

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

_____)	
SAMUEL PHILBRICK et al.,)	
Plaintiffs,)	
)	
v.)	Civil Action No. 1:19-CV-00773 (JEB)
)	
ALEX M. AZAR et al.,)	
Defendants.)	
_____)	

**THE NEW HAMPSHIRE DEPARTMENT OF HEALTH AND HUMAN SERVICES’
NOTICE OF LEGISLATION AND FINDINGS**

The New Hampshire Department of Health and Human Services hereby submits the following Notice of Legislation and Findings:

1. On June 28, 2019, the New Hampshire Department of Health and Human Services filed its Reply Memorandum in Support of Its Partial Motion for Summary Judgment as to Count II of the Plaintiffs’ Complaint. ECF No. 37. In the Reply, the New Hampshire Department of Health and Human Services notified the Court that “[a] new bill, Senate Bill 290 (2019), which modifies the Granite Advantage program, ha[d] been adopted by the New Hampshire House and Senate and [wa]s being enrolled for presentation to the Governor” ECF No. 37 at 2 n.1. The New Hampshire Department of Health and Human Services stated that, “should Senate Bill 290 become law, it will materially change the Granite Advantage program as it currently exists and may require the Federal Defendants to re-examine the approved waiver presently under review by this Court.” ECF No. 37 at 12. Accordingly, the New Hampshire Department of Health and Human Services stated it would “notify the Court and the parties in this matter promptly should Senate Bill 290 be signed into law by the Governor.”

Id.

2. Consistent with its Reply Memorandum, the New Hampshire Department of Health and Human Services hereby provides Notice to the Court and the parties that the Governor signed SB 290 into law on July 8, 2019. A copy of the final version of SB 290 is attached as Exhibit A.¹

3. Additionally, in accordance with SB 290, the Commissioner of the New Hampshire Department of Health and Human Services has exercised his authority under the new statute to “temporarily waive the application of the community engagement requirement for the beneficiaries of the Granite Advantage program for the period of June 1 to September 30, 2019 . . .” Exhibit B. The Commissioner’s letter cites the passage of SB 290 and additional notice efforts related to the program as the basis for his decision. A copy of the Commissioner’s letter is hereby attached as Exhibit B.

NEW HAMPSHIRE DEPARTMENT OF
HEALTH AND HUMAN SERVICES

By its attorney,

THE OFFICE OF THE NEW HAMPSHIRE
ATTORNEY GENERAL

Dated: July 10, 2019

/s/Lindsey B. Courtney
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¹ An electronic copy of the final bill can be accessed at:
http://gencourt.state.nh.us/bill_status/Results.aspx?q=1&txtbillnumber=sb290&txtsessionyear=2019.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent by ECF on July 10, 2019, to counsel of record.

/s/Lindsey B. Courtney
Lindsey B. Courtney

EXHIBIT A

CHAPTER 159
SB 290-FN - FINAL VERSION

03/14/2019 0834s
5Jun2019... 2331h
06/27/2019 2626CofC
06/27/2019 2667EBA

2019 SESSION

19-0893
01/03

SENATE BILL ***290-FN***

AN ACT relative to the New Hampshire granite advantage health care program.

SPONSORS: Sen. Rosenwald, Dist 13; Sen. Feltes, Dist 15; Sen. Fuller Clark, Dist 21; Sen. Hennessey, Dist 5; Sen. Sherman, Dist 24; Sen. Cavanaugh, Dist 16; Sen. Kahn, Dist 10; Sen. Levesque, Dist 12; Sen. Soucy, Dist 18; Sen. Watters, Dist 4; Rep. Wallner, Merr. 10; Rep. Elliott, Rock. 8; Rep. Knirk, Carr. 3; Rep. Nordgren, Graf. 12; Rep. Guthrie, Rock. 13

COMMITTEE: Health and Human Services

AMENDED ANALYSIS

This bill makes various changes to the New Hampshire granite advantage health care program, including:

I. Clarifying which beneficiaries may be subject to the work and community engagement requirement.

II. Adding exemptions for certain persons from the community engagement requirement.

III. Adding circumstances for the elimination of the community engagement requirement.

Explanation: Matter added to current law appears in ***bold italics***.
Matter removed from current law appears ~~[in brackets and struck through.]~~
Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

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03/14/2019 0834s
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06/27/2019 2626CofC
06/27/2019 2667EBA

19-0893
01/03

STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Nineteen

AN ACT relative to the New Hampshire granite advantage health care program.

