NHeLP
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September 24, 2007

Centers for Medicare & Medicaid Services
Department of Health and Human Services
Attention: CMS-2234-P,
Mail Stop C4-26-05
7500 Security Boulevard
Baltimore, MD 21244-1850

BY ELECTRONIC MAIL

Re: Medicaid Transportation Proposed Rule
72 FR 48604 (August 24, 2007)

Dear Secretary Leavitt:

The National Health Law Program (NHeLP) is a public interest law firm working to increase and improve access to quality health care on behalf of low-income individuals by providing legal analysis and representation, information, education and policy advocacy. With offices in California, North Carolina and Washington, D.C., NHeLP provides specialized assistance on indigent health care matters to attorneys, community-based organizations and national and state policy makers. We are writing to comment on the Proposed Rule on Medicaid Transportation Services, which was published in the Federal Register on August 24 and implements §6083 of the Deficit Reduction Act of 2005 (DRA).

The National Health Law Program supports, in principle, the establishment, at State option, of a non-emergency transportation brokerage program by Centers for Medicare & Medicaid Services (CMS). A number of States already have been using non-emergency transportation brokers and obtaining federal financial participation as an administrative expense or seeking a 1915(b) waiver to waive Medicaid requirements of comparability, freedom of choice and statewideness. The revised Rule, like the statute, eliminates these important Medicaid mandates without requiring States to provide justification for the waivers. Additionally, it limits non-emergency transportation services to beneficiaries who have no other means of transportation and fails to require adequate State oversight to ensure that beneficiaries obtain the most appropriate transportation services offered by transportation brokers. Our comments suggest alternatives that we believe will help enhance access to transportation services.

Provisions of the Proposed Regulations

I. STATES MUST ASSURE THAT NON-EMERGENCY TRANSPORTATION SERVICES FURNISHED BY TRANSPORTATION BROKERAGE SYSTEMS ARE MEDICALLY APPROPRIATE AND OFFER A FULL-RANGE OF SERVICES.

42 C.F.R. § 440.170(a)(4) of the Rule appropriately states that transportation services include "wheelchair vans, taxis, stretcher cars, bus passes and tickets, secured transportation containing an occupant protection system that addresses safety needs of disabled or special needs individuals, and other forms of transportation otherwise covered under the state plan." However, it fails to require that States ensure that services offered by transportation brokers to individual Medicaid beneficiaries are the most appropriate for their medical conditions. For example, a wheelchair van, not a bus pass, would be appropriate means of transportation for medically frail individual following knee surgery. Similarly, provision of an aide along with a taxicab ride would be appropriate for a beneficiary with Alzheimer's disease going to a doctor's appointment. States must make certain that their brokers provide the level of transportation services needed by beneficiaries and not simply opt for the least expensive.

To ensure that States and their contracted transportation brokers furnish the most appropriate "medically necessary" non-emergency transportation services and adhere to the Medicaid principles surrounding "amount, duration and scope," CMS should amend 42 C.F.R. § 440.170(a)(4) by adding a reference to 42 C.F.R. § 440.230.

II. COMPREHENSIVE STATE MONITORING AND OVERSIGHT OF NON-EMERGENCY TRANSPORTATION BROKERAGE SYSTEMS IS CRITICAL TO ENSURING STATE COMPLIANCE WITH 42 C.F.R. § 431.53.

The Rule, as it is currently written, says little about State monitoring and oversight of non-emergency transportation brokerage systems. The Rule states simply that an individual or entity under contract "is subject to regular auditing and oversight by the State," but provides no specificity on guidelines the State must use in monitoring transportation brokers. It does, however, explain that that transportation brokers must "ha[ve] oversight procedures to monitor beneficiary access and complaints and ensure the transport personnel are licensed, qualified, competent, and courteous," but does not explain how States should track that information or how they should report the information to CMS. Furthermore, the Rule says nothing about how States will ensure Medicaid beneficiaries' due process rights, including notice and hearing rights, in a transportation brokerage system.

