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July 6, 2018

By Email and Posted Mail

Timothy Hill
Acting Director, Center for Medicaid and CHIP Services
U.S Department of Health and Human Services
Centers for Medicare & Medicaid Services
7500 Security Boulevard
Mail Stop: C5-22-17
Baltimore, MD 21244

Re: Kentucky ABP SPA – vision, dental, and NEMT

Dear Mr. Hill:

We understand that the Kentucky Medicaid agency may have submitted an Alternative Benefit Plan (ABP) State Plan Amendment (SPA) to you on or about April 20, 2018 or April 23, 2018. Anticipating implementation of the Kentucky HEALTH Section 1115 project, this ABP SPA would terminate coverage of routine vision and dental services and non-emergency medical transportation (NEMT) for the Medicaid adult expansion population, effective July 1, 2018 (to coincide with the date the project was to go into effect).

The SPA is not listed on CMS's website of approved SPAs. Thus, we have concluded that CMS has not approved this SPA. For the reasons below, we ask that you not approve this SPA.

The submission process used by the State violated federal laws designed to ensure government transparency and public participation. On July 2, 2018, the Kentucky Cabinet for Health and Family Services updated its website to inform the public of the Medicaid vision, dental, and NEMT cuts, and Governor Bevin and Adam Meier, Cabinet Secretary, promulgated an emergency regulation immediately implementing these cuts. See 907 KAR 1:642E. The Cabinet's website provided a link to two public notices. The first, dated April 23, 2018, stated that the Cabinet for Health and Family Services planned to submit a SPA terminating NEMT for the expansion population and limiting their vision and dental services to earned coverage through the My

Rewards account. That Public Notice also said there would be a 30-day comment period. The second Public Notice, dated June 30, 2018, stated that the ABP SPA “was filed with CMS on April 20, 2018.”¹ That notice also stated that, effective July 1, 2018, routine dental and vision services and NEMT would not be covered. It said there would be a 30-day comment period. Both notices said copies were available “at each county’s Department for Community Based Services” and at <http://www.chfs.ky.gov/dms/public+notices.htm>.

There are numerous procedural problems. First, both the original ABP SPA and the revised ABP SPA were filed before the public had an opportunity to comment. Second, we visited a handful of county DCBS offices on July 3 and July 5, and the notices were not posted or made available in all offices. Third, the website link provided in the notices does not work. These deficiencies violated federal law. See 42 C.F.R § 440.386 (“Prior to submitting to the Centers for Medicare and Medicaid Services for approval of a State plan amendment to establish an Alternative Benefit Plan or an amendment to substantially modify an existing Alternative Benefit Plan, a state must have provided the public with advance notice of the amendment and reasonable opportunity to comment for such amendment....”). The Public Notices were also inconsistent with guidance from CMS that is binding on the Cabinet. See CMCS Informational Bulletin, Process for Amending Alternative Benefit Plans (Sept, 24, 2014) (“States that do not publish the public notice or provide tribal notification prior to submitting a new ABP or an amendment to an existing ABP will be required to revise the effective date of the submission, which could jeopardize the ongoing alignment between the ABP and underlying Medicaid state plan.”).

The ABP SPA should also be rejected because it seeks to terminate NEMT, dental, and vision services, effective July 1, 2018. On June 29, 2018, Federal District Court Judge Boasberg vacated the approval of the Kentucky HEALTH Section 1115 project, which would have authorized the State to end coverage of NEMT for the expansion group and limit dental and vision to earned coverage through the My Rewards program. See *Stewart v. Azar*, _ F. Supp. 3d __, Civ. No. 1:18-cv-152 (JEB), 2018 WL 3203384 (D.D.C. June 29, 2018). Without an approved waiver, the State lacks authority to terminate NEMT. Moreover, in vacating the Section 1115 approval, the Court expressly intended to maintain the status quo. *Id.*, slip op. at 57. On July 1, the proposed effective date for the SPA, the status quo was coverage of vision, dental, and NEMT services for the expansion population. The Cabinet did not need to terminate the coverage to comply with the Court’s Order in *Stewart*. These terminations did not maintain the status quo.

We ask you to reject the SPA and return it to the State. We ask you to take this action quickly. The State’s actions regarding termination of the vision, dental, and NEMT benefits are causing great confusion and harm. Just yesterday, we were contacted by an employee of a Medicaid-participating MCO, concerned that a member had just been told that she could not get medically necessary surgery that she needs right now. The member was told that the surgery could not occur until some teeth were pulled; however, the dental services

¹ Other postings on the Cabinet’s website say this SPA was submitted on April 23, <https://chfs.ky.gov/agencies/dms/Pages/default.aspx>, or April 20, <https://chfs.ky.gov/agencies/dms/Pages/publicnotices.aspx?View=%7B9db3b9cb-0b5f-46bb-883a-d7e20f08b3f8%7D&SortField=LinkFilename&SortDir=Desc>.

to pull those teeth were being denied because of the State's announced cutback. If you have any questions, please contact me at perkins@healthlaw.org.

Sincerely,

/s/ Jane Perkins

Jane Perkins

Catherine McKee

National Health Law Program

Anne Marie Regan

Kentucky Equal Justice Center

Samuel Brooke

Southern Poverty Law Center

cc: Deepthy Kishore (for U.S Department of Justice)

Matthew F. Kuhn (for Office of Kentucky Governor)