Be it Enacted by the Senate and House of Representatives in General Court convened:

1 159:1 New Hampshire Granite Advantage Health Care Program. Amend RSA 126-
2 AA:2, III to read as follows:

3 III.(a) Newly eligible adults who are unemployed shall be eligible to receive
4 benefits under this paragraph if the commissioner finds that the individual is engaging
5 in at least 100 hours per month based on an average of 25 hours per week in one or more
6 work or other community engagement activities, ***including self-employment***, as follows:

7 (1) Unsubsidized employment including by nonprofit organizations.

8 (2) Subsidized private sector employment.

9 (3) Subsidized public sector employment.

10 (4) On-the-job training.

11 (5) Job skills training related to employment, including credit hours
12 earned from an accredited college or university in New Hampshire. Academic credit
13 hours shall be credited against this requirement on an hourly basis.

14 (6) Job search and job readiness assistance, including, but not limited to,
15 persons receiving unemployment benefits and other job training related services, such
16 as job training workshops and time spent with employment counselors, offered by the
17 department of employment security. Job search and job readiness assistance under this
18 section shall be credited against this requirement on an hourly basis.

19 (7) Vocational educational training not to exceed 12 months with respect
20 to any individual.

21 (8) Education directly related to employment, in the case of a recipient
22 who has not received a high school diploma or a certificate of high school equivalency.

23 (9) Satisfactory attendance at secondary school or in a course of study
24 leading to a certificate of general equivalence, in the case of a recipient who has not
25 completed secondary school or received such a certificate.

26 (10) Community service or public service.

27 (11) ~~[Caregiver services for a nondependent relative or other person with~~
28 ~~a disabling medical or developmental condition.]~~

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1 (12) Participation in substance use disorder treatment *or recovery*
2 *activities and/or mental health treatment.*

3 (b) If an individual in a family receiving benefits under this paragraph fails to
4 comply with the work or community engagement activities required in accordance with
5 this paragraph, the assistance shall be ~~terminated~~ *suspended*. The commissioner shall
6 adopt rules under RSA 541-A to determine good cause and other exceptions to
7 termination. Following approval by the joint health care reform oversight committee,
8 pursuant to RSA 161:11, to initiate rulemaking, any rules proposed under this
9 subparagraph shall be submitted to the fiscal committee of the general court, which
10 shall review the rules prior to submission to the joint legislative committee on
11 administrative rules and make recommendations to the commissioner regarding the
12 rules. An individual may apply for good cause exemptions which shall include, at a
13 minimum, the following verified circumstances:

14 (1) The beneficiary experiences the birth or death of a family member
15 living with the beneficiary.

16 (2) The beneficiary experiences severe inclement weather, including a
17 natural disaster, and therefore was unable to meet the requirement.

18 (3) The beneficiary has a family emergency or other life-changing event
19 such as divorce.

20 (4) The beneficiary is a victim of domestic violence, dating violence, sexual
21 assault, or stalking consistent with definitions and documentation required under the
22 Violence Against Women Reauthorization Act of 2013 under 24 C.F.R. section 5.2005 and
23 24 C.F.R. section 5.2009, as determined by the commissioner pursuant to rulemaking
24 under RSA 541-A.

25 ~~[(5) The beneficiary is a custodial parent or caretaker of a child 6 to 12~~
26 ~~years of age who, as determined by the commissioner on a monthly basis, is unable to~~
27 ~~secure child care in order to participate in qualifying work and other community~~
28 ~~engagement either due to a lack of child care scholarship or the inability to obtain a~~
29 ~~child care provider due to capacity, distance, or another related factor.]~~

30 (c) This paragraph shall only apply to those considered able-bodied adults as
31 described in section 1902(a)(10)(A)(i)(VIII) of the Social Security Act of 1935, as amended,
32 42 U.S.C. section 1396a(a)(10)(A)(i).