The Rule should be amended to include the following before 42 C.F.R. § 440.170(a)(4)(i):

> State plans must include a description of specific State efforts to monitor beneficiary access as well as beneficiary complaints, including a State tracking mechanism to ensure that beneficiaries maintain their due process rights as they utilize non-emergency Medicaid transportation services through a brokerage system.

III. MEDICAID MANDATES OF COMPARABILITY, STATEWIDENESS AND FREEDOM OF CHOICE ARE CRITICAL TO ENSURING THAT MEDICAID BENEFICIARIES OBTAIN ACCESS TO QUALITY NON-EMERGENCY TRANSPORTATION SERVICES.

The Rule, at 42 C.F.R. § 440.170(a)(4), allows States to establish a non-emergency medical transportation brokerage program "notwithstanding § 431.50 (statewide operation) and § 431.51 (freedom of choice of providers) of this chapter and § 440.240 (comparability of services for groups)." While this language mirrors that of the DRA, it contravenes the intent of Medicaid program and its basic principle of providing services to beneficiaries in a consistent manner within a State as well as among different groups of beneficiaries.

The flexibility allowed States under this provision seems to grant them the authority to offer a higher level of service or enhanced benefits to one region of the State and a lower or basic package to another region. Without the above-mentioned mandates, a State such as California would be allowed to establish a transportation brokerage system providing wheelchair van service in San Francisco and a different brokerage system offering only bus passes and tickets in Los Angeles. It also would allow the State to create one brokerage system for Aged and Disabled beneficiaries that offers stretcher cars and another system for child beneficiaries that furnishes only taxicab service. Furthermore, without providing justification for the need to waive freedom of choice and an explanation for how it would do so, the State could approve a brokerage system that significantly limits the number of transportation providers and, thus, reduces the access to non-emergency transportation services of Medicaid beneficiaries. Rather than improving access, this provision presents a step backward for Medicaid beneficiaries in their effort to obtain needed transportation services and, therefore, should be clearly limited to brokerage systems.

We believe that as CMS finalizes the Rule, it should emphasize that this provision applies only to the State option of establishing transportation brokerage systems and not to other State efforts to comply with the federal mandate under 42 C.F.R. § 431.53 to "assure necessary transportation for recipients to and from providers."

IV. NON-EMERGENCY MEDICAL TRANSPORTATION SERVICES SHOULD BE PROVIDED TO MEDICAID BENEFICIARIES WHO NEED ACCESS TO MEDICAL SERVICES REGARDLESS OF WHETHER THEY HAVE OTHER MEANS OF TRANSPORTATION.

42 C.F.R. § 440.170(a)(4) of the Rule, like the statute, explains that a State plan may provide for establishment of a non-emergency medical transportation brokerage program to "provide for individuals eligible for medical assistance under the State plan who need access to medical care and have no other means of transportation." The requirement that the beneficiary have no other means of transportation can significantly limit the number of Medicaid-enrolled individuals who can benefit from needed transportation services. Moreover, it fails to take account of medical conditions or treatment that prevent beneficiaries who may normally have other means of transportation, but cannot utilize them before or after a medical appointment. For example, a Medicaid beneficiary with end-stage renal disease may need non-emergency transportation services after a course of kidney dialysis despite the fact that he owns a car. A long and physically exhausting process, kidney dialysis requires patients to spend several hours three

times a week at a hospital or clinic, after which they are unable to drive. Individuals with cancer undergoing chemotherapy or those with significant disabilities may have similar experiences that prevent them from using their regular means of transportation.

We believe that CMS should amend 42 C.F.R. § 440.170(a)(4) by adding the term "available" after the word "other" in the phrase "for individuals eligible for medical assistance under the State plan who need access to medical care and have no other means of transportation." This change would enable individuals described above to access medically necessary non-emergency transportation services in circumstances in which their routine mode of transportation is not medically appropriate.

We would like to thank you for the opportunity to provide comments to the Proposed Rule. Thank you also for your consideration of these comments. We hope that they will be helpful as you contemplate the best ways to improve the Proposed Rule.

Sincerely,

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National Health Law Program