STATE OF ARKANSAS
ATTORNEY GENERAL
LESLIE RUTLEDGE

Opinion No. 2016-087

August 8, 2016

Cindy Gillespie, Executive Director
Arkansas Department of Human Services
P.O. Box 1437, Slot S201
Little Rock, AR 72203-1437

Dear Ms. Gillespie:

This is in response to your request for my opinion as to the validity of a proposed Arkansas law limiting the number of people who may enroll in the Arkansas Works Program. You provide this background:

> Currently, the Medicaid expansion population receives health insurance coverage through the Health Care Independence Program, also known as the Private Option. There are approximately 250,000 Arkansans under 138% of the federal poverty level who are currently receiving health insurance through this program. However, Act No. 46 of 2015 was signed into law ending the Health Care Independence Program as of December 31, 2016.
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> In a recent extraordinary session, the General Assembly authorized the Arkansas Works Program to provide health insurance for the Medicaid expansion population while further acting to encourage employer-based insurance, to incentivize beneficiaries to work or seek work opportunities, and to promote personal responsibility and program integrity. To date, the State of Arkansas has been recognized as a leader in healthcare innovation.
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> Given the evolutionary nature of this Arkansas policy, discussions about the future of healthcare in Arkansas are ongoing. Several proposals have been offered to cap or otherwise limit the number of qualifying individuals who may receive health insurance or medical

> assistance through the Arkansas Works Program. As a specific example, some legislators have proposed capping enrollment of qualified individuals into the Arkansas Works Program at 250,000 or the number reflecting the current enrollment and then not allowing new enrollees into the program.

Your questions are:

1. Would an Arkansas law that would cap the number of qualifying individuals who may receive health insurance or medical assistance through the Arkansas Works Program be valid under federal law?

2. Would an Arkansas law that would limit enrollment into the Arkansas Works Program to only those individuals currently enrolled in the Private Option be valid under federal law?

RESPONSE

In my opinion, the answer to each of your questions is "no." A law limiting the number of people who may enroll in the Arkansas Works Program, thereby excluding people from the program who otherwise qualify to be part of the Medicaid expansion population under federal law, would not meet applicable federal requirements for participation in Medicaid and would in all likelihood not be approved by the Secretary of Health and Human Services. The plan would thus be invalid for purposes of obtaining and spending federal funds to cover any part of the Medicaid expansion population.

Specifically, to be compliant with federal law and be approved for federal funding, the Arkansas Works Program would need to cover all members of what you describe as the Medicaid expansion population. *See* 42 U.S.C. § 1369a(a)(10)(A)(i)(VIII) (requiring that a state plan "provide for making medical assistance available ... to all individuals ... beginning January 1, 2014, who are under 65 years of age, not pregnant, not entitled to, or enrolled for, benefits under part A of subchapter XVIII, or enrolled for benefits under part B of subchapter XVIII, and are not described in a previous subclause of this clause, and whose income (as determined under subsection (e)(14)) does not exceed 133 percent of the poverty line (as defined in section 1397jj(c)(5) of this title) applicable to a family of the size involved.") But the two manners of capping enrollment discussed in your question each appear to run afoul of this federal requirement of

making assistance available to all individuals in the Medicaid expansion population if a state wants to receive federal funds covering any part of the Medicaid expansion population.

DISCUSSION

A state that elects to participate in Medicaid – and thereby receive federal money to help provide medical assistance to people of limited income and resources – must submit to the Secretary of Health and Human Services, for her approval, a state plan for medical assistance. *See* 42 U.S.C. § 1396-1 ("The sums made available under this section shall be used for making payments to States which have submitted, and had approved by the Secretary, State plans for medical assistance.") Except in limited circumstances (discussed below), the Secretary may only approve a state plan if it complies with a long list of statutory requirements set forth in 42 U.S.C. § 1396a. *See* 42 U.S.C. § 1396a (listing the prerequisite that "[a] state plan for medical assistance must provide").

