



All-State Medicaid and CHIP Call February 28, 2023



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Unwinding Home and Community-Based Services Public Health Emergency Flexibilities



February 28, 2023

COVID-19 Public Health Emergency Flexibilities

Secretary Becerra sent a letter¹ to U.S. Governors on February 9, 2023 specifying the renewal of the PHE for an additional 90 days. Based on current trends regarding COVID-19:

- The U.S. Department of Health and Human Services is planning for this to be the final renewal and for the COVID-19 PHE to end on May 11, 2023.
- This allows for 90 days notice before the COVID-19 PHE ends.

¹ Letter to U.S. Governors from Health and Human Services Secretary Xavier Becerra on renewing COVID-19 PHE: <https://www.hhs.gov/about/news/2023/02/09/letter-us-governors-hhs-secretary-xavier-becerra-renewing-covid-19-public-health-emergency.html>

COVID-19 HCBS Public Health Emergency Flexibilities

Emergency amendments and flexibilities for home and community-based services (HCBS) waivers and state plan benefits were made available to states to assist in responding to the COVID-19 public health emergency.

PHE Flexibility	HCBS Medicaid Authority
Section 1135 Waivers	Flexibilities in 1915(c) waivers or 1915(i), 1915(k) and 1905(a) state plan benefits that are not available using the Appendix K or Disaster Relief (DR) SPA authorities
Disaster Relief (DR) State Plan Amendment (SPA)	1905(a) benefits, 1915(i) State Plan HCBS benefits and 1915(k) Community First Choice (CFC) state plan benefits
Appendix K	1915(c) waiver
Attachment K	Section 1115 demonstrations with HCBS-like services

Key Dates for Expiration of HCBS PHE Flexibilities

Authority/Provision	Expiration Date ¹
Section 1135 Waiver	Expires at the end of the PHE (May 11, 2023)
Disaster Relief (DR) State Plan Amendment (SPA)	Expires at the end of the PHE or any earlier approved date elected by state and approved by CMS
HCBS Appendix and Attachment K	Expires no later than six months after the end of the PHE (November 11, 2023)

¹ Expiration dates based on May 11, 2023 expiration of the PHE

States can find additional information on how to unwind Disaster Relief SPAs and 1135s at: <https://www.medicaid.gov/resources-for-states/coronavirus-disease-2019-covid-19/unwinding-and-returning-regular-operations-after-covid-19/index.html>

Unwinding HCBS-Related Flexibilities Granted During the COVID-19 PHE

For the purposes of this HCBS-specific presentation, the term “unwinding” refers to the process that each state designs and implements to:

- Return its HCBS programs, services and supports to routine operation; and/or
- Adapt techniques and strategies from temporarily approved flexibilities to adjust to the changing needs of participants and providers through permanent amendments to the authority and/or program.

Section 1135 Waivers

Many states utilized the following section 1135 waivers to modify HCBS program requirements such as:

- Written person-centered planning
- HCBS Settings
- 1915(c) and 1915(k) level of care timelines
- Conflict of interest
- 1915(i) eligibility timelines
- 1905(a) and 1915(k) CFC personal representatives providing services

Note: Section 1135 waivers expire at the end of the PHE.¹

¹ Per the December 2020 State Health Official Letter (SHO) #20-004, states have additional time to complete certain actions after the PHE ends. Examples include initial HCBS level of care determinations, provider screening requirements, and temporary provider enrollment

Continuing DR SPA Flexibilities for State Plan HCBS Benefits

Extending approved flexibilities temporarily

- States have the option to submit a SPA in section 7.4.B or 7.4.C¹ of the state plan if choosing to temporarily extend DR SPA flexibilities for HCBS benefits beyond the end of the PHE.
- These SPAs are subject to SPA submission requirements, where applicable, including:
 - ✓ *Effective date*
 - ✓ *Public notice*
 - ✓ *Tribal consultation*

¹ February 14, 2023 All-State Call <https://www.medicaid.gov/resources-for-states/downloads/covid19allstatecall02142023.pdf>

Make Provisions Approved in a Disaster Relief SPA Permanent

States may submit a regular SPA making Disaster Relief SPA provisions part of the state plan indefinitely:

- The state should submit the SPA with a requested effective date of May 12, 2023
- CMS will review the SPA following all the standard processes and timelines

Continuing 1915(i) State Plan HCBS Flexibilities

Extending 1915(i) flexibilities CMS approved in a DR SPA

- 1915(i) SPA submissions must comply with all SPA submission requirements, including public notice and tribal consultation.
 - As required in 42 CFR § 441.745(a)(2)(v), 1915(i) HCBS SPAs with substantive changes must be approved with a prospective date.
 - In order to prevent a gap in authority, the submission must be received and approved by CMS before the end of the PHE with sufficient time for CMS to review and adjudicate the SPA before May 12, 2023.
 - States will need to submit a regular 1915(i) SPA on the 1915(i) template to make DR SPA 1915(i) State Plan HCBS flexibilities part of the state plan indefinitely.