33 (d) This paragraph shall not apply to:

34 (1) A person who is unable to participate in the requirements under
35 subparagraph (a) due to illness, incapacity, or treatment, including inpatient treatment,
36 as certified by a licensed physician, an advanced practice registered nurse (APRN), a
37 licensed behavioral health professional, a licensed physician assistant, a licensed

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1 alcohol and drug counselor (LADC), or a board-certified psychologist. The physician,
2 APRN, licensed behavioral health professional, licensed physician assistant, LADC, or
3 psychologist shall certify, on a form provided by the department, the duration and
4 limitations of the disability.

5 (2) A person participating in a state certified drug court program, as
6 certified by the administrative office of the superior court.

7 (3) A parent or caretaker [~~as identified in RSA 167:82, II(g)~~] where the
8 required care ***of an individual who may or may not reside in the household*** is considered
9 necessary by a licensed physician, APRN, board-certified psychologist, physician
10 assistant, or licensed behavioral health professional who shall certify the duration that
11 such care is required.

12 (4) A custodial parent or caretaker of a dependent child [~~under 6 years of~~
13 ~~age~~] ***through 12 years of age*** or a child with developmental disabilities who is residing
14 with the parent or caretaker; provided that the exemption shall only apply to one parent
15 or caretaker in the case of a 2-parent household ***where responsibility for the child the***
16 ***exemption is based on is shared by the 2 parents or caretakers.***

17 (5) Pregnant women.

18 (6) A beneficiary who has a disability as defined by the Americans with
19 Disabilities Act (ADA), section 504 of the Rehabilitation Act, or section 1557 of the
20 Patient Protection and Affordable Care Act [~~and is unable to meet the requirement for~~
21 ~~reasons related to that disability~~] ***with or without an accommodation***; or who has an
22 immediate family member in the home with a disability under federal disability rights
23 laws and who is unable to meet the requirement for reasons related to the disability of
24 that family member, or the beneficiary or an immediate family member who is living in
25 the home or the beneficiary experiences a hospitalization or serious illness.

26 (7) Beneficiaries who are identified as medically frail, under 42 C.F.R.
27 section 440.315(f), and as defined in the alternative benefit plan and in the state plan and
28 who are certified by a licensed physician or other medical professional to be unable to
29 comply with the work and community engagement requirement as a result of their
30 condition as medically frail. The department shall require proof of such limitation
31 annually, including the duration of such disability, on a form approved by the
32 department.

33 (8) Any beneficiary who is in compliance with the requirement of the
34 Supplemental Nutritional Assistance Program (SNAP) and/or Temporary Assistance to
35 Needy Families (TANF) employment initiatives.

36 (9) ***Any beneficiary who is homeless as defined by the McKinney-Vento***
37 ***Homeless Assistance Act of 1987, 42 U.S.C. section 11301 et seq.***

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1 (e) The commissioner shall adopt rules under RSA 541-A pertaining to the
2 community engagement requirement. Following approval by the joint health care
3 reform oversight committee, pursuant to RSA 161:11 to initiate rulemaking, any rules
4 proposed under this subparagraph shall be submitted to the fiscal committee of the
5 general court, which shall review the rules prior to submission to the joint legislative
6 committee on administrative rules and make recommendations to the commissioner
7 regarding the rules. The rules shall be consistent with the terms and conditions of any
8 waiver issued by the Centers for Medicare and Medicaid Services for the program,
9 *provided that any waiver issued by the Centers for Medicare and Medicaid Services is*
10 *not unreasonably inconsistent with any provision of this chapter*, and shall address, at a
11 minimum, the following:

- 12 (1) Enrollment, suspension, and disenrollment procedures in the program.
- 13 (2) Verification of compliance with community engagement activities.
- 14 (3) Verification of exemptions from participation.
- 15 (4) Opportunity to cure and re-activation following noncompliance,
16 including not being barred from re-enrollment.
- 17 (5) Good cause exemptions.
- 18 (6) Education and training of enrollees.
- 19 (7) Annual certification of medical frailty pursuant to 42 C.F.R. section
20 440.315(f), including proof and duration of such condition on a form supplied by the
21 department.

