



June 1, 2021

Anne Marie Costello  
Acting Deputy Director  
Centers for Medicare & Medicaid Services  
Department of Health and Human Services  
P.O. Box 8016  
Baltimore, MD 21244-8016

ALSO SENT VIA EMAIL

**RE: Oklahoma Residence Requirement for Waiver Services**

Dear Ms. Costello:

The National Health Law Program, The Arc of the United States, The Arc of Oklahoma, Oklahoma Disability Rights Center, the Oklahoma Policy Institute, and Legal Aid Services of Oklahoma, Inc., write to bring your attention to a serious problem in Oklahoma's Medicaid program. The State has enacted a law affecting three of its home and community based (HCB) waivers. The only waivers affected are for people with intellectual disabilities. The law requires that individuals reside in the State for at least five years before they may apply for any of the three waivers. As outlined below, this requirement is illegal.

## **Background**

On May 20, 2021, Governor Kevin Stitt signed [Oklahoma House Bill 2899](#), which goes into effect on July 1, 2021 and provides that:

Applications for Home and Community Based Waiver Services for the Community Waiver, In-Home Supports Waiver for Adults, and In-Home Supports Waiver for Children operated by the Department of Human Services shall not be made until an applicant has been a resident of Oklahoma for five (5) years prior to the date of application. The Department of Human Services shall promulgate rules as necessary for the implementation and administration of the provisions of this section.

This statute violates the law in several ways, as set forth below.

### **Illegal Residence Requirement**

#### *Violation of the Medicaid Act*

The Medicaid Act prohibits the Secretary of Health and Human Services from allowing a state plan “which imposes, as a condition of eligibility for medical assistance . . . *any* residence requirement which excludes any individual who resides in the state.” 42 U.S.C. § 1396a(b)(2) (emphasis added). Implementing regulations prohibit Medicaid-participating states from denying Medicaid eligibility because an individual has not resided in the state for a specified period. 42 C.F.R. § 435.403(j)(1). Oklahoma’s law would exclude hundreds of Oklahoma residents from eligibility for HCB waiver services based on the amount of time they had lived in the state, therefore violating these Medicaid requirements.

According to press reports, Oklahoma legislators who sponsored the bill took the position that federal law does not prohibit the residence requirement because the waivers are optional and, thus, the State can decide who is eligible. See Carmen Foreman, [Adding a 5-year residency rule on Oklahoma disability aid is unconstitutional, critics say](#), THE OKLAHOMAN (May 19, 2021). Setting aside the fact that state participation in Medicaid is altogether optional, this reasoning is incorrect. “Once the state offers an optional service, it must comply with all federal statutory and regulatory mandates.” *Lankford v. Sherman*, 451 F.3d 496, 504 (8th Cir. 2006). Moreover, as cited above, the Medicaid Act’s residence requirement prohibits conditions on eligibility for “medical assistance,” and the first sentence of the waiver statute makes it explicit that HCB waiver services are such assistance. See 42 U.S.C. § 1396n(c)(1) (“The Secretary may by waiver provide that a

State plan approved under this subchapter may include as ‘medical assistance’ under such plan . . . home or community-based services[.]”).

The Oklahoma law also contravenes the Medicaid Act’s reasonable promptness provision, which requires states to “provide that all individuals wishing to make application for medical assistance under the plan shall have opportunity to do so, and that such assistance shall be furnished with reasonable promptness.” *Id.* § 1396a(a)(8). This requirement was added to the Social Security Act at a time when persons whom the state had determined to be eligible for benefits were being placed on waiting lists and was intended to prevent the denial of benefits, even temporarily. See *Jefferson v Hackney*, 406 U.S. 544, 544-45 (1972) (citing H.R. Rep. No.1300, 81st Cong., 1st Sess., 48, 148 (1949); 95 Cong. Rec. 13934 (remarks of Rep. Forand)). The Oklahoma law violates this statute.

#### *Violation of the U.S. Constitution*

The Supreme Court has struck down state residence requirements that deny public benefits to new residents. Denying eligibility for public assistance to newly arrived residents imposes a penalty on the right to travel that, absent a compelling governmental interest, violates the Equal Protection Clause. A state’s legitimate interest in saving money does not constitute a compelling governmental interest sufficient to justify burdening the right to travel. See *Shapiro v. Thompson*, 394 U.S. 618, 627 (1969). The Court more recently struck down a California law limiting the amount of cash assistance that newly arrived residents could receive in the first year of their residence to the amount they were receiving in their previous state. See *Saenz v. Roe*, 526 U.S. 489, 503-04 (1999). It held that the limit imposed by California violated the Privileges and Immunities Clause of the Fourteenth Amendment, which guarantees all citizens the right to the same privileges and immunities enjoyed by other citizens. *Id.* Courts have applied this reasoning to Medicaid benefits. See, e.g., *Bethesda Lutheran Homes and Servs. v. Leean*, 122 F.3d 443 (7th Cir. 1997); *Duffy v. Meconi*, 395 F. Supp. 2d 132 (D. Del. 2005).

#### *Violation of the Americans with Disabilities Act*

Oklahoma’s law also runs afoul of the ADA because it discriminates against people with intellectual disabilities and increases that population’s risk of institutionalization. Title II of the ADA prohibits states from providing separate benefits or imposing eligibility criteria that screen out individuals with disabilities from full and equal enjoyment of a program or activity. See 42 U.S.C. § 12132; 28 C.F.R. § 35.130(b). Requiring a 5-year residence requirement for people with intellectual disabilities is a discriminatory

restriction on access to HCB waiver services based on their disability when the State's other HCB waivers have no such restriction. In addition, the 5-year residence requirement violates the ADA's integration mandate which, as recognized in *Olmstead v L.C.*, requires that services be provided in the most integrated setting appropriate to a person's needs. See 527 U.S. 581 (1999) (applying 42 U.S.C. § 12132; 28 C.F.R. § 35.130(d)). The Oklahoma law violates the ADA because it will require Medicaid beneficiaries who have resided in the State for fewer than five years to go into more restrictive ICF settings to get the long term services and supports they need.

## **Conclusion**

Oklahoma's residence requirement will harm hundreds of people. It is not authorized by the Medicaid Act or the U.S. Constitution. We respectfully ask CMS to inform Oklahoma's Medicaid agency that CMS will prohibit application of the residence requirement contained in HB 2899. If you have questions or would like to discuss this further, please contact Jane Perkins at [perkins@healhtlaw.org](mailto:perkins@healhtlaw.org) or (919) 968-6308 (x101).

Sincerely,

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