



# National Indian Health Board NATIONAL TRIBAL COVID-19 RESPONSE

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## Section 1115 Medicaid Waiver Authority – Emergency

### Background

Section 1115 of the Social Security Act delegates to the Secretary of Health and Human Services the authority to approve “experimental, pilot, and demonstration projects” for the Medicaid program. Medicaid is a partnership between states and the federal government and is designed to be a health insurance program for low-income and other vulnerable populations. In their implementation of Medicaid, states have some flexibility in how they design their State Plans. However, there are some restrictions. If states wish to deliver their Medicaid program in a way that requires waiving some of these restrictions, they can design a project and submit a Section 1115 waiver to the Centers for Medicare & Medicaid Services (CMS), the agency responsible for evaluating and approving these waivers.

In approving these projects, CMS is authorized to waive certain other provisions of the Social Security Act, where the provisions of Medicaid are written. These projects must be “likely to assist in promoting the objectives” of Medicaid but also must be budget neutral, meaning that the waiver must not cause the federal government to incur more costs than they would have if the waiver were not present. These waivers are designed in order to allow states to be innovative in their approach to delivery of Medicaid services.

### What does a Section 1115 project look like during an emergency?

Typically when states apply for a Section 1115 waiver, they have to convince CMS that their proposed project is both budget neutral and promotes the objective of the Medicaid program. The requirement for a budget neutrality analysis is waived during a federal emergency.

The Section 1115 waiver can be used to try new approaches to delivering Medicaid when a disaster has affected the capacity of the local health care system or even when state residents are displaced. For example, after Hurricane Maria devastated Puerto Rico, the island applied for an emergency Section 1115 waiver to allow residents to obtain Medicaid services outside of Puerto Rico – without having to establish residency in a new state.<sup>1</sup> The explanation offered for the waiver was that they wanted to see if offering services to displaced residents through their Medicaid program was preferable to forcing them to establish residency in a new state and have to apply for Medicaid there.

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<sup>1</sup> This waiver can be viewed here: <https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/pr/pr-disaster-relief-ca.pdf>



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## How can this be used during an emergency?

CMS can work with states during a federally declared emergency to expedite decisions on Section 1115 waivers that are designed to address the direct impacts of the event that led to the emergency. States must keep these waivers narrow in scope and cannot use them to implement measures unrelated to the emergency.

CMS provides guidance for states to shorten or even entirely waive the normal 30 day notice and comment period in order to facilitate an expedited decision. In order to get its waiver approved, a state must show it acted in good faith, and in a diligent, timely, and prudent manner; the circumstances constitute an emergency and could not have been reasonably foreseen; and that delay would undermine or compromise the purpose of the demonstration and be contrary to the interests of beneficiaries.

On March 22, 2020, CMS published a 2019 novel coronavirus (COVID-19) specific toolkit to help states apply for emergency Section 1115 waivers to respond to the pandemic. The toolkit can be found [here](#).

## Is Tribal Consultation required?

When states propose a Section 1115 waiver, they are required to conduct Tribal consultation and solicit the feedback from Tribes that may be affected by the waiver. However, the timeline in which this is undertaken may be affected by CMS's decision to grant an expedited approval.

## How long are waiver requests approved for?

It varies. CMS has discretion to work with the states to determine the scope and time period for requested flexibilities. For example, CMS approved Puerto Rico's emergency Section 1115 waiver in 2017 from, "November 13, 2017, to January 27, 2018 or whenever the disaster declaration expires, whichever is longer."<sup>2</sup>

## Conclusion

The Section 1115 waiver affords flexibility to states and facilitates experimental projects. The waiver allows CMS to make exceptions to certain elements of Medicaid law for states, as long as the proposed project is budget neutral and promotes the objectives of the program.

## Questions?

Please contact Christopher Chavis, Policy Analyst, at 202-750-3402 or at [cchavis@nihb.org](mailto:cchavis@nihb.org).

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<sup>2</sup> *Id.*