



March 12, 2021

Ms. Elizabeth Richter, Acting Administrator  
Centers for Medicare & Medicaid Services

Ms. Judith Cash, Acting Deputy Director  
Center for Medicaid & CHIP Services

Dear Acting Administrator Richter and Acting Deputy Director Cash,

The State of Georgia is responding to letters sent by the Centers for Medicare & Medicaid Services (CMS) on February 12, 2021 regarding the approved 1115 demonstration waiver, Georgia Pathways to Coverage (Georgia Pathways). In its letter CMS stated it is “commencing a process of determining whether to withdraw the authorities approved in the Pathways to Coverage demonstration that permit the state to require work and other community engagement activities as a condition of Medicaid eligibility,” and that CMS has “preliminarily determined” that those provisions of Georgia Pathways would not advance the objectives of the Medicaid program.

The State respectfully disagrees with that preliminary determination. CMS is improperly equating Georgia’s waiver with Medicaid community engagement waivers that CMS has approved in other states as Georgia’s waiver takes a fundamentally different approach. Georgia Pathways advances the statutory purposes of the Medicaid program by 1) promoting increased coverage for Georgians who are currently ineligible for Medicaid and 2) providing “rehabilitation and other services to help such families and individuals attain or retain capability for independence or self-care.” The qualifying hours and activities do not apply to individuals who are otherwise eligible for Medicaid. Rather the qualifying hours and activities are merely a pathway to Medicaid coverage for those who are otherwise ineligible for Medicaid.

Contrary to CMS’s suggestion, the COVID-19 pandemic provides no basis to excise the qualifying hours and activities from the Georgia Pathways program. Georgia Pathways provides a wide range of qualifying activities in which individuals can engage. Moreover, there is also a temporary “good cause” exception if, after enrolling in Medicaid through Georgia Pathways, an individual or immediate family member experiences a hospitalization or serious illness or needs to quarantine due to COVID exposure. If anything, the COVID-19 crisis makes the qualifying hours and activities — which include work, job training, education, or volunteering—more important, not less. CMS must allow this program to begin as planned and authorized.



### **A. The Georgia Pathways program voluntarily grants Medicaid eligibility to individuals who would not otherwise be covered.**

Georgia has not fully expanded its Medicaid program and is statutorily barred from doing so under current state law. *See* O.C.G.A. § 49-4-142.1 et seq. In 2012, the U.S. Supreme Court ruled that states had the option of fully expanding Medicaid, but could not be mandated to do so under the Patient Protection and Affordable Care Act (PPACA). The PPACA’s Medicaid expansion was an attempt to “enlist[] States in a new health care program.” *NFIB v. Sebelius*, 567 U.S. 519, 584 (2012) (Roberts, C.J., joined by Breyer & Kagan, JJ.). While “[t]he original program was designed to cover medical services for four particular categories of the needy: the disabled, the blind, the elderly, and needy families with dependent children,” the PPACA “transformed” Medicaid “into a program to meet the health care needs of the entire nonelderly population with income below 133 percent of the poverty level.” *Id.* at 583. As a result, the expansion meant Medicaid “is no longer a program to care for the neediest among us, but rather an element of a comprehensive national plan to provide universal health insurance coverage.” *Id.*

As a result of the Supreme Court’s ruling, “States may now choose to reject the expansion.” *Id.* at 587. States may do so for any reason, including “because they are unsure they will be able to afford their share of the new funding obligations, or because they are unwilling to commit the administrative resources necessary to support the expansion.” *Id.*; *see also* CMS, HHS, Frequently Asked Questions on Exchanges, Market Reforms, and Medicaid 11 (Dec. 10, 2012) (explaining that “states have the flexibility to start or stop the expansion.”), <https://go.usa.gov/xmN4j>.

Georgia is one of twelve states that has chosen not to fully expand Medicaid under the ACA. In 2019, however, Georgia decided to pursue a Section 1115 waiver. Georgia began the process by researching other states’ experiences with expansion, conducting environmental scans of Georgia’s population, and analyzing potential options. Georgia officials held meetings with CMS officials in late 2019 to work collaboratively develop the waiver and incorporate a qualifying hours and activities requirement for newly eligible recipients.

Those meetings continued regularly—and often weekly—well into 2020, and CMS made several recommendations to improve Georgia’s plan. For example, CMS asked Georgia to modify its proposal to ensure that there would be coverage for new recipients affected by COVID-19. Georgia responded by agreeing to special terms and conditions (STCs) that excused compliance with the qualifying hours and community activities requirement through a “good cause exception” when a “beneficiary is quarantining in response to having COVID-19 symptoms, a COVID-19 diagnosis, or exposure to COVID-19, or because of a closure of the place(s) where the beneficiary was meeting the hours requirement related to COVID-19 and as a result, is unable to fulfill the hours and activities requirement.” STC ¶36(h). Georgia and CMS also agreed that the State would provide “reasonable accommodations to individuals with disabilities protected by the ADA,” which may include an accommodation for disabilities caused by COVID-19 after a beneficiary enrolled. *See* STC ¶37(d).



