

Presumably most of those States have already made those decisions. Although the delay proposed in this rule will not affect the tax threshold, it will provide some relief to States in making other adjustments.

C. Alternatives

We welcome comments not only on the proposed delay in enforcement, but also on alternatives that may more constructively address the underlying problems and their likely impacts on States and other stakeholders.

In accordance with the provisions of Executive Order 12866, this regulation was reviewed by the Office of Management and Budget.

(Catalog of Federal Domestic Assistance Program No. 93.778, Medical Assistance Program)

Dated: April 30, 2009.

Charlene Frizzera,

Acting Administrator, Centers for Medicare & Medicaid Services.

Approved: May 1, 2009.

Kathleen Sebelius,

Secretary.

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DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Parts 431, 433, 440 and 441

[CMS-2287-P2; CMS-2213-P2; CMS 2237-P]

RIN 0938-AP75

Medicaid Program: Rescission of School-Based Services Final Rule, Outpatient Services Definition Final Rule, and Partial Rescission of Case Management Services Interim Final Rule

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Proposed rule.

SUMMARY: This rule proposes to rescind the December 28, 2007 final rule entitled "Elimination of Reimbursement Under Medicaid for School Administration Expenditures and Costs Related to Transportation of School-Age Children Between Home and School"; the November 7, 2008 final rule entitled "Clarification of Outpatient Hospital Facility (Including Outpatient Hospital Clinic) Services Definition"; and certain provisions of the December 4, 2007 interim final rule with comment period entitled "Optional State Plan Case

Management Services." These regulations have been the subject of Congressional moratoria and have not yet been implemented (or, with respect to case management interim final rule, have only been partially implemented) by CMS. In light of concerns raised about the adverse effects that could result from these regulations, in particular the potential restrictions on services available to beneficiaries, potential deleterious effect on state partners in the economic downturn, and the lack of clear evidence demonstrating that the approaches taken in the regulations are warranted, CMS is proposing to rescind the two final rules in full, and to partially rescind the interim final rule. Rescinding these provisions will permit further opportunity to determine the best approach to further the objectives of the Medicaid program in providing necessary health benefits coverage to needy individuals.

DATES: To be assured consideration, comments must be received at one of the addresses provided below, no later than 5 p.m. on June 1, 2009.

ADDRESSES: In commenting, please refer to file code CMS-2287-P2. Because of staff and resource limitations, we cannot accept comments by facsimile (FAX) transmission.

You may submit comments in one of four ways (please choose only one of the ways listed):

1. *Electronically.* You may submit electronic comments on this regulation to <http://www.regulations.gov>. Follow the instructions under the "More Search Options" tab.

2. *By regular mail.* You may mail written comments to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS-2287-P2, P.O. Box 8010, Baltimore, MD 21244-8010.

Please allow sufficient time for mailed comments to be received before the close of the comment period.

3. *By express or overnight mail.* You may send written comments to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS-2287-P2, Mail Stop C4-26-05, 7500 Security Boulevard, Baltimore, MD 21244-1850.

4. *By hand or courier.* If you prefer, you may deliver (by hand or courier) your written comments before the close of the comment period to either of the following addresses:

a. For delivery in Washington, DC—Centers for Medicare & Medicaid Services, Department of Health and

Human Services, Room 445-G, Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201.

(Because access to the interior of the Hubert H. Humphrey Building is not readily available to persons without Federal government identification, commenters are encouraged to leave their comments in the CMS drop slots located in the main lobby of the building. A stamp-in clock is available for persons wishing to retain a proof of filing by stamping in and retaining an extra copy of the comments being filed.)

b. For delivery in Baltimore, MD—Centers for Medicare & Medicaid Services, Department of Health and Human Services, 7500 Security Boulevard, Baltimore, MD 21244-1850.

If you intend to deliver your comments to the Baltimore address, please call telephone number (410) 786-9994 in advance to schedule your arrival with one of our staff members.

Comments mailed to the addresses indicated as appropriate for hand or courier delivery may be delayed and received after the comment period.

FOR FURTHER INFORMATION CONTACT: Lisa Parker, (410) 786-4665.

