



November 16, 2023

The Honorable Xavier Becerra  
Secretary  
U.S. Department of Health and Human Services  
200 Independence Avenue, SW  
Washington, DC 20202

Mrs. Chiquita Brooks-LaSure  
Administrator  
Centers for Medicare & Medicaid Services  
7500 Security Boulevard  
Baltimore, MD 20244

Mr. Daniel Tsai  
Deputy Administrator and Director  
Centers for Medicare & Medicaid Services  
7500 Security Boulevard  
Baltimore, MD 20244

***Re: Pathways to Coverage 1115 Demonstration Waiver (Project Number 11-W-00342/4)  
Request for Reconsideration of CMS' October 5, 2023 Denial Notice***

Dear Secretary Becerra, Administrator Brooks-LaSure, and Director Tsai:

On February 24, 2023, the Georgia Department of Community Health (DCH) submitted a formal request to the Centers for Medicare and Medicaid Services (CMS) to amend and extend the end date of the Pathways to Coverage 1115 Demonstration (Project Number 11-W-00342/4) to allow additional time in which to evaluate and assess the effectiveness of the demonstration waiver. Specifically, DCH requested the end date be revised to reflect an end date of September 30, 2028. To be clear, this was not a request for an “extension” in the classic sense of allowing a demonstration project to last longer than its initially authorized term. Instead, the sole purpose of DCH’s request was to ensure Georgia was able to implement its program for the originally authorized five-year term notwithstanding the lengthy delay caused by CMS’s unlawful rescission of key program terms and the subsequent need for litigation.

On October 5, 2023, CMS nonetheless denied DCH’s request on the basis that DCH should have submitted an extension request in accordance with special terms and conditions #8 instead of a request to amend; that the State’s February 24th letter did not meet the minimum requirements for CMS to consider it an extension request; and that the State failed to provide a 30-day state public notice and comment period as required by



42 C.F.R. § 431.408(a) and 42 C.F.R. § 431.412(c). But CMS fundamentally misconstrued the nature of, and reasons for, Georgia’s request. Accordingly, DCH submits this request for reconsideration<sup>1</sup>.

*The Two-Year Delay in Implementation Was the Direct Result of CMS’ Unlawful Actions.*

The two-year implementation delay was solely due to CMS’ unlawful attempt to rescind Pathways’ community engagement requirements<sup>2</sup>. CMS’ unlawful reopening of the waiver and attempted rescission of core program terms forced DCH to engage in protracted additional proceedings before the agency, as well as litigation in federal court. DCH was unable to launch and implement the Pathways program during this period of agency reconsideration and subsequent litigation.

But for CMS’ unlawful actions, DCH would not have been required to engage in these additional administrative and legal proceedings. Accordingly, the February 24<sup>th</sup> request sought to change the end date of the demonstration to September 30, 2028 to ensure that DCH could operate Pathways for the *full five-year period that was originally authorized*. Allowing a five-year demonstration period would align with the District Court’s August 19, 2022 decision as well as CMS’ initial approval of the Pathways demonstration, and would further Section 1115’s purpose of expanding coverage while studying the effectiveness of new, state-specific approaches.

CMS’ decision to deny DCH the ability to implement Pathways for the originally authorized five-year demonstration period runs counter to the District Court’s decision. The court clearly stated in its final ruling that CMS’ decision to withdraw and rescind its approval was arbitrary and capricious. Indeed, the court found that CMS’s rescission “rested on numerous, profound flaws.” District Court Order at 60. “In addition to failing to address a key aspect of the problem, the Agency’s explanation for its decision relied on an incorrect baseline; drew key support from blatantly inapt comparisons; imported impermissible factors; failed to consider whether there were reliance interests and how weighty they were; and, ultimately, failed to explain why the Agency now believes the Pathways demonstration would *not* further the purpose of Medicaid.” *Id.* In short, the flaws of CMS’s rescission were so severe and pervasive that the District Court vacated the rescission altogether rather than simply remanding for further consideration. *Id.* at 58-65.