These negotiations resulted in a comprehensive plan that benefitted all stakeholders. CMS advanced its goal of increasing Medicaid coverage; Georgia advanced its goal of promoting activities to help individuals attain independence and self-reliance; and Georgians with income up to 100% of the federal poverty level became eligible for Medicaid benefits for the first time. In short, even though Georgia had no obligation to expand eligibility, the State worked with CMS in good faith to adopt an innovative program to deliver coverage to a new category of individuals while helping them build important skills and become more independent and self-reliant.

**B. Revoking the qualifying hours and activities of Georgia’s Section 1115 waiver would be arbitrary and unlawful.**

CMS’ February 12, 2021 letter suggests that the agency intends to seek major changes to the carefully negotiated Georgia Pathways waiver. The letter states that “[t]he COVID-19 pandemic has made community engagement infeasible” and Georgia Pathways thus “would not promote the objectives of the Medicaid program.” However, the agency still wants to “leav[e] in place ... the extension of Medicaid eligibility to certain otherwise-ineligible individuals.” Any attempt to change the terms of the waiver at this late stage would be arbitrary and unlawful, and CMS must allow the Georgia Pathways program to proceed as initially designed.

*First*, any attempt to excise the qualifying hours and activities undermines the waiver’s intent and constitutes an arbitrary and unlawful bait-and-switch. Under *NFIB*, Georgia had *no obligation* to expand Medicaid to individuals with incomes below 133% of the poverty line. Nonetheless, Georgia worked closely with CMS and relevant stakeholders to develop an innovative program to voluntarily expand coverage to tens of thousands of otherwise-ineligible, low-income Georgians while ensuring that those individuals were taking steps to build skills, find work, complete additional education, or volunteer in their communities. Any attempt to excise the qualifying hours would arbitrarily upend the policy choices at the heart of this program. As the Supreme Court explained in *NFIB*, the “legitimacy” of any expansion of the Medicaid program requires that the State “voluntarily and knowingly accepts the terms of the contract.” 567 U.S. at 77 (Roberts, C.J., joined by Breyer & Kagan, JJ.). And “[r]especting this limitation is critical to ensuring that Spending Clause legislation does not undermine the status of the States as independent sovereigns in our federal system.” *Id.*; see also *id.* at 675-79 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting) (same). Here, Georgia unequivocally did not “voluntarily and knowingly” agree to expand coverage absent the qualifying hours and activities.

*Second*, any attempt to excise the qualifying hours and activities would make it impossible to effectuate the expansion as is the qualifying hours and activities are core to the waiver. Implementing Pathways absent qualifying hours and activities would eliminate the mechanism for enrolling individuals in Medicaid and, ultimately, defeats the purpose of the demonstration waiver. Simply put, without the qualifying hours and activities, no one currently ineligible for Medicaid would be able to enroll in Medicaid under current Georgia law.



**Third**, in a letter dated January 4, 2021, CMS reaffirmed its commitment to Georgia Pathways. That letter noted that programs like Georgia Pathways “have proven to be a cornerstone of state innovation from which new best practices can emerge and next generation program design be fostered.” CMS Ltr. 1 (Jan. 4, 2021). And the letter further affirmed that, “[b]y their nature, section 1115 demonstrations represent a contract between state and federal government.” *Id.* For that reason, the letter outlined the terms and conditions through which CMS could withdraw approval of the Georgia Pathways waiver. Among other provisions, those terms outlined that “CMS shall make the effective date for its determination no sooner than 9 months after the date on which CMS transmits its determination.” *Id.* at 2. Georgia agreed to CMS’ terms shortly thereafter.

CMS has now indicated that it wishes to rescind that agreement. CMS’ proffered reason for that attempt is no different than its proffered reason for eliminating the qualifying hours and activities: “The current COVID-19 pandemic and economic environment ... necessitate that CMS maintain the regulatory flexibility to respond appropriately to the current or changed circumstances ... .” Yet, CMS did not identify any “changed circumstances” in the thirty-two days between January 4 to February 12, nor could it. As noted below, the pandemic’s conditions have only *improved* over that time period.