With respect to what you refer to as the "Medicaid expansion population," 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII) requires that the plan must provide for making medical assistance available to "*all* individuals" in that population. *See* 42 U.S.C. § 1369a(a)(10)(A)(i)(VIII) (requiring that a state plan "provide for making medical assistance available … to *all* individuals … beginning January 1, 2014, who are under 65 years of age, not pregnant, not entitled to, or enrolled for, benefits under part A of subchapter XVIII, or enrolled for benefits under part B of subchapter XVIII, and are not described in a previous subclause of this clause, and whose income (as determined under subsection (e)(14)) does not exceed 133 percent of the poverty line (as defined in section 1397jj(c)(5) of this title) applicable to a family of the size involved") (emphasis added).

It appears that each of the capping plans described in your questions would exclude from the Arkansas Works program persons who would otherwise be eligible members of the Medicaid expansion population as described under the federal law set forth above. Such a plan, assuming that it would not cover all persons in the Medicaid expansion population, will not satisfy the above-referenced federal requirements for a valid plan. There is no reason to believe the Secretary could or would approve such a plan.

Under federal law, the Secretary may waive compliance with federal requirements for state Medicaid participation if the waiver will "assist in promoting the objectives" of the Medicaid program. 42 U.S.C. § 1315(a). The Secretary has, in

fact, granted certain waivers to the State in connection with the Private Option.[1] The Secretary has made clear, however, her position that: (1) "[e]nrollment caps ... do not further the objectives of the Medicaid program;" and (2) accordingly, she does "not anticipate that [she] would authorize enrollment caps" applying to the Medicaid expansion population.[2] In my view, either placing a numerical cap on enrollment in the Arkansas Works Program or limiting enrollment to the people currently enrolled in the Private Option would amount to an "enrollment cap" of the sort the Secretary does not anticipate authorizing. As I understand it, either capping mechanism would likely exclude from Arkansas Works persons who are otherwise eligible under federal law to be included in the Medicaid expansion population.

The Secretary's statements concerning the almost certain denial of a waiver for capping programs are important for two reasons. *First*, the mere fact that a plan with an enrollment cap would require a waiver illustrates that in the absence of a waiver such a plan does not comply with the applicable federal law. *Second*, the Secretary's decision not to provide a discretionary waiver for capping programs would be nearly impossible if not completely impossible to challenge. Without a waiver, Arkansas Works would not be a valid plan to obtain and spend federal funds on the Medicaid expansion population—because it fails to meet the requirement of 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII) to provide coverage for the entire Medicaid expansion population.

For the foregoing reasons, it is my opinion that a law limiting the number of people who may enroll in the Arkansas Works Program, thereby excluding people from the program who otherwise qualify to be part of the Medicaid expansion population under federal law, would not meet applicable federal requirements for participation in Medicaid and would in all likelihood not be approved by the Secretary of Health and Human Services. The plan would thus be invalid for

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[1] *See* Letter from Marilyn Tavenner, Administrator, Centers for Medicare & Medicaid Services, U.S. Dep't of Health and Human Services, to Andy Allison, Director, Arkansas Dep't of Human Services (Sept. 27, 2013), *available at* https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/ar/Health-Care-Independence-Program-Private-Option/ar-private-option-app-ltr-09272013.pdf (last visited July 29, 2016).

[2] Affordable Care Act: State Resources FAQ 9 (Dep't of Health and Human Services, Centers for Medicare & Medicaid Services, Apr. 25, 2013), *available at* https://www.medicaid.gov/state-resource-center/FAQ-medicaid-and-chip-affordable-care-act-implementation/downloads/Affordable-Care-Act-FAQ-enhanced-funding-for-medicaid.pdf (last visited July 29, 2016).

purposes of obtaining and spending federal funds to cover any part of the Medicaid expansion population.

Sincerely,

LESLIE RUTLEDGE
Attorney General