SUPPLEMENTARY INFORMATION: *Inspection of Public Comments:* All comments received before the close of the comment period are available for viewing by the public, including any personally identifiable or confidential business information that is included in a comment. We post all comments received before the close of the comment period on the following Web site as soon as possible after they have been received: <http://www.regulations.gov>. Follow the search instructions on that Web site to view public comments.

Comments received timely will also be available for public inspection as they are received, generally beginning approximately 3 weeks after publication of a document, at the headquarters of the Centers for Medicare & Medicaid Services, 7500 Security Boulevard, Baltimore, Maryland 21244, Monday through Friday of each week from 8:30 a.m. to 4 p.m. To schedule an appointment to view public comments, phone 1-800-743-3951.

I. Background

A. Elimination of Reimbursement Under Medicaid for School Administration Expenditures and Costs Related to Transportation of School-Age Children Between Home and School

Under the Medicaid program, Federal payment is available for the costs of administrative activities as found

necessary by the Secretary for the proper and efficient administration of the State plan. On December 28, 2007, we published a final rule to eliminate Federal Medicaid payment for the costs of certain school-based administrative and transportation activities based on a Secretarial finding that these activities are not necessary for the proper and efficient administration of the Medicaid State plan and are not within the definition of the optional transportation benefit (72 FR 73635). Under the final rule, Federal Medicaid payments were not available for administrative activities performed by school employees or contractors, or anyone under the control of a public or private educational institution, and for transportation between home and school. Federal financial participation (FFP) remained available for covered services furnished at or through a school that are included in a child's individualized education plan (IEP), and for transportation from school to a provider in the community for a covered service. FFP also remained available for the costs of school-based Medicaid administrative activities conducted by employees of the State or local Medicaid agency, and for transportation to and from a school for children who are not yet school age but are receiving covered direct medical services at the school.

The December 28, 2007, final rule became effective on February 26, 2008. Subsequent to publication of the final rule, section 206 of the Medicare, Medicaid, and SCHIP Extension Act of 2007 (Pub. L. No. 110–173) imposed a moratorium until June 30, 2008, that precluded CMS from imposing any restrictions contained in the rule that are more stringent than those applied as of July 1, 2007. Section 7001(a)(2) of the Supplemental Appropriations Act of 2008 (Pub. L. No. 110–252) extended this moratorium until April 1, 2009 and section 5003(b) of the American Recovery and Reinvestment Act (ARRA) further extended the moratorium until July 1, 2009.

B. Clarification of Outpatient Hospital Facility (Including Outpatient Hospital Clinic) Services Definition

Outpatient hospital services are a required service under Medicaid. On November 7, 2008, we published a final rule to introduce new limitations on which treatments could be billed and paid as an outpatient hospital service, thereby altering the pre-existing definition of “outpatient hospital services.” The final rule became effective on December 8, 2008. Section 5003(c) of ARRA precludes CMS from taking any action to implement the final

rule with respect to services furnished between December 8, 2008 and June 30, 2009.

C. Optional State Plan Case Management Services

On December 4, 2007, we published an interim final rule with comment period that revised current Medicaid regulations to incorporate changes made by section 6052 of the Deficit Reduction Act of 2005 (DRA) (72 FR 68077). In addition, we placed new limitations on the services and activities that could be covered and paid as an optional targeted case management service or optional case management service.

The interim final rule became effective on March 3, 2008. Section 7001(a)(3)(B)(I) of the Supplemental Appropriations Act imposed a partial moratorium until April 1, 2009, precluding CMS from taking any action to impose restrictions on case management services that were more restrictive than those in effect on December 3, 2007. The law contained an exception for the portion of the regulation as it related directly to implementing the definition of case management services and targeted case management services. That partial moratorium was extended by section 5003(a) of ARRA until July 1, 2009.