22 159:2 New Paragraphs; New Hampshire Granite Advantage Health Care Program.
23 Amend RSA 126-AA:2 by inserting after paragraph VIII the following new paragraphs:

24 IX. The commissioner shall, as expeditiously as possible, submit to the Centers
25 for Medicare and Medicaid Services an amendment to the waiver for approval of a
26 revised waiver of retroactive eligibility permitting coverage for the 45-day period
27 immediately preceding the determination of eligibility for all persons insured in the
28 program.

29 X. The commissioner shall waive the application of the work and community
30 engagement requirement in subparagraph III(a) or the suspension from coverage for
31 noncompliance for any period of time up to but not after July 1, 2021 upon a finding of
32 one or more of the following circumstances that impact a substantial number of program
33 members who are mandatory for the requirement:

- 34 (a) The inability to communicate verbally and in writing and directly counsel
35 all members who are mandatory for the requirement and not already exempted or are in
36 compliance in accordance with the rules of the work and community engagement
37 requirement adopted under 541-A.

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1 (b) The unavailability of qualifying activities in any region of the state that
2 may result in a disproportionate impact upon program members located elsewhere.

3 (c) The impact of seasonal employment opportunities on the ability of
4 members to achieve the minimum hours for qualifying activities.

5 (d) The inability to achieve the minimum hours of qualifying activities after
6 taking into account all applicable exemptions despite good faith efforts to comply.

7 (e) The unavailability of transportation and other supports for members who
8 are not eligible for assistance through granite workforce.

9 (f) Other unforeseen circumstances that impact the administration and
10 verification of the program and that more likely than not would cause members to be
11 suspended from the program.

12 XI. The commissioner shall notify the governor, the president of the senate and
13 the speaker of the house of representatives in writing no later than 7 days after making
14 a finding under paragraph X with a detailed explanation as to the basis of the findings,
15 the steps the department can and is taking to address the circumstances that gave rise
16 to the findings, and any recommendations regarding how the suspension of the
17 requirement may be lifted and the compliance provisions of the program resumed. The
18 commissioner may submit an amendment to the program waiver (CMS # 11-W-00298/1) to
19 incorporate the authority to waive the suspension of coverage consistent with this
20 provision, to the extent required by the Centers for Medicare and Medicaid Services.

21 159:3 New Hampshire Granite Advantage Health Care Program; Commission to
22 Evaluate the Effectiveness and Future of the New Hampshire Granite Advantage Health
23 Care Program. Amend RSA 126-AA:4, II to read as follows:

24 II.(a) The commission shall evaluate the effectiveness and future of the program.
25 Specifically the commission shall:

26 (1) Review the program's financial metrics.

27 (2) Review the program's product offerings.

28 (3) Review the program's impact on insurance premiums for individuals
29 and small businesses.

30 (4) Make recommendations for future program modifications, including,
31 but not limited to whether the program is the most cost-effective model for the long term
32 versus a return to private market managed care.

33 (5) Evaluate non-general fund funding options for longer term
34 continuation of the program, including options to accept funding from the federal
35 government allowing a self-administered program.

36 (6) Review up-to-date information regarding changes in the level of
37 uncompensated care through shared information from the department, the department

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1 of revenue administration, the insurance department, and provider organizations and
2 the program's impact on insurance premium tax revenues and Medicaid enhancement
3 tax revenue.

4 (7) Review the granite workforce pilot program.

5 (8) Evaluate reimbursement rates to determine if they are sufficient to
6 ensure access to and provider capacity for all behavioral health services.

7 (9) Review the number of people who are found ineligible or who are
8 dropped from the rolls of the program because of the work requirement *and determine*
9 *whether the age of beneficiaries subject to the requirement should be changed. The*
10 *commission shall issue any recommendation for change by December 1, 2019.*

11 (10) *Review the reasons beneficiaries are found ineligible or are dropped*
12 *from the program and determine if the number of required hours should be changed.*
13 *The commission shall issue any recommendation for change by December 1, 2019.*

14 (11) Review the program's provider reimbursement rates and overall
15 financing structure to ensure it is able to provide a stable provider network and
16 sustainable funding mechanism that serves patients, communities, and the state of New
17 Hampshire.