Consequently, CMS must reinstate the full five-year term of Pathways as initially approved. Refusing to amend the end date to account for delays caused by CMS’ unlawful rescission would effectively constitute *another* unlawful amendment of the program that arbitrarily shortens the period of the Pathways program from what CMS originally authorized. Any such action would be every bit as unlawful and arbitrary as the

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<sup>1</sup> The October 5, 2023 denial notice issued by CMS is void of any language prohibiting the right to appeal or the opportunity to request reconsideration. Accordingly, DCH is submitting a formal request for reconsideration.

<sup>2</sup> On October 15, 2020, CMS approved Georgia’s request to extend Medicaid coverage to individuals who meet the specified qualifying activities requirements through its Pathways 1115 Demonstration. The demonstration was approved and deemed effective beginning October 15, 2020 through September 30, 2025. The approved implementation date was July 1, 2021. On February 12, 2021, CMS notified DCH of its intent to withdraw the authorities previously approved that allowed the State to require community engagement activities as condition of eligibility. On December 23, 2021, CMS withdrew its authority to implement the qualifying activities. Georgia filed suit and the matter was litigated before the U.S. District Court. On August 19, 2022, the court ruled in favor of the State, vacating CMS’ rescission order on the ground that it was arbitrary and capricious. *See* Order, Dkt. No. 52, *Georgia v. Brooks Lasure*, No. 2:22-cv-6 (S.D. Ga. Aug. 19, 2022) (“District Court Order”).



previous rescission because it would fail to take into account that the delay was caused solely by CMS and that DCH was not seeking an expansion of the program term but was merely requesting that CMS allow the program to proceed as originally authorized.

CMS thus badly misses the mark when it invokes the Special Terms and Conditions and the regulations regarding public notice periods. Under the current expiration date of September 30, 2025, Georgia would be forced to begin the public notice and extension process in the spring of 2024,<sup>3</sup> less than one year since launching the program, despite not having had sufficient time to operate the program as originally authorized and to conduct the required monitoring and evaluation. This is clearly not the result intended by either the initially authorized program or the District Court. The District Court held that CMS acted unlawfully by arbitrarily curtailing the original scope of the Pathways program—yet CMS is now attempting to do the same thing again by refusing to allow Georgia to operate the program for its full authorized term.

#### Special Terms and Conditions

In its October 5<sup>th</sup> letter, CMS indicates that DCH incorrectly submitted a request for an amendment. DCH agrees that STC #6 enumerates specific changes that would be considered amendments. However, this list is not exhaustive as this section also contains a catch all phrase which allows for amendments to “other comparable program elements.” DCH interprets this broadly to include other program elements such as the effective dates of the demonstration. Moreover, there is no language within STC #6 which expressly prohibits CMS from amending the demonstration and extending the end date to make the State whole for delays solely attributable to CMS’ unlawful actions. Accordingly, DCH requests that CMS take into account the unique circumstances surrounding the Pathways to Coverage demonstration as well as the Court’s order in making its decision.

#### The Artificially Shortened Time Period of the Demonstration Makes it Impossible for the State to Meet all of the Federal Requirements for an Extension Request

CMS’ October 5<sup>th</sup> denial letter provides that “if the state intends to request an extension of the demonstration, its application must comply with 42 CFR 431.412(c) [sic].” The notice goes on to state that DCH’s February 24<sup>th</sup> letter does not meet the minimum requirements to be considered an extension request and that the State failed to meet the requirements of 42 C.F.R. § 431.408(a) and 42 C.F.R. § 431.412(c). But a close look at those requirements underscores that they make little sense here and are entirely inapposite to this request. Those requirements address the expansion of a waiver *beyond* its originally authorized period. They make no sense, and should not apply, in the very different context of a state that seeks an amendment of the end date to account for time lost due to the agency’s own unlawful actions.