II. Provisions of the Proposed Regulation

Since the publication of these final regulations, we have received additional public input about the adverse effects that could result from these regulations. In addition, the statutory moratoria indicate strong concern in Congress about the effects of these regulations. In particular, we have become aware that the provisions of these rules could result in restrictions on services available to beneficiaries and there is a lack of clear evidence demonstrating that the approaches taken in the regulations are warranted at this time. In order to ensure that beneficiaries are not harmed while we reconsider the approaches taken in these rules, as discussed in detail below, we propose to rescind the November 7, 2008 final rule entitled “Clarification of Outpatient Hospital Facility (Including Outpatient Hospital Clinic) Services Definition”; the December 28, 2007 final rule entitled “Elimination of Reimbursement Under Medicaid for School Administration Expenditures and Costs Related to Transportation of School-Age Children Between Home and School”; and certain provisions of the December 4, 2007 interim final rule with comment period entitled “Optional State Plan Case Management Services.”

We are soliciting public comments on the proposal to rescind these rules and to aid our consideration of the many complex questions surrounding these issues and the need for regulation in these areas. In particular, we seek the following:

- Information, including specific examples where feasible, of problems that would result from rescission of these final rules, and potential approaches to resolve those problems if these final rules are rescinded;
- Information, including specific examples where feasible, addressing the scope and nature of problems that would result if these final rules were implemented;
- Information, including specific examples, and the scope and nature of the potential problem where feasible, on whether implementation of these final rules would reduce beneficiary access to program information and covered health care services;
- Comment on whether these final rules provide sufficient clarity to ensure sound Medicaid program operation; and
- Comment on whether the objectives of the rules might also be accomplished through alternative approaches, such as program guidance and technical support, to ensure valid Medicaid claiming procedures.

A. Elimination of Reimbursement Under Medicaid for School Administration Expenditures and Costs Related to Transportation of School-Age Children Between Home and School

We propose to rescind the December 28, 2007 final rule in its entirety. We have become aware that the adverse consequences of the final rule may be more significant than previously assumed, and that the consideration of alternative approaches may be warranted. These concerns were suggested by the public comments submitted in response to the September 7, 2007 proposed rule (72 FR 51397), but we may not have been fully aware of the magnitude of the potential adverse consequences. Since issuing the final rule, we have become aware that the limitations on Federal Medicaid funding under the final rule could substantively affect State outreach efforts in schools, and the availability of Medicaid services for eligible beneficiaries. We previously assumed that, since such activities were within the scope of the overall mission of the schools, the activities would continue with funding from other sources available for educational activities. Because this assumption may be invalid, we are concerned that implementation of the rule could

adversely affect Medicaid beneficiaries. We are requesting comments on this issue.

Moreover, we are concerned that there is insufficient evidence on the need for the particular approach taken by the final rule. The oversight reviews that we cited in issuing the final rule, indicating some deficiencies in procedures for claiming school-based administrative expenditures and necessary transportation, were several years old and based on data collected more than 5 years ago. These claims did not reflect CMS guidance issued after the review data was collected; nor did they reflect the greater administrative oversight and technical assistance that we have made available more recently. Moreover, CMS has tools at its disposal to address inappropriate claiming that could arise in any setting, so we will continue to evaluate the efficacy of these tools in addressing any claiming issues.

In light of these concerns, we propose to rescind the provisions of the final rule while we further review the underlying issues and determine whether a different approach is necessary, and revise the regulations to remove the regulatory provisions added by the December 28, 2007 final rule. We would instead apply the policies in effect before the December 28, 2007 final rule became effective, as set forth in guidance on school-based administrative claiming and school transportation.

Specifically, we propose to revise §§ 431.53(a) and 440.170(a) to remove language indicating that, for purposes of Medicaid reimbursement, transportation does not include transportation of school-age children from home to school and back when a child is receiving a Medicaid-covered service at school. In addition, we propose to remove § 433.20, which provides that Federal financial participation under Medicaid is not available for expenditures for administrative activities by school employees, school contractors, or anyone under the control of a public or private educational institution.

