizona and Maine waiver expansions would be invoked as a reason to freeze enrollment in Ohio’s Medicaid state plan expansion. In both cases, these states chose to expand access to Medicaid coverage for childless adults through an 1115 waiver because covering these citizens was not yet an option under the Medicaid state plan. These programs achieved a Medicaid expansion at the state’s request – using waiver authority instead of state plan authority – prior to the enactment of the Affordable Care Act, which made adult expansions an option under the Medicaid state plan. The Arizona experience is typically cited as a case *for* expansion not against, because the political backlash against the freeze is what drove Arizona to become the first Republican state to expand Medicaid.

The freeze on enrollment would hurt hundreds of thousands of Ohioans. As we have publically explained as recently as this afternoon, an enrollment freeze would have several detrimental effects:

- **The freeze will result in significant coverage losses.** When Arizona implemented a similar freeze in 2011, 70 percent of the people who were enrolled when the freeze took effect were not on the program 18 months later. If a similar result occurs here, then **more than 500,000 Ohioans could lose coverage.**

¹ It has been suggested that other states have imposed eligibility freezes in the past and that no litigation has ensued. While we haven’t had the opportunity to fully explore the circumstances of those other examples, it is of little legal significance or value that just because “others have gotten away with it,” Ohio would too.

- **The freeze could lock enrollees in poverty.** The threat of losing health care coverage if the expansion is frozen will create a disincentive to find new employment for the currently enrolled population because, if their income increases above 138 percent of poverty, they will lose expansion coverage. **“Grandfathered” enrollees may choose not to accept a better job or work additional hours** if they fear they could lose coverage, especially for the 27 percent in this group who have a chronic medical condition.
- **The freeze would forfeit significant resources to fight opioid abuse.** Ohio spent nearly \$1 billion to combat opioid abuse and other drug addictions in 2016. Of that amount, an estimated \$650 million was paid for by Medicaid drug addiction and behavioral health services, including **\$279 million that was made available through the expansion.** As of April 2017, more than 580,000 Ohioans with behavioral health needs have been able to access services through expanded Medicaid coverage. Through Group VIII coverage, over 75% of the population reported easier access to opioid treatment and care.
- **The freeze would significantly negatively impact the state economy.** Notwithstanding the obvious impacts healthcare industry and forgone taxes gained from the additional lives, the impact to the State’s economy would be significant and tremendously detrimental, as Behavioral health providers, rural hospitals, and many of the smaller group health providers would be seriously impacted by this loss of covered lives.

In conclusion, the risks upon the State of Ohio (including litigation and loss of funding), and more importantly, the harm that will befall hundreds of thousands of our most vulnerable citizens, weigh strongly against an enrollment freeze on July 1, 2019.