Section 42 C.F.R. § 431.408(a) provides in pertinent part that a state “must provide at least a 30-day public notice and comment period regarding applications for a demonstration project, or an extension of an existing demonstration project . . .” The public notice of the comment period must include a “comprehensive description” of the application or extension including, *inter alia*, a description of the program goals and

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<sup>3</sup> Per 42 C.F.R. § 431.412(c), a request to extend an existing demonstration under Section 1115(a), (e), and (f) of the Act will be considered only if it is submitted at least 12 months prior to the expiration date of the demonstration when requesting an extension.



objectives; an estimate of enrollment and expenditures, including a financial analysis of the extension request; and the hypothesis and evaluation parameters of the demonstration. *Id.*

Section 42 C.F.R. § 431.412(c)(2) further provides that “[a]n application to extend an existing demonstration will be considered complete, for purposes of initiating the Federal-level public notice period, when the State provides the following:

- (i) A historical narrative summary of the demonstration project, which includes the objectives set forth at the time the demonstration was approved, evidence of how these objectives have or have not been met, and the future goals of the program.
- (ii) If changes are requested, a narrative of the changes being requested along with the objective of the change and the desired outcomes.
- (iii) A list and programmatic description of the waivers and expenditure authorities that are being requested for the extension period, or a statement that the State is requesting the same waiver and expenditure authorities as those approved in the current demonstration.
- (iv) Summaries of External Quality Review Organization (EQRO) reports, managed care organization (MCO) and State quality assurance monitoring, and any other documentation of the quality of and access to care provided under the demonstration, such as the CMS Form 416 EPSDT/CHIP report.
- (v) Financial data demonstrating the State’s historical and projected expenditures for the requested period of the extension, as well as cumulatively over the lifetime of the demonstration. This includes a financial analysis of changes to the demonstration requested by the State.
- (vi) An evaluation report of the demonstration, inclusive of evaluation activities and findings to date, plans for evaluation activities during the extension period, and if changes are requested, identification of research hypotheses related to the changes and an evaluation design for addressing the proposed revisions.
- (vii) Documentation of the State’s compliance with the public notice process set forth in § 431.408 of this subpart, including the post-award public input process described in § 431.420(c) of this subpart, with a report of the issues raised by the public during the comment period and how the State considered the comments when developing the demonstration extension application.”

These requirements make absolutely no sense in the context of Georgia’s request to amend the program period. Here, the Pathways program is still in its infancy due to the lengthy delays caused by CMS’ unlawful rescission and the need for subsequent litigation. Due to the delayed July 1, 2023 implementation date and the artificially shortened time frame for the demonstration, the program has only been operating for a few months. It would thus be illogical to require, at this nascent stage of implementation, the State to submit comprehensive data about big-picture (and data-intensive) matters such as whether Pathways has achieved its



objectives. Indeed, it would be arbitrary and capricious to fault Georgia for not submitting this information given that the only reason for the insufficient data is CMS' own unlawful actions that significantly delayed the launch of the program.

As explained in the Pathways evaluation design, the demonstration seeks to test the following hypotheses *over a five-year period*:

The demonstration will:

1. Increase access to primary care.
2. Encourage members to use the Member Rewards Account (MRA) for services.
3. Increase member engagement in care.
4. Reduce the number of uninsured Georgia residents with incomes up to 100% FPL.
5. Increase the number of adults with incomes up to 100% FPL who are engaged in at least 80 hours a month of employment or employment related activities.
6. Increase the wage growth for those individuals made eligible for Medicaid through this Demonstration.
7. Increase the number of Pathways participants who transition to commercial health insurance after separating from Medicaid.
8. Increase the number of Georgia residents with incomes up to 100% FPL enrolled in Employer Sponsored Insurance.
9. Improve the fiscal sustainability of the Georgia Medicaid program.