18 (b) Any funding solutions recommended by the commission shall not include
19 the use of new general funds.

20 (c) The commission shall solicit information from any person or entity the
21 commission deems relevant to its study.

22 (d) The commission shall make a recommendation on or by [February]
23 *October* 1, 2019 to the commissioner concerning recommended monitoring and
24 evaluation requirements for work and community engagement requirements, including
25 a draft of proposed metrics for quarterly and annual reporting, including suggested
26 costs and benefits evaluations.

27 159:4 New Hampshire Granite Advantage Health Care Program; Commission to
28 Evaluate the Effectiveness and Future of the New Hampshire Granite Advantage
29 Program. Amend RSA 126-AA:4, I(b) and (c) to read as follows:

30 ~~(b) [Of the commission members listed in this paragraph, only the 6 legislative~~
31 ~~members shall be voting members. All other members shall serve in an advisory~~
32 ~~capacity only.~~

33 (e)] Legislative members of the commission shall receive mileage at the
34 legislative rate when attending to the duties of the commission.

35 159:5 New Hampshire Granite Advantage Health Care Program; Commission to
36 Evaluate the Effectiveness and Future of the New Hampshire Granite Advantage Health
37 Care Program. Amend RSA 126-AA:4, III to read as follows:

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1 III. The members of the commission shall elect a chairperson from among the
2 members. The first meeting of the commission shall be called by the first-named senate
3 member. The first meeting of the commission shall be held within 45 days of the
4 effective date of this section. [~~Four of the 6 voting~~] *Eight* members of the commission
5 shall constitute a quorum.

6 159:6 Effective Date. This act shall take effect upon its passage.

Approved: July 08, 2019
Effective Date: July 08, 2019

EXHIBIT B



State of New Hampshire

DEPARTMENT OF HEALTH AND HUMAN SERVICES

129 PLEASANT STREET, CONCORD, NH 03301-3857
603-271-9200 FAX: 603-271-4912 TDD ACCESS: RELAY NH 1-800-735-2964

JEFFREY A. MEYERS
COMMISSIONER

July 8, 2019

His Excellency, Governor Christopher T. Sununu
State House
107 North Main Street
Concord, New Hampshire 03301

The Honorable Donna M. Soucy
State House, Room 302
107 North Main Street
Concord, New Hampshire 03301

The Honorable Steve Shurtleff
State House
107 North Main Street
Concord, New Hampshire 03301

Re: Determination and Findings Relative to the Granite Advantage Community Engagement Requirement

Dear Governor Sununu, President Soucy and Speaker Shurtleff:

In accordance with the provisions of Senate Bill 290, now codified at RSA 126-AA:2, X, I am notifying you of my decision to temporarily waive the application of the community engagement requirement for the beneficiaries of the Granite Advantage program for the period of June 1 to September 30, 2019 for the reasons described below. This action, which effectively delays the implementation of the work and community engagement requirement, is consistent with Paragraph 18 of the final terms and conditions of Waiver No. 11-W-00298/1 issued by the Centers for Medicare and Medicaid Services (CMS) on November 30, 2018 for the Granite Advantage program that permits the state upon thirty days prior notice to CMS to choose the implementation date for this requirement.

A. Findings In Support of Decision to Temporarily Waive the Application of the Community Engagement Requirement

1. The changes to the Community Engagement requirement represent an unforeseen circumstance that will impact the administration of the program and that will more likely than not lead to persons losing coverage. This finding is made pursuant to RSA126-AA:2,X (f).

Senate Bill 290 makes several changes to the exemptions and qualifying activities of the community engagement requirement that are applied only prospectively upon enactment and would

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significantly effect the administration of the program. SB 290 changes the exemption for parents or caretakers of a child from a child age 6 to a child age 12. It also changes the qualifying activities to explicitly include self-employment and, for the first time, to include participation in recovery activities and mental health treatment. The bill also now categorically exempts persons with an ADA disability regardless of whether their disability would impact compliance with the community engagement requirement.