B. Clarification of Outpatient Hospital Facility (Including Outpatient Hospital Clinic) Services Definition

We propose to rescind the November 7, 2008 final rule in its entirety. While we previously perceived the rule as having little impact (because it affected only the categorization of covered services), we have become aware that this perception may have been based on inaccurate assumptions. In particular, we assumed that, to the extent that covered services were no longer within

the outpatient hospital benefit category, those services could be easily shifted to other benefit categories. We have received input indicating that such shifts may be difficult in light of the complexity of State funding and payment methodologies and health care service State licensure and certification limits. As a result, the November 7, 2008 final rule could have an adverse impact on the availability of covered services for beneficiaries.

Therefore, we propose to rescind the November 7, 2008 final rule in its entirety and reinstate the regulatory definition of "outpatient hospital services" at 42 CFR 440.20 that existed before the final rule became effective. Specifically, we propose to remove the provisions at § 440.20(a)(4)(i), which define Medicaid outpatient hospital services to include those services recognized under the Medicare outpatient prospective payment system (defined under 42 CFR 419.2(b)) and those services paid by Medicare as an outpatient hospital service under an alternate payment methodology. We would also remove the requirement at § 440.20(a)(4)(ii) that services be furnished by an outpatient hospital facility or a department of an outpatient hospital as described at § 413.65. Finally, we propose to remove the provision at § 440.20(a)(4)(iii) that limits the definition of outpatient services to exclude services that are covered and reimbursed under the scope of another Medicaid service category under the Medicaid State plan.

In addition, we are proposing to withdraw § 447.321 of the proposed rule published on September 28, 2007 (72 FR 55158) upon which we reserved action in the final rule. These provisions contained regulatory guidance on the calculation of the outpatient hospital and clinic services upper payment limit (UPL).

C. Optional State Plan Case Management Services

We propose to rescind certain provisions of the December 4, 2007 interim final rule with comment period. In discussions with States about the implementation of case management requirements, we have become concerned that certain provisions of the interim final rule may unduly restrict beneficiary access to needed covered case management services, and limit State flexibility in determining efficient and effective delivery systems for case management services. In particular, we are concerned that the interim final rule may be overly narrow in defining individuals transitioning to community settings, and we are concerned that

beneficiary access to services may be affected by the limitations in the interim final rule on payment methodologies, on provision of case management services by other agencies or programs, on qualified providers, on administrative case management activities, and on coverage of services furnished in different settings.

Many of these same concerns were expressed by public commenters and we are concerned that adverse consequences may occur for beneficiaries and the program as a whole if these provisions were implemented. We believe that these same concerns were also reflected by the Congressional moratorium on the implementation of this rule. That moratorium indicated a particular concern with administrative requirements and limitations included in the interim final rule. Therefore, we propose to rescind certain provisions of the December 4, 2007 interim final rule.

Specifically, we propose to remove §§ 440.169(c) and 441.18(a)(8)(viii), because we believe that these provisions may be overly restrictive in defining "individuals transitioning to a community setting," for whom case management services may be covered under § 440.169(a). Until we address the comments submitted on the interim final rule, we believe that States should have additional flexibility to provide coverage using a reasonable definition of this term. We are also proposing to remove §§ 441.18(a)(5) and (a)(6). We believe that these provisions may unduly limit States' delivery systems for case management services. We further propose to remove § 441.18(a)(8)(vi) because the requirement for payment methodologies in this provision may be administratively burdensome, may result in restrictions on available providers of case management services, and generally may limit beneficiary access to services. For similar reasons, in § 441.18, we propose to rescind paragraphs (c)(1), (c)(4), and (c)(5) that limit the provision of case management activities that are an integral component of another covered Medicaid service, another non-medical program, or an administrative activity. On the issues addressed by these rescinded provisions, we will continue to apply the interpretive policies in force prior to issuance of the interim final rule.

We propose to rescind parts of § 441.18(c)(2) and (c)(3) to remove references to programs other than the foster care program, because we are concerned that these provisions may be overly restrictive in narrowing State options for delivery of case management services. We propose to consolidate the

remaining provisions of these paragraphs as paragraph (c) to read as follows:

“(c) Case management does not include, and FFP is not available in expenditures for, services defined in § 441.169 of this chapter when the case management activities constitute the direct delivery of underlying medical, educational, social, or other services to which an eligible individual has been referred, including for foster care programs, services such as, but not limited to, the following:

(1) Research gathering and completion of documentation required by the foster care program.