At this early stage of the program, the State does not and will not have sufficient historical data to determine what, if any, program changes are needed, or which authorities will be requested in future versions of the demonstration. The State also will not have ample data regarding its historical and projected expenditures for the requested period of the extension, as well as cumulatively over the lifetime of the demonstration. Further, the State has not and will not have an opportunity to develop an evaluation report of the demonstration, inclusive of evaluation activities and findings to date, plans for evaluation activities during the extension period, and if changes are requested, identification of research hypotheses related to the changes and an evaluation design for addressing the proposed revisions. And the sole reason for this lack of data is CMS' unlawful delay of the launch of Pathways and Georgia's subsequent need for judicial intervention.

As noted in our February 24<sup>th</sup> letter, Demonstration Year 1 is the baseline as no true comparison group for this population exists. Thus, the first Demonstration Year will be used as the baseline for analyses of Medicaid encounter and administrative data. In order for the program's independent evaluator to answer the research questions outlined in the evaluation design, it must utilize robust statistical methods to analyze trends over time, which obviously cannot be done with only a few months of data.

Indeed, STC 8 itself underscores the absurdity of CMS' position. STC 8 offers states two options as a demonstration project is nearing its end: (1) submit an extension in accordance with 42 C.F.R. § 431.412(c); or (2) "States that do not intend to request an extension of the demonstration beyond the period authorized in these STCs must submit a transition and phase-out plan consistent with the requirements of STC 9." Thus, under CMS' view in its October 5<sup>th</sup> letter, Georgia would need to either submit a full extension request notwithstanding the minimal data available or else *prepare a plan to wind down the program* after it has



barely begun. Either option is untenable and would deprive Georgia of the opportunity to implement its program as originally planned and authorized.

Finally, as the District Court recognized, because Pathways is an *expansion* of coverage to individuals not otherwise eligible, any attempt by CMS to limit or curtail the program would “result in *less* Medicaid coverage for Georgians.” District Court Order at 33. If CMS uses its own unlawful rescission and subsequent litigation as an excuse to artificially curtail the length of the Pathways program, the sole result is that fewer individuals will have the opportunity to receive coverage. That result would be inequitable and arbitrary and would flout the purposes of both the Medicaid program generally and Section 1115 specifically.

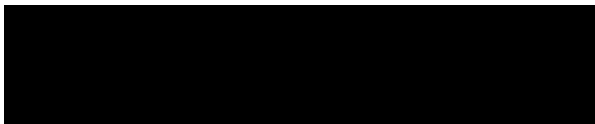
### **CONCLUSION**

Over the past several months, DCH has worked closely with CMS to develop the measuring metrics for the Pathways program. Notwithstanding the parties’ best efforts, there is still more work to be done in this area. The primary focus at this time should be on implementing and operating the program, providing medical assistance to vulnerable residents in Georgia, assessing and analyzing its effectiveness, and performing the monitoring and evaluation tasks.

In closing, DCH requests that CMS reconsider and reverse its October 5, 2023 denial and restore the originally authorized five-year demonstration period by adjusting the demonstration’s end date to September 30, 2028. Ensuring that Georgia can operate Pathways for a five-year demonstration period provides an equitable solution that eliminates the need for Georgia to submit a formal extension application a mere one year after its initial implementation. A full five-years will provide a meaningful and sufficient opportunity to assess and evaluate the effectiveness of the demonstration, identify required changes, and complete the monitoring and evaluation efforts. It would be arbitrary, capricious, and contrary to law to allow delays attributable to CMS’ own unlawful actions to effectively shorten by years the originally authorized period of the waiver.

We respectfully request your decision by December 15, 2023. Should you have additional questions or concerns, I may be reached at (404) 656-7513 or via email at [lrhodes@dch.ga.gov](mailto:lrhodes@dch.ga.gov). DCH reserves all rights, remedies, claims, and defenses regarding this matter, including but not limited to initiating litigation, to protect the interests of Georgians if CMS refuses to allow Pathways to be implemented consistent with its original authorization.

Regards,



Chief Health Policy Officer  
Medical Assistance Plans Division