



DEPARTMENT OF HEALTH AND HUMAN SERVICES (HHS)
Centers for Medicare & Medicaid Services

Notice of Opportunity for Hearing on Compliance of Texas Calculation of Post-Eligibility Treatment of Income with Titles XI and XIX (Medicaid) of the Social Security Act

AGENCY: Centers for Medicare & Medicaid Services, HHS

ACTION: Notice of Opportunity for a Hearing
Compliance of Texas Calculation of Post-Eligibility Treatment of Income for Institutionalized Individuals and Certain Participants in Home and Community-Based Services Waivers

DATES: Requests to participate in the hearing as a party must be received by the presiding officer by [30 days after publication].

FOR FURTHER INFORMATION CONTACT:

Benjamin R. Cohen, Hearing Officer
Centers for Medicare & Medicaid Services
2520 Lord Baltimore Drive, Suite L
Baltimore, MD 21244

SUPPLEMENTARY INFORMATION:

This notice announces the opportunity for an administrative hearing concerning the finding of the Administrator of the Centers for Medicare & Medicaid Services (CMS) that the Texas Health and Human Services Commission (HHSC) is not properly calculating the post-eligibility treatment of income (PETI) for institutionalized individuals and certain participants in home and community-based services (HCBS) waivers.

Section 1902(r)(1) of the Social Security Act (the Act), codified at 42 U.S.C. 1396a(r)(1), mandates that, in applying the PETI calculation against institutionalized individuals and certain participants of HCBS waivers to determine how much of their income must be contributed to the cost of their institutional or HCBS waiver services, states must deduct from their incomes “amounts for incurred expenses for medical or remedial care that are not subject to payment by a third party, including . . . necessary medical or remedial care recognized under State law but *not covered under the State plan*[.]” (Emphasis added.) This statutory mandate is incorporated in the federal regulations at 42 CFR 435.725(c)(4)(ii) and 435.733(c)(4)(ii) (for the categorically needy in non-209(b) states).

CMS has consistently interpreted the phrase “not covered under the state plan” as meaning *not paid for* by the state Medicaid program. (See *Maryland Dept. of Health and Mental Hygiene v. Centers for Medicare and Medicaid Services*, 542 F.3d 424, 432-433 (3rd Cir. 2008)). Thus, deductions must be made in the PETI calculation for incurred medical or remedial expenses for services that are not included in the state plan, or that are included in the state plan but were not paid for by the state Medicaid agency because the individual was not eligible for Medicaid when the services were delivered. States are permitted to limit past medical expenses to those incurred within three months of an individual applying for Medicaid. 42 CFR 435.831. However, the Texas HHSC has acknowledged that it limits the mandatory incurred medical expense deduction in the PETI calculation to those that were incurred when an individual was eligible under the state plan. This practice has the effect of excluding services that are covered under the state plan but which were not paid for by the Texas HHSC because the individual was not eligible for Medicaid when they were delivered.

Throughout 2017, CMS and the Texas HHSC engaged in several discussions during which CMS explained its longstanding interpretation of section 1902(r)(1) of the Act. CMS also provided several documents supporting that interpretation, including a 2008 decision from the U.S. Court of Appeals for the Fourth Circuit, in which the court upheld CMS’s disapproval of a Maryland state plan amendment (SPA) that proposed a PETI calculation method nearly identical to the one that the Texas HHSC presently imposes. On May 1, 2018, CMS issued a corrective action letter, informing the Texas HHSC that, if it did not demonstrate compliance with these requirements within 30 days of the date of the letter, CMS would initiate formal compliance proceedings. Texas HHSC asked for several extensions and ultimately submitted a formal response on August 10, 2018. The August 10, 2018, response did not evidence compliance with section 1902(r)(1) of the Act.

Absent a hearing request or if, following a hearing requested, the Administrator determines that the Texas HHSC is not in compliance with federal Medicaid law and regulations, CMS will begin withholding federal financial participation (FFP). The FFP withholding will continue until the Texas HHSC comes into compliance with the requirement in section 1902(r)(1) of the Act to deduct incurred medical or remedial expenses for services that are included in the state plan but were not paid for by the state Medicaid agency in its PETI calculations.

The notice to Texas containing the details concerning this compliance issue, the proposed withholding of FFP, opportunity for a hearing, and possibility of postponing and ultimately avoiding withholding by coming into compliance, reads as follows:

Dear Ms. Muth:

This letter provides notice that the Centers for Medicare & Medicaid Services (CMS) has determined the Texas Health and Human Services Commission (HHSC) to be out of compliance with federal Medicaid law in the manner in which it conducts its post-eligibility treatment of income (PETI) calculations for institutionalized individuals and certain individuals receiving home and community-based services (HCBS). The Texas HHSC policy and practice violates section 1902(r)(1) of the Social Security Act (the Act), codified at 42 U.S.C. 1396a(r)(1), which

requires generally that incurred medical expenses not covered by a third party must be taken into account in making the PETI calculations.

