



NEW HAMPSHIRE LEGAL ASSISTANCE

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Via Electronic Submission

Sylvia Matthews Burwell, Secretary
U.S. Department of Health and Human Services
Marilyn Tavenner, Administrator
Centers for Medicare and Medicaid Services
7500 Security Boulevard, MS-S2-26-12
Baltimore, MD 21244-1850
Submitted via Medicaid.gov

RE: New Hampshire Health Protection Program
Premium Assistance Section 1115 Research and Demonstration Waiver
Comments of New Hampshire Legal Assistance

Dear Secretary Burwell and Administrator Tavenner:

New Hampshire Legal Assistance (NHLA) submits these comments regarding New Hampshire's Final Application for the New Hampshire Health Protection Program Premium Assistance Section 1115 Research and Demonstration Waiver ("Waiver Application").¹

NHLA is a non-profit law firm. We represent low-income and elderly clients in civil cases impacting their basic needs. Healthcare is a fundamental human need, and our law firm prioritizes representation of people who need access to healthcare and health insurance coverage. We applaud the New Hampshire Department of Health and Human Services ("NHDHHS") and the New Hampshire Insurance Department ("NHID") for their efforts to implement the New Hampshire Health Protection Program. This expansion of health insurance coverage is a magnificent step toward improved access to healthcare for low-income Granite Staters. We also thank NHDHHS and NHID for their responsiveness to a number of concerns we raised during the state public

¹ NHLA submits these comments without prejudice to the right of our law firm and/or our current or future clients to make any claims in any current or future litigation. Absence of comment regarding any provision in the Waiver Application should not be construed as support for that provision nor agreement that it is lawful.

comment period for the Waiver Application. As set forth below, NHLA continues to have significant concerns about the proposed elimination of the Medicaid appeals process for Premium Assistance Program enrollees.

The Waiver Application's list of specific waiver requests does not include waiver of the Medicaid appeals process for Premium Assistance Program enrollees. See Waiver Application at 28-29. Nevertheless, Section III of the Waiver Application specifically proposes elimination of the Medicaid appeals process for "denials of benefits covered by the [Qualified Health Plan]." Waiver Application at 11. The Waiver Application distinguishes between the Qualified Health Plan ("QHP") appeals process and the Medicaid appeals process. It states that "QHP Premium Assistance enrollees will use their QHP appeals process to appeal denials of benefits covered under the QHP" and that "QHP Premium Assistance enrollees will continue to use the Medicaid appeals process for denials of wrapped benefits." *Id.* (emphasis added).

Although Premium Assistance Program enrollees will have their health insurance delivered through QHPs, they will remain Medicaid beneficiaries entitled to the rights afforded them under the Medicaid statute and regulations. Medicaid law has been carefully crafted to meet the specific healthcare and health insurance coverage needs of low-income people. Its appeal provisions are designed to ensure that low-income people never lose their critically important health insurance benefits without a lawful reason. These essential protections derive from the Due Process Clause of the U.S. Constitution, as interpreted in the Supreme Court's landmark decision in Goldberg v. Kelly, 397 U.S. 254 (1970). Medicaid regulations require that state Medicaid agencies provide appeal processes that comply with Goldberg. 42 C.F.R. 431.205(d) ("The [Medicaid] hearing system must meet the due process standards set forth in Goldberg v. Kelly, 397 U.S. 254 (1970) . . .").

As NHLA commented during the state public comment period, we are concerned that the QHP appeals process falls short of the Goldberg due process standards. The Waiver Application states that Premium Assistance "enrollees will receive the full set of Medicaid-required protections throughout the appeals process," Waiver Application at 112, however that conclusory statement appears to be inconsistent with existing QHP appeals law.

Two cornerstone principles of Medicaid appeal law are that beneficiaries must have an opportunity for a hearing before their benefits are reduced or terminated, and that those beneficiaries who choose to appeal must have the option to continue receiving benefits while the appeal is pending. These concepts are generally known as "pre-termination review" and "aid paid pending appeal," respectively. Under existing health insurance law, the QHP appeals process fails to provide adequately either pre-termination review or aid paid pending appeal. Although somewhat heightened procedural protections in the vein of pre-termination review and aid paid pending appeal are available for so-called

“expedited” internal and external appeals under N.H. RSA 420-J and the applicable NHID regulations, they do not fully comply with Medicaid appeal law. And even those protections are not available at all for non-expedited internal and external appeals. Many QHP internal and external appeals will involve coverage determinations that do not qualify for the expedited appeal processes. Premium Assistance Program enrollees will therefore lose their right to pre-termination review and aid paid pending appeal in many disputes. Medicaid law simply does not permit a distinction between appeals in the nature of expedited appeals and those in the nature of non-expedited appeals. Any waiver of enrollees’ rights to pre-termination review and/or aid paid pending appeal – as contemplated by the Waiver Application – would likely expose NHDHHS to costly litigation and ultimately fail constitutional scrutiny.

Goldberg’s procedural due process protections extend far beyond pre-termination review and aid paid pending appeal. The decision and applicable Medicaid regulations also mandate very specific requirements for notices, hearings, and decisions. See, e.g. Goldberg, 397 U.S. at 267-271. Although the Waiver Application suggests that many of these procedures will be available, it does not point to any existing QHP appeals law that guarantees them. See Waiver Application at 11.

Application of the QHP appeals process to Medicaid beneficiaries may also run afoul of the Medicaid law’s “single state agency” provisions. Like all states, New Hampshire must designate a single state agency to administer the Medicaid program; NHDHHS is the agency so designated. See 42 U.S.C. § 1396a(a)(5). NHDHHS may not delegate its authority to make discretionary decisions about Medicaid regulations and policies or their application. See 42 C.F.R. § 431.10(e). The QHP appeals process is overseen by NHID, not NHDHHS. It is difficult to envision how NHDHHS could maintain its “single state agency” authority under those circumstances.

Finally, there are compelling policy arguments against elimination of the Medicaid appeals process for denials of QHP benefits. Premium Assistance Program enrollees may face obstacles such as limited English proficiency, illiteracy, and learning disability, among others. They are uniformly low-income and therefore highly unlikely to be able to retain private attorneys to litigate health insurance disputes. Despite these challenges, Premium Assistance Program enrollees will have to navigate a complex multi-venue appeal structure in which they must invoke the QHP appeals process for certain coverage determinations and the Medicaid appeals process for others.

NHLA is also concerned that NHID lacks capacity to oversee the volume of appeals that might be filed by Premium Assistance Program enrollees. According to NHID’s 2013 Annual Report, only 80 external appeal requests were filed during Fiscal Year 2013, and of those, only 35 were qualified for external review and adjudicated. 162nd Annual Report of the State of New Hampshire Insurance

Department at 13 (available at www.nh.gov/insurance/aboutus/annualreport/documents/162nd_ann_rpt.pdf).

NHLA urges you to deny the Waiver Application's request to eliminate the Medicaid appeals process for certain coverage determinations. The Premium Assistance Program will offer enrollees a number of "wrapped" benefits – services that are required under Medicaid law but are not Essential Health Benefits provided by QHPs. The Medicaid appeals process should be applied to all QHP coverage determinations, essentially in the form of a wrapped benefit. This will ensure compliance with the Due Process Clause, the Supreme Court's Goldberg decision, and Medicaid law.

Thank you for considering these comments. NHLA would welcome the opportunity to work with you as you review the Waiver Application.

Very truly yours,



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Policy Director

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