



Oregon
Law Center

WORKING TOGETHER TO ACHIEVE JUSTICE FOR LOW INCOME OREGONIANS

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Via Electronic Submission

Michelle Hatfield
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David Bangsberg, Chair
Oregon Health Policy Board
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Re: Oregon Health Authority Application for 1115 Demonstration Waiver Renewal and Amendment

Dear Ms. Hatfield and Mr. Bangsberg:

We appreciate the opportunity to comment on the draft renewal application for the Oregon Health Plan 1115 waiver. Oregon Law Center is a non-profit legal services provider that represents low income Oregonians on civil legal matters, including legal matters regarding Medicaid and other publicly funded health benefits. We staff a statewide public benefits hotline, and regularly talk to and represent individuals who need or receive Medicaid or state funded health care programs.

On behalf of our low income clients, Oregon Law Center appreciates many of the new goals and commitments expressed in the current application for 1115 waiver, especially those focused on health equity. These health equity measures represent an important shift in focus to make sure that the benefits of the Affordable Care Act

and Medicaid in Oregon reach all low income communities. We are also grateful for the many important changes that the leadership at the Oregon Health Authority have made over the past 5 years to improve health care and access to health care in Oregon.

However, we have deep concerns that this current 1115 waiver application continues to request permission for Oregon to deny medically necessary and medically appropriate health care to low income Oregonians using the Prioritized List of Services. The current 1115 waiver application aims toward addressing health equity and social determinants of health, but does so on top of a foundation of outdated, inappropriate, and unprecedented health care rationing that undermines those important aims. Oregon cannot build an equitable system of health care while it denies low income Oregonians, including children, medically necessary and medically appropriate health care through the continued use of the Prioritized List of Services. We firmly believe that Oregon should modify the current 1115 waiver application to stop the inflexible use of the Prioritized List of Services, at the very least for children who should have the right to EPSDT. If the state of Oregon intends to go forward with the use of the Prioritized List of Services, it should exclude Early and Periodic Screening, Detection, and Treatment (EPSDT) from adherence to the Prioritized List, and must change the 1115 application to very explicitly require flexibility and individualized decision making in the application of the Prioritized List.

I. Rationing health care through the use of the Prioritized List of Services is no longer an “experiment” and does not promote the objectives of the Medicaid Act, therefore should not be included in an 1115 waiver application.

Oregon’s 1115 waiver application asks the federal Health and Human Services agency for permission to provide less health care to Oregonians than they would otherwise be required to provide under traditional Medicaid. In order to justify this (or any) 1115 waiver, the waiver must be an “experimental, pilot, or demonstration project”, and must be found to be “likely to assist in promoting the objectives of the

Medicaid Act.” 42 U.S.C. § 1315(a). The objectives of the Medicaid Act are to enable states to furnish medical assistance to individuals whose incomes and resources are insufficient 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. 42 U.S.C. § 1396

Oregon was given approval to waive the minimum requirements of the Medicaid program in 1993 in order to experiment with the use of the Prioritized List of Services in 1993. Originally, the idea behind Oregon’s waiver to limit health care to the Prioritized List was to provide limited health care treatment to low income Oregonians, so that more low income Oregonians to get at least some health care. Providing less health care allowed Oregon to save money and enroll more people (people at a slightly higher income level than was supported by the federal government in 1993) onto the Oregon Health Plan. That original purpose for experimenting with the Prioritized List is gone. Now, Oregon provides the Oregon Health Plan to people up to 138% of the federal poverty level due to the Affordable Care Act, and the federal match money that comes with it.

The state has had ample time to demonstrate how the rationing of health care through the strict application of this Prioritized List has furthered the goals of the Medicaid program. However, the state has not provided analysis or data to demonstrate that this “experiment” is actually promoting the objectives of the Medicaid Act. Oregon has failed to justify the continued use of this controversial aspect of their 1115 waiver which denies medically necessary and medically appropriate health care to low income Medicaid recipients. Without adequate demonstration that this experiment is actually furthering the goals of the Medicaid program, this 1115 waiver application is inappropriate and should not be submitted without modification. The lack of justification for denying medically necessary and medically appropriate health care to low income Medicaid recipients threatens the success and legitimacy of the more recent, important, and admirable other aspects of Oregon’s 1115 wavier application.

II. Continued inflexible adherence to the Prioritized List of Services and Line of Funding do not support the goals of the Medicaid program or the Oregon Health Authority and should not be included in this renewal application.

As mentioned above, Oregon's current 1115 waiver application does not sufficiently address how the goals of the 1115 demonstration waiver program are met by the continued use of the Oregon Health Plan Prioritized List of Services that functions to ration health care services to Medicaid recipients in Oregon.

Currently, the Prioritized list of Services is applied with such inflexibility that medically necessary and medically appropriate services are routinely denied to low income individuals who cannot afford to pay for treatment on their own, if their condition requires any variance from the strictly applied list of condition and treatment pairings. This inflexibility and lack of variance procedures results in health care denials that thwart, not promote, the goals of the Medicaid program, and therefore violate the conditions for approval of an 1115 waiver. This inflexibility leaves low income Oregonians to suffer from debilitatingly painful "below the line of coverage" conditions like hernias without surgery that could treat their condition. This inflexibility even leaves low income Oregonians who have a condition above the line of coverage on the Prioritized List (considered a high priority even under the waived program) without adequate treatment because, due to their particular combination of health conditions, the treatments "paired" with their condition on the Prioritized list do not work, and they are denied any other treatment because it isn't paired with their condition on the Prioritized list.