Pursuant to section 1904 of the Act, codified at 42 U.S.C. 1396c, and 42 CFR 430.35, a portion of the federal financial participation (FFP) of the administrative costs associated with the operation of the Texas Medicaid program will be withheld. However, CMS is first providing the Texas HHSC with an opportunity for a hearing on this withholding decision. Absent a hearing request or if, following a hearing requested, the Administrator determines that the Texas HHSC is not in compliance with federal Medicaid law and regulations, CMS will begin this FFP withholding. The FFP withholding will continue until the Texas HHSC comes into compliance with the requirement in section 1902(r)(1) of the Act to deduct incurred medical or remedial expenses for services that are included in the state plan but were not paid for by the state Medicaid agency in its PETI calculations. The details of the finding, proposed withholding, opportunity for Texas to request a hearing on the finding, and possibility of postponing, and ultimately avoiding, withholding by coming into compliance are described below.

I. The Finding

Section 1902(r)(1) of the Act mandates that, in applying the PETI calculation against institutionalized individuals and certain participants of HCBS waivers to determine how much of their income must be contributed to the cost of their institutional or HCBS waiver services, states must deduct from an individual's income "amounts for incurred expenses for medical or remedial care that are not subject to payment by a third party, including . . . necessary medical or remedial care recognized under State law *but not covered under the State plan*["]” (Emphasis added.) This statutory mandate is incorporated in the federal regulations at 42 CFR 435.725(c)(4)(ii) and 435.733(c)(4)(ii) (for the categorically needy in non-209(b) states).

CMS has consistently interpreted the phrase “not covered under the state plan” as meaning *not paid for* by the state Medicaid program. (See *Maryland Dept. of Health and Mental Hygiene v. Centers for Medicare and Medicaid Services*, 542 F.3d 424, 432-433 (3rd Cir. 2008)). Thus, deductions must be made in the PETI calculation for incurred medical or remedial expenses for services that are not included in the state plan, or that are included in the state plan but were not paid for by the state Medicaid agency because the individual was not eligible for Medicaid when the services were delivered. States are permitted to limit past medical expenses to those incurred within three months of an individual applying for Medicaid. 42 CFR 435.831. However, the Texas HHSC has acknowledged that it limits the incurred medical expense deduction in the PETI calculation to only those expenses incurred on or after the date on which the individual met all eligibility requirements for Medicaid. This practice has the effect of excluding services that are covered under the state plan but which were not paid for by the Texas HHSC because the individual was not eligible for Medicaid when they were delivered, regardless of how recently the services were provided.

Throughout 2017, CMS and the Texas HHSC engaged in several discussions, during which CMS explained its longstanding interpretation of section 1902(r)(1) of the Act. CMS also provided several documents supporting that interpretation, including a 2008 decision from the U.S. Court of Appeals for the Fourth Circuit, in which the court upheld CMS's disapproval of a Maryland

state plan amendment (SPA) that proposed a PETI calculation method nearly identical to the one the Texas HHSC presently imposes. On May 1, 2018, CMS issued a corrective action letter informing the Texas HHSC that, if it did not demonstrate compliance with these requirements within 30 days of the date of the letter, CMS would initiate formal compliance proceedings. The Texas HHSC asked for several extensions and ultimately submitted a formal response on August 10, 2018. The August 10, 2018, response did not evidence compliance with section 1902(r)(1) of the Act.

The Texas HHSC's submission of its quarterly expenditure reports through the CMS-64 includes a certification that the state is operating under the authority of its approved Medicaid state plan. However, at this time, CMS has not received information from the Texas HHSC providing evidence of compliance with section 1902(r)(1) of the Act.

II. Proposed Withholding

In light of the Texas HHSC's non-compliance with section 1902(r)(1) of the Act, CMS is moving forward with a formal determination of substantial noncompliance with federal requirements described in section 1902(r)(1) of the Act to deduct amounts for incurred expenses for medical or remedial care recognized under state law but not covered under the state plan in the PETI calculation. Subject to the Texas HHSC's opportunity to request a hearing, CMS will withhold a portion of FFP from the Texas HHSC's quarterly claim of expenditures for administrative costs until such time as the Texas HHSC is and continues to be in compliance with the federal requirements. 42 CFR 430.35. The withholding will initially be 4 percent of the federal share of the Texas HHSC's quarterly claim for administrative expenditures, an amount that was developed based on the proportion of total state Medicaid expenditures that are used for expenditures for eligibility determinations, as reported on Form CMS-64.10 Line 50. The withholding percentage will increase by 2 percentage points for every quarter in which the Texas HHSC remains out of compliance, up to a maximum withholding percentage of 100 percent (of total administrative expenditures). The withholding will end when the Texas HHSC demonstrates that it has implemented a corrective action plan bringing its procedures to process eligibility determinations under its Medicaid program into compliance with the federal requirements found at section 1902(r)(1) of the Act.

III. Opportunity to Request a Hearing

Hearing procedures are found at 42 C.F.R. Part 430 Subpart D. As specified in the accompanying Federal Register notice, the Texas HHSC may request an administrative hearing within 30 days of the date of this letter prior to this determination