(2) Assessing adoption placements.

(3) Recruiting or interviewing potential foster care parents.

(4) Serving legal papers.

(5) Home investigations.

(6) Providing transportation.

(7) Administering foster care subsidies.

(8) Making placement arrangements.”

We would retain the remaining provisions of the interim final rule with comment period, and finalize those provisions in a future rulemaking.

III. Collection of Information Requirements

This document does not impose information collection and recordkeeping requirements. Consequently, it need not be reviewed by the Office of Management and Budget under the authority of the Paperwork Reduction Act of 1995.

IV. Response to Comments

Because of the large number of public comments we normally receive on **Federal Register** documents, we are not able to acknowledge or respond to them individually. We will consider all comments we receive by the date and time specified in the **DATES** section of this preamble, and, when we proceed with a subsequent document, we will respond to the comments in the preamble to that document.

V. Regulatory Impact Analysis

A. Overall Impact

We have examined the impact of this proposed rule as required by Executive Order 12866, the Congressional Review Act, the Regulatory Flexibility Act (RFA), section 1102(b) of the Social Security Act, the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4), and Executive Order 13132 on Federalism. Executive Order 12866 (as amended) directs agencies to assess all costs and benefits of all available regulatory alternatives and, if regulation is

necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). A regulatory impact analysis (RIA) must be prepared for major rules with economically significant effects (\$100 million or more in any 1 year).

One of the three rules we propose to rescind was estimated to save the Federal government, by reducing its financial participation in the Medicaid program, amounts in excess of this threshold, with corresponding increases in costs to States (or in some cases to local entities or to other Federal programs) that would essentially offset these savings. That is, the primary economic effect predicted under this rule was to change the sources of “transfer payments” among government entities rather than the levels of actual services delivered. For example, the RIA for the final rule regarding Medicaid reimbursement for school administration and transportation of school-aged children assumed that localities would continue to provide such transportation even though one source of funding was reduced. Rescission of these rules would simply restore the *status quo ante*. That is, the Medicaid program would not gain these savings and other Federal, State, or local programs would not lose the Medicaid funding. (We acknowledge that many commenters were concerned that these three rules would have additional and substantial adverse effects on service provision and that the conclusions of the original RIAs did not reflect on this point. As explained earlier in this preamble, we share some of those concerns.) Except for portions of the case management interim final rule, these rules have not yet taken “real world” effect because of the moratoriums on enforcement. Accordingly, we believe that the proposed rescissions would have no economic effect, assuming that the situation before July 1, 2009 is taken as the “counterfactual” case.

In the alternative, it might be argued that the appropriate counterfactual is that rescinding these rules would create “economically significant” benefits and costs of the same magnitude but exactly the opposite of those analyzed in the original RIAs. For example, the final rule regarding school administration expenditures and costs related to transportation was estimated to reduce Federal Medicaid outlays by \$635 million in FY 2009 and by a total of \$3.6 billion over the first 5 years (FY 2009–2013). The proposed rescission would eliminate these Federal savings with a

corresponding offset in State, local, and Federal funding increases that would otherwise be needed to maintain existing services.

In the current economic climate, and with the drastic budgetary reductions being made in most States, the assumption of an essentially offsetting change in spending responsibilities that leaves service provision unchanged is completely unrealistic. However, because these rules are being proposed for rescission without ever having been enforced, no purpose would be served in re-estimating hypothetically the effects of the original rules, or in estimating hypothetically the potential effects of more realistically estimated current responses.

Accordingly, we have decided for purposes of this rulemaking that the most straightforward assumption to make is that we are preserving the status quo, and that under the criteria of EO 12866 and the Congressional Review Act this is not an economically significant (or “major”) rule. However, we welcome comments on this conclusion. We also welcome comments on an alternative that the original final rules did not specifically address, namely rescinding these final rules without prejudicing future promulgation of rules that might restrict Federal spending (though perhaps not as substantially).