These changes made by SB 290 were enacted very late in the first month of compliance for the program and must now be incorporated into the Department's eligibility system through multiple software updates that require extensive testing to ensure accuracy. This process takes weeks to complete. It is impractical, if not impossible, to implement these changes manually. As a result of the Department's inability to effectuate these changes into the eligibility system until sometime in August, thousands of beneficiaries could receive notices that they are at risk for suspension or are suspended even though they are now exempt under the SB 290 changes. For example, there are approximately 2000 additional parents or caretakers of minor children who will now be exempt as a result of raising the threshold for the exemption from age 6 to 12. But there is no ability to code that change prior to August 1st. As a result, many parents who are now coded as mandatory and are subject to the requirement will, in fact, be exempt. The eligibility system, however, will not recognize that change prior to the issuance of a suspension letter for those parent or caretakers of children between 7 and 12 who did not otherwise satisfy the requirement for June and/or July.

The Department must also amend its administrative rules to reflect the changes made to exemptions and qualifying activities. This too is a process that will take additional time and impacts the administration of the program. In amending the community engagement requirement, the legislature did not relieve the Department from having accurate rules in place.

2. Despite extensive efforts, the Department requires additional time to effectively communicate with a significant number of Granite Advantage beneficiaries regarding the community engagement program in accordance with the Administrative Rule He-W 837(c). This finding is made pursuant to RSA 126-AA:2,X (a).

The Granite Advantage rules require the department to provide both "information and assistance" to the Granite Advantage population with respect to every material element of the community engagement program. SB 290 now takes this requirement a step further and suggests that the Department "directly counsel" Granite Advantage beneficiaries. SB 290 also requires the Department to apply for an amended waiver from CMS incorporating all the changes to the program made by the legislation, including a revised retroactive coverage waiver. Providing information and assistance alone to the Granite Advantage members will require a delay in implementing the community engagement requirement.

Starting last summer, the department has undertaken multiple efforts to explain the program, including 11 public information sessions, sustained advertisements on radio and social media, over 50,000 telephone calls, counseling sessions in each of the department's 11 district offices, and four separate letters to beneficiaries. Exemption and other forms were distributed to providers to facilitate interactions with their patients. In recent days, teams of state employees have travelled door to door in selected locations in the state to speak with persons from whom we have not received information.

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These considerable efforts did not result in the type and volume of personal contact that would help ensure the success of the program. Of the 50,000 plus phone calls made, less than 10% of those called answered their phone; and only 10% of that number were able to provide identifying information that enabled the department to discuss personal health information. The district office sessions held three times per week for two months drew less than 500 persons. Of the 1,200 home visits to date, less than 150 persons were able to be approached.

Despite these efforts, and notwithstanding the ability for beneficiaries to provide information regarding qualifying activities and exemptions in person, over the phone or by facsimile, online and at the 11 department district offices, the department has no information on the compliance status of approximately 17,000 beneficiaries who are mandatory for the program in the month of June. Clearly, there needs to be a continuing effort by the department, its managed care organizations who serve this population and other providers in order to educate the beneficiaries and implement the program in order that it does not result in the unintended loss of coverage for thousands of beneficiaries.

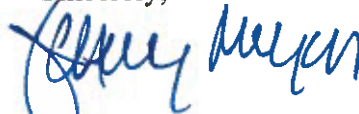
B. Ongoing Efforts and Future Steps

The Department will continue its ongoing efforts to communicate with all beneficiaries as required, including utilizing the managed care organizations and other providers. The Department will also proceed to develop and submit changes to the Granite Advantage Waiver as required by SB 290 and submit an amendment to the program's administrative rules.

C. Conclusion

Based on the foregoing findings, I am exercising authority provided in Senate Bill 290 to waive the application of the community engagement requirement for the 4-month period of June 1 through September 30, 2019. The waiver of retroactive eligibility that was implemented on January 1, 2019 remains in place and is unaffected by this determination, pending the Department's application to CMS for a modification of that waiver in accordance with Senate Bill 290. Separate notice will be made to CMS that the implementation of the community engagement requirement will be delayed consistent with this determination.

Sincerely,



Jeffrey A. Meyers
Commissioner