



NEW HAMPSHIRE LEGAL ASSISTANCE

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Via Email Only to PAP1115Waiver@dhhs.state.nh.us

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

Dear Mr. Meyers:

New Hampshire Legal Assistance (NHLA) submits these comments regarding the draft Premium Assistance Section 1115 Research and Demonstration Waiver (“draft Waiver”).¹ Please consider these comments in addition to those we submitted on October 8, 2014, and October 20, 2014.

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 Department of Health and Human Services (“DHHS”) and the Insurance Department (“NHID”) for your 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.

NHLA supported SB 413, which created the Health Protection Program, and we support your efforts to stand up the Premium Assistance Program. We do have substantial concerns about two components of the draft Waiver: (1) the

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 draft Waiver should not be construed as support for that provision nor agreement that it is lawful.

elimination of the Medicaid appeal process for enrollees; and (2) the mechanism for tracking enrollees' maximum cost-sharing obligations.

Appeals

The draft Waiver's list of specific waiver requests does not include waiver of the Medicaid appeal process for Premium Assistance Program enrollees. It is however apparent that DHHS is indeed proposing to eliminate Medicaid appeals in many circumstances. See Draft Waiver at 27-28. According to Section III of the draft Waiver, Premium Assistance Program enrollees will be entitled to use the Qualified Health Plan ("QHP") appeal process for coverage determinations related to services provided through the QHP. (As we understand the draft Waiver and related information received from DHHS and NHID, the Medicaid appeal process will remain available for all eligibility-related determinations and coverage determinations for so-called "wrapped" services.) See Draft Waiver at 11-12.

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) . . .).

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. (There are numerous other procedural requirements going to the nature of the appeal process, as well.)

The QHP appeal 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 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 circumstances. 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 draft Waiver – would likely fail constitutional scrutiny.

The Premium Assistance Program will offer to enrollees a number of “wrapped” benefits – services that are required under Medicaid law but are not Essential Health Benefits provided by QHPs. The Medicaid appeal process should be extended to all QHP coverage determinations, essentially in the form of a wrapped benefit. This will ensure compliance with the Due Process Clause and the Supreme Court’s Goldberg decision. It will also mean that Premium Assistance Program enrollees – who may face obstacles such as limited English proficiency, illiteracy, and learning disability, among others – will not have to navigate a multi-venue appeal structure in which they must invoke the Medicaid appeal process for eligibility-related determinations and coverage determinations for wrapped benefits, and the QHP appeal process for coverage determinations made by the QHP.

Cost-Sharing Tracking

As a threshold matter, NHLA offers our wholehearted support for the absence of premiums and coinsurance in the draft Waiver’s cost-sharing scheme. That being said, we wish to note that the co-payments proposed for Premium Assistance Program enrollees with incomes between 100 and 138 percent of the federal poverty level will work a substantial burden on people who have little, if any, disposable income to spend on healthcare. Abundant research demonstrates that co-payments – even those in relatively small amounts – discourage people from accessing healthcare that they need. See National Health Law Program, “Medicaid Premiums and Cost Sharing” (March 26, 2014), available at www.healthlaw.org/publications/search-publications/Medicaid-Premiums-Cost-Sharing. The central purpose of SB 413, which created the New Hampshire Health Protection Program, was to “promote the improvement of overall health.” That goal simply cannot be achieved if enrollees can’t afford co-payments and therefore forego or delay healthcare. We encourage DHHS and NHID to explore every possible avenue for reducing or eliminating copayments.

The significance of the cost-sharing burden underscores the importance of tracking enrollees’ co-payments to ensure that they do not exceed their maximum cost-sharing obligations. The draft Waiver caps cost-sharing at 5 percent of quarterly household income. See Draft Waiver at 14. We note that capping cost-sharing at 5 percent of monthly household income, which appears to be permissible under Medicaid law, would likely reduce the overall cost-sharing

burden on enrollees, and we encourage DHHS and NHID to consider giving enrollees the option to select either a quarterly or a monthly approach.

The draft Waiver is also virtually silent on how the cost-sharing cap will be enforced. DHHS and NHID have not identified their plans to address the following significant issues:

1. Enrollees' quarterly household income may fluctuate not only from quarter to quarter, but within quarters. Their maximum quarterly cost-sharing obligations should be capable of immediate adjustment upon notice to DHHS of a change in income.
2. Enrollees may also suffer sharp declines in income sufficient to move them below 100 percent of the federal poverty level. The cost-sharing tracking mechanism should be capable of immediately eliminating their obligation to make co-payments, even within a particular quarter.
3. The "shoebox method" – requiring enrollees to track their own co-payments – should be avoided at all costs.
4. There should be a simple way for DHHS and NHID to make enrollees whole when they pay co-payments exceeding 5 percent of quarterly household income. Refunds should be processed promptly and automatically, without requiring enrollees to request them.

Once again, we thank you for your efforts to implement the New Hampshire Health Protection Program consistent with the objectives of SB 413. NHLA would welcome the opportunity to continue working with you as you move forward.

Very truly yours,



Sarah Mattson Dustin, Esq.
Policy Director