The RFA requires agencies to analyze options for regulatory relief of small entities if final rules have a “significant economic impact on a substantial number of small entities.” For purposes of the RFA, small entities include small businesses, nonprofit organizations, and small governmental jurisdictions, including school districts. “Small” governmental jurisdictions are defined as having a population of less than fifty thousand. Individuals and States are not included in the definition of a small entity. Although many school districts have populations below this threshold and are therefore considered small entities for purposes of the RFA, we originally determined that the impact on local school districts as a result of the final rule on School Administration Expenditures and Costs Related to Transportation of School-Age Children would not exceed the threshold of “significant” economic impact under the RFA, for a number of reasons. Most simply, the estimated annual Federal savings under this final rule were only about one eighth of one percent of total annual spending on elementary and secondary schools, far below the threshold of 3 to 5 percent of annual revenues or costs used by HHS in determining whether a proposed or final

rule has a “significant” economic impact on small entities. Accordingly, regardless of the counterfactual, rescission of this rule would not have a “significant” impact on a substantial number of small entities. Our analyses of the final rules regarding Case Management and Outpatient Hospital Facilities concluded that neither rule would have a significant impact on a substantial number of small entities. Accordingly, rescinding those final rules in whole or in part and preserving the *status quo ante* would likewise fail to trigger the “significant” impact threshold. We further note that in all three cases any impact of this rulemaking would be positive rather than negative on affected entities. Accordingly, the Secretary certifies that this proposed rule would not have a significant impact on a substantial number of small entities.

In addition, section 1102(b) of the Act requires us to prepare a regulatory impact analysis if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 604 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside of a Metropolitan Statistical Area and has fewer than 100 beds. Of the three final rules we propose to rescind in whole or in part, only the Outpatient Hospital Facility rule would have had any possible effect on small rural hospitals. Our analysis of that rule concluded that it would have had no direct effect on these hospitals, and that any indirect effect as a result of State adjustments could not be predicted. Regardless, any effects of this proposed rescission on small rural hospitals would be positive, not negative. Accordingly, we are not preparing an analysis for section 1102(b) of the Act because we have determined, and the Secretary certifies, that this proposed rule would not have a direct impact on the operations of a substantial number of small rural hospitals.

Section 202 of the Unfunded Mandates Reform Act of 1995 also requires that agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of \$100 million in 1995 dollars, updated annually for inflation. That threshold level is currently approximately \$130 million. This proposed rule contains no mandates that will impose spending costs on State, local, or tribal governments in the aggregate, or by the private sector, of \$130 million. Our analyses of all three final rules concluded that they would impose no mandates of this magnitude,

and these proposed rescissions create no mandates of any kind.

Executive Order 13132 on Federalism establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirements on State and local governments, preempts State law, or otherwise has Federalism implications. EO 13132 focuses on the roles and responsibilities of different levels of government, and requires Federal deference to State policy-making discretion when States make decisions about the uses of their own funds or otherwise make State-level decisions. The original final rules, however much they might have limited Federal funding, did not circumscribe States’ authority to make policy decisions regarding transportation, case management, or hospital outpatient services. This proposed rule will likewise not have a substantial effect on State or local government policy discretion.

B. Anticipated Effects

As discussed above, one of the three final rules was predicted to have substantial effects on the use of Federal Medicaid funds for services that were arguably not the responsibility of Medicaid to fund. While rescission of this rule will have little or no immediate fiscal effect since the projected changes never occurred, other important effects will remain. For one thing, continuing controversy and uncertainty over the proper boundaries between Medicaid and other funding sources will remain, particularly for services that are not medical and for services that are also the primary responsibility of other programs.

C. Alternatives

We welcome comments not only on the proposed rescission of each rule, in whole or in part, but also on alternatives that may more constructively address the underlying problems and their likely impacts on State beneficiaries of the Medicaid program.

In accordance with the provisions of Executive Order 12866, this regulation was reviewed by the Office of Management and Budget.

List of Subjects

42 CFR Part 431

Grant programs—health, Health facilities, Medicaid, Privacy, Reporting and recordkeeping requirements.