Ending Temporary Appendix K and Attachment K HCBS Flexibilities (1 of 2)

Approved 1915(c) Appendix K and 1115 Attachment K flexibilities:

- Automatically expire when they reach the end date indicated in Section K-1-F of the template, or as indicated in the 1115, or earlier if a state requested and CMS approved a different end date for individual flexibilities.
- For most states this is no later than 6 months after the end of the PHE (November 11, 2023); this could be an earlier date if requested by the state and approved by CMS.

All temporary changes must conclude and states must resume compliance with the language in their current, approved 1915(c) waiver or 1115 demonstration upon termination of the Appendix or Attachment K.

Ending Temporary Appendix K and Attachment K HCBS Flexibilities (2 of 2)

- The state can end the entire Appendix or Attachment K by amending the end date if they determine the flexibilities are no longer needed.
- However, states need to ensure that ending an Appendix or Attachment K flexibility prior to its approved expiration date does not impact adherence to requirements in SMDL 21-003 (implementation of the American Rescue Plan Act of 2021, section 9817 which is the temporary 10 percentage point Federal Medical Assistance Percentage (FMAP) increase).
- Please to reach out to CMS via CMSUnwindingSupport@cms.hhs.gov to end an authority or flexibility early.

Continuing 1915(c) Appendix K Flexibilities (1 of 2)

- Changes made through a 1915(c) Appendix K that states choose to continue beyond its expiration date must be submitted as a regular amendment to the state's 1915(c) waiver application via the Waiver Management System.
- These waiver amendments must adhere to all regulatory provisions, and policies and procedures detailed in the Version 3.6 1915(c) waiver application and accompanying instructions, technical guide, and review criteria.
- CMS encourages states to submit 1915(c) waiver amendments as soon as possible.

Continuing 1915(c) Appendix K Flexibilities (2 of 2)

- Substantive changes to 1915(c) waivers may only be approved with a prospective effective date and waiver applications and/or amendments should be submitted at least 90 calendar days in advance of the proposed effective date.
- States must follow the existing requirements for public notice and tribal consultation.
- States should consider the time needed to conduct adequate public notice and submit the amendment in order to allow for the prospective approval prior to the end of the PHE.

Examples of Appendix K Flexibilities That May Be Approved in 1915(c) Waivers (1 of 3)

Use of telehealth or other electronic methods of service delivery for:

- Case management, personal care services that only require verbal cueing, in-home habilitation, individual supported employment, health coordination, peer support, counseling, training and support for family caregivers and other services that may be facilitated by telehealth while still facilitating community integration;
- Electronic signatures for evaluations, assessments and service plan meetings.

Examples of Appendix K Flexibilities That May Be Approved in 1915(c) Waivers (2 of 3)

- Home-delivered meals, assistive technology, and other services the state feels will be beneficial to their waiver population going forward. Reminder that meals provided as part of these services shall not constitute a "full nutritional regimen" (3 meals per day).
- New or modified non-facility based community integration services. Many facility-based day services suspended operations during the pandemic, accelerating opportunities for more individualized and integrated day supports that benefit community integration going forward.

Examples of Appendix K Flexibilities That May Be Approved in 1915(c) Waivers (3 of 3)

- Rate increases:
 - Waiver services, and
 - Recruitment and bonus payments for direct support professionals
- Retainer Payments at the permissible level of the lesser of 30 consecutive days or the total number of nursing facility bed-hold days approved in the state plan
- Payment for family caregivers to render services¹
- New options for self-directed services and/or budget authority

¹ See February 21, 2023 All-State Call <https://www.medicaid.gov/resources-for-states/coronavirus-disease-2019-covid-19/cmcs-medicaid-and-chip-all-state-calls/cmcs-medicaid-and-chip-all-state-calls-2023/index.html>

Appendix K Flexibilities That Are Not Approvable in a Standard 1915(c) Waiver (1 of 2)

- Provision of waiver services in institutional settings (excluding respite and services provided in accordance with section 3715 of the CARES Act)
- Extension of timeframes for level of care (re)evaluations
- Flexibility with the HCBS settings requirements at 42 CFR § 441.301(c)(4)(vi)(D) stating that individuals are able to have visitors of their own choosing at any time