Over the years, it appears that the 1115 waiver applications have de-emphasized the need for individualized decisions when the strict application of the Prioritized List does not allow for medically necessary and medically appropriate health care. This current 1115 waiver application does not address this important deficiency and must be amended. The current 1115 waiver application needs to be changed to include specific instructions requiring approval of medically necessary, medically appropriate

care for OHP enrollees if their particular combination of conditions requires treatment that does not perfectly match the Prioritized List condition/treatment pairings. Without such flexibility, the Oregon Health Plan discriminates against individuals with disabilities and certain conditions, undermines the agency's goals to promote health and health equity, and leaves low income Oregonians to suffer from common and serious health conditions without any treatment.

III. Oregon should remove from the 1115 waiver application the request to continue to waive EPSDT.

Oregon is one of the few (if not the only) state in the nation to eschew the foundational Medicaid principle that children should receive medically necessary and medically appropriate health care. Oregon's current practice of denying medically necessary and medically appropriate treatment to children is shocking and violates the federal Medicaid Act by failing to provide health care treatment to those who can't afford it, and promote the attainment of independence and ability for self care. Oregon's waiver of EPSDT hurts low income children throughout our state. Right now, children living in poverty are forced to live with painful and dangerous conditions like chronic ear infections, and conditions with potential lifelong negative impacts like selective mutism, among many others, because Oregon has waived our childrens' right to EPSDT.

This waiver of EPSDT undermines the other stated goals of the proposed waiver which are to provide equitable access to coverage and improve health through equity measures. We request that the state remove the request to waive EPSDT from the current 1115 waiver application. If the state is unwilling to remove EPSDT from the waiver request, we request that the state include very specific requirements for flexibility and individualized decision making to approve medically necessary and medically appropriate treatment for children even when that treatment does not match perfectly with the Prioritized List of Services condition/treatment pairs.

IV. The current 1115 application should extend Flexible Services to Fee For Service enrollees, and apply due process protections to requests for Flexible/Health Related Services.

Oregon Law Center supports the Oregon Health Authority's waiver request to provide Flexible Services/health related services to support low income Oregonians' health. However, it appears from past waivers and the current 1115 waiver application that Flexible services are only available to people enrolled in CCOs. We request that the application specify that the state will make Flexible services available to those enrolled in Fee For Service (FFS) Medicaid as well as those enrolled in CCOs.

Additionally, we believe that the current request for Flexible Services should not be approved unless state specifies that any denials of requests for Flexible Services be afforded the basic due process rights that any Medicaid service would receive – a written denial with an explanation for the denial and an opportunity to challenge it. We know that it is still rare for an OHP enrollee (or even many OHP providers) to know about the existence of flexible services. However, if an enrollee is lucky enough to have a provider ask for such services, but they are denied, the enrollee does not even have a right to know the basis for the denial or have an opportunity to challenge the denial. We request that the state make it very clear in the application for extension/amendment that “health related services” and all “flexible services” are Medicaid services and include basic Medicaid and constitutional due process protections.

If Flexible Services/ Health Related Services are not provided to FFS enrollees, and if enrollees have no legal right to question or challenge a denial of Flexible Services, then this innovative program is furthering health inequity instead of promoting health equity. Many people with disabilities or severe health conditions require enrollment in FFS Oregon Health Plan in order to meet their special health care needs. Those individuals should not be deprived of an important health care benefit solely because they need the flexibility of FFS enrollment. Additionally, the

fact that there is no way to challenge a denial of a request for flexible services deprives individual OHP enrollees of even the most basic ability to question the appropriateness of such a denial. This contradicts the basic principles of due process and means that there is essentially no transparency or accountability in the provision of these services by CCOs. As currently proposed in the 1115 waiver application, the Flexible Services would promote health inequity, and undermine the stated goals of the agency. The application should be changed to include FFS flexible services, basic due process after denial of Flexible Services, and a clear mechanism for oversight and evaluation of the equity impact of approvals and denials of Flexible Services.

V. Comments on Other aspects of the 1115 Waiver.

Oregon Law Center wholeheartedly approves and applauds other aspects of this waiver application. The incredibly important success of Oregon's Cover all Kids program and the imminent Cover all People program are critical components of OHA's health equity goals. These programs demonstrate strong and ethical leadership by legislators and the agency in Oregon and are an incredibly admirable commitment to equity in healthcare in the state. The proposals in this application to maximize OHP coverage with continuous eligibility for children and adults to minimize health care disruption from "churn" are very important and commendable. Expedited enrollment and more attention during coverage transitions are also critical goals and would be welcome changes to the current system. While we support the provision of health related services and support for social determinants of health, we think it is important to note (as mentioned above) that given the current rationing of health care through use of the Prioritized List of Services, Oregon is proposing to spend Medicaid money on social determinants of health, while denying coverage for the actual determinants of health – actual health care treatment. We firmly believe that Oregon's 1115 waiver application would better achieve its stated goals by providing both adequate medically necessary and appropriate health care and also social determinants of health. We have general concerns about CCO accountability and

measuring whether underutilization is occurring, as well as concerns about whether and how adequate language access is achieved by each CCO, and we wish .

Again, we thank you for the opportunity to provide comment on the current 1115 waiver application and we would be happy to provide more information on any topic mentioned herein, or any other topic concerning the current application.

Submitted on **January 7, 2022** by:

/s/ Beth Englander

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