**Fourth**, CMS’ references to the COVID-19 pandemic provide no basis to excise the qualifying hours and activities. Unlike programs in some other states, Georgia’s waiver is unique and the first of its kind, as it does not impose any requirements on existing Medicaid recipients. Rather, Georgia provides a pathway for individuals to newly obtain Medicaid coverage through participation in a wide range of possible activities. Thus, as CMS previously recognized, “expanding Medicaid coverage to individuals not previously eligible will have a significant positive impact on access to health care during and after a public health emergency.” CMS Approval Ltr. 14 (Oct. 15, 2020). CMS makes no attempt to explain in its latest letter how *expanding* coverage in a pandemic would fail to “promote the objectives of the Medicaid program.” Moreover, the COVID-19 pandemic was ongoing when CMS approved Georgia Pathways in October. CMS raised specific concerns about the pandemic’s impact on potential beneficiaries throughout the waiver negotiations, and Georgia specifically addressed those concerns to CMS’ satisfaction in the STCs. CMS fails to explain why it has suddenly changed its position about the adequacy of these measures.

**Fifth**, if anything, the COVID-19 pandemic makes the qualifying hours and activities more important, not less. In approving the Georgia Pathways program, CMS highlighted that “recent research during the COVID-19 pandemic indicates that factors such as a lack of economic participation, social isolation, and other economic stressors have negative impacts on mental and physical health” CMS Approval Ltr. 1 n.1 (Oct. 15, 2020). Therefore, “incentives and requirements that increase such participation may have a positive effect on beneficiary health and economic mobility.” *Id.*

Even for individuals facing economic disruption or job losses, the qualifying hours and activities contains significant flexibility for beneficiaries to choose activities that will help them learn



new skills and move toward independence and self-sufficiency. *See* STC ¶33 (documenting seven different categories of qualifying activities). Of course, new participants can qualify through public or private employment, including self-employment and employment as an independent contractor. They can also qualify for Medicaid coverage with a variety of other pursuits. On-the-job training counts. So does participation in job readiness activities related to the *preparation* for employment, including GED programs, rehabilitation activities, or vocational educational training. Enrollment in an institution of higher education qualifies as well. Beneficiaries can also volunteer with “public or non-profit organizations participating in projects that serve the community.” Additionally, a participant does not even need to do any of these activities full time. Georgia Pathways requires only eighty hours per month. *See* STC ¶32.

The program also contains a “good cause” exception for individuals already enrolled in Georgia Pathways who subsequently become unable to meet their qualifying hours due to injury or illness, including illness of a family member; the birth or adoption of a child; a family emergency, such as domestic violence; the loss of housing; and several other reasons. *See* STC ¶36. Moreover, the “good cause” exception expressly covers Georgia Pathways participants who are quarantining due to COVID-19 exposure or unable to meet the qualifying hours and activities due to a public health emergency. *See* STC ¶36(h). This robust “good cause” exception directly refutes the suggestion in CMS’ February 12, 2021 letter that COVID-19 has made it “infeasible” to implement the qualifying hours and activities. The program’s current terms—adopted in close coordination with CMS officials—contain more than ample flexibility for individuals affected by the pandemic.

***Finally***, any attempt to rescind the qualifying hours and activities would be especially arbitrary given that COVID cases, hospitalizations, and deaths are plummeting, both in Georgia and nationwide. President Biden recently announced that every adult in the country will have access to a vaccine by the end of May 2021. *See* William Wan et al., *Biden promises enough coronavirus vaccine for ‘every adult in America’ by the end of May*, Washington Post (March 2, 2021), <https://wapo.st/3uReWnP>. Georgia’s high schools, technical colleges, and university systems are open for both in-person and virtual settings. Moreover, as evidenced by Georgia’s relatively low unemployment rate of 5.3% in March 2021, employers are accelerating hiring as the pandemic wanes and the economy recovers. In short, there is no reason to believe that COVID-19 will make it infeasible for individuals go engage in the qualifying hours and activities beginning as planned on July 1, 2021.

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For all of these reasons, revoking the qualifying hours and activities of the Georgia Pathways waiver would be arbitrary, unreasonable, and unlawful. We firmly believe that the Georgia Pathways waiver promotes the purposes of the Medicaid program by expanding coverage to currently uninsured individuals, is essential to helping beneficiaries build new skills and move toward independence, and contains sufficient flexibility to accommodate individuals impacted by COVID-19 or other injuries or illnesses. The State welcomes the opportunity to discuss this matter with CMS further given the importance of providing this new coverage option for Georgians. However, should CMS revoke approval of the waiver, Georgia will challenge the decision.



**GEORGIA DEPARTMENT  
OF COMMUNITY HEALTH**

Sincerely,



Frank W. Berry  
Commissioner

cc: The Honorable Brian P. Kemp, Governor of Georgia  
Ms. Etta Hawkins, State Monitoring Lead, Medicaid and CHIP Operations Group