Appendix K Flexibilities That Are Not Approvable in a Standard 1915(c) Waiver (2 of 2)

- Authorization for HCBS providers to serve as the only willing and qualified case manager under 42 CFR § 441.301(c)(1)(vi) due to the PHE (i.e., waiving conflict of interest requirements due to the PHE personnel crisis)
- Extension of due dates for CMS-372s and quality reports

Continuing Attachment K Flexibilities under a Section 1115 Demonstration

- States interested in continuing existing Attachment K flexibilities beyond the current expiration date under a section 1115 demonstration may submit a new demonstration request or an amendment to an existing demonstration and should contact their demonstration's project officer for additional technical assistance.
- States should follow all state public notice and application requirements as described under 42 CFR § 431.408 and 42 CFR § 431.412 for new applications or demonstration special terms and conditions for amendments.
- States should consider existing Attachment K expiration dates and the time needed to conduct state and federal public notice in order to allow for prospective approval, as section 1115 demonstration actions cannot be made retroactive.
- In order to facilitate timely CMS review, states should consider submitting their applications at least 120 calendar days in advance of the proposed effective date, after the state completes its state public notice.

Maintenance of Effort (MOE)

- As of February 2023, there are two major statutory provisions that impose MOE requirements on State Medicaid programs.
 - Section 6008(b)(1) of the Families First Coronavirus Relief Act
 - Section 9817 of the American Rescue Plan Act (ARP) of 2021
- These two statutes have different requirements and states should be aware of both sets of expectations as states are unwinding and making adjustments to HCBS waivers, state plan benefit programs and demonstrations.
- CMS reminds states that the expiration of a COVID-19 PHE authority does not result in a MOE violation (e.g. expiration of section 1135 waiver flexibilities upon expiration of the section 1135 authority itself is not an MOE violation).

MOE Considerations and Section 9817 of the ARP Requirements (1 of 2)

CMS expects states to demonstrate compliance with section 9817 of the ARP, beginning April 1, 2021 and until the state funds equivalent to the amount of federal funds attributable to the increased FMAP are fully expended, no later than March 31, 2025. To demonstrate compliance with the requirement not to supplant existing state funds expended for Medicaid HCBS, states must:

- Not impose stricter eligibility standards, methodologies, or procedures for HCBS programs and services than were in place on April 1, 2021;
- Preserve covered HCBS, including the services themselves and the amount, duration, and scope of those services, in effect as of April 1, 2021; and
- Maintain HCBS provider payments at a rate no less than those in place as of April 1, 2021.

Note: The expiration of Appendix K flexibilities upon the expiration of the Appendix K itself is not an MOE violation

MOE Considerations and Section 9817 of the ARP Requirements (2 of 2)

- If a state plans to end an HCBS PHE flexibility earlier than anticipated it must consider the Section 9817 ARP requirements.
- CMS expects states to retain temporary changes in effect on April 1, 2021 to HCBS eligibility, covered services, and/or payment rates approved through the Appendix or Attachment K amendments, or a disaster relief state plan amendment for as long as allowable under those authorities (e.g., according to the end date approved under an Appendix K amendment but no later than 6 months post PHE).
- CMS will not apply non-compliance penalties to the receipt of the increased FMAP once the authority for those temporary changes has expired or if the state needs to implement changes to comply with other federal statutory or regulatory requirements.

Summary

- States should prepare now for unwinding HCBS-related PHE flexibilities.
- CMS encourages states to submit section 1115 demonstration applications, 1915(c) waiver amendments, 1915(i) SPAs and 1915(k) CFC SPAs as soon as possible.
- If states choose to end HCBS-related PHE flexibilities prior to expiration of the flexibility, states will need to ensure there are no MOE violations.
- CMS is available to answer questions and provide technical assistance to assist states in the unwinding process.

Resources

- Send questions about unwinding to:
CMSUnwindingSupport@cms.hhs.gov
- [State Health Official letter #20-004](#), December 22, 2020
- American Rescue Plan Act of 2021 State Medicaid Director Letter
<https://www.medicaid.gov/federal-policy-guidance/downloads/smd21003.pdf>
- States can find additional information on how to unwind Disaster Relief SPAs and section 1135 waivers at: <https://www.medicaid.gov/resources-for-states/coronavirus-disease-2019-covid-19/unwinding-and-returning-regular-operations-after-covid-19/index.html>

Questions