42 CFR Part 433

Administrative practice and procedure, Child support claims, Grant

programs—health, Medicaid, Reporting and recordkeeping requirements.

42 CFR Part 440

Grant programs—health, Medicaid.

42 CFR Part 441

Family planning, Grant programs—health, Infants and children, Medicaid, Penalties, Prescription drugs, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, the Centers for Medicare & Medicaid Services would amend 42 CFR chapter IV as set forth below:

PART 431—STATE ORGANIZATION AND GENERAL ADMINISTRATION

Subpart B—General Administrative Requirements

1. The authority citation for part 431 continues to read as follows:

Authority: Sec. 1102 of the Social Security Act (42 U.S.C. 1302).

2. Section 431.53 is revised to read as follows:

§ 431.53 Assurance of transportation.

A State plan must—
(a) Specify that the Medicaid agency will ensure necessary transportation for recipients to and from providers; and
(b) Describe the methods that the agency will use to meet this requirement.

PART 433—STATE FISCAL ADMINISTRATION

3. The authority citation for part 433 continues to read as follows:

Authority: Sec. 1102 of the Social Security Act (42 U.S.C. 1302).

§ 433.20 [Removed]

4. Part 433 is amended by removing § 433.20

PART 440 SERVICES: GENERAL PROVISIONS

5. The authority citation for part 440 continues to read as follows:

Authority: Sec. 1102 of the Social Security Act (42 U.S.C. 1302).

6. Section 440.20 is amended by revising the section heading and paragraph (a) to read as follows:

§ 440.20 Outpatient hospital services and rural health clinic services.

(a) Outpatient hospital services means preventive, diagnostic, therapeutic, rehabilitative, or palliative services that—

- (1) Are furnished to outpatients;
- (2) Are furnished by or under the direction of a physician or dentist; and

(3) Are furnished by an institution that—

(i) Is licensed or formally approved as a hospital by an officially designated authority for State standard-setting; and

(ii) Meets the requirements for participation in Medicare as a hospital;

(4) May be limited by a Medicaid agency in the following manner: A Medicaid agency may exclude from the definition of “outpatient hospital services” those types of items and services that are not generally furnished by most hospitals in the State.

* * * * *

§ 440.169 [Amended]

7. Section 440.169 is amended by removing and reserving paragraph (c).

8. Section 440.170(a)(1) is revised to read as follows:

§ 440.170 Any other medical care or remedial care recognized under State law and specified by the Secretary.

(a) *Transportation.* (1) “Transportation” includes expenses for transportation and other related travel expenses determined to be necessary by the agency to secure medical

examinations and treatment for a recipient.

* * * * *

PART 441—SERVICES: REQUIREMENTS AND LIMITS APPLICABLE TO SPECIFIC SERVICES

9. The authority citation for part 441 continues to read as follows:

Authority: Sec. 1102 of the Social Security Act (42 U.S.C. 1302).

10. Section 441.18 is amended by removing and reserving paragraphs (a)(4), (a)(5), and (a)(8)(vi); removing (a)(8)(viii); and revising paragraph (c) to read as follows:

§ 441.18 Case management services.

* * * * *

(c) Case management does not include, and FFP is not available in expenditures for, services defined in § 441.169 of this chapter when the case management activities constitute the direct delivery of underlying medical, educational, social, or other services to which an eligible individual has been referred, including for foster care

programs, services such as, but not limited to, the following:

- (1) Research gathering and completion of documentation required by the foster care program.
- (2) Assessing adoption placements.
- (3) Recruiting or interviewing potential foster care parents.
- (4) Serving legal papers.
- (5) Home investigations.
- (6) Providing transportation.
- (7) Administering foster care subsidies.
- (8) Making placement arrangements.

* * * * *

(Catalog of Federal Domestic Assistance Program No. 93.773, Medical Assistance Program)

Dated: April 30, 2009.

Charlene Frizzera,

Acting Administrator, Centers for Medicare & Medicaid Services.

Approved: May 1, 2009.

Kathleen Sebelius,

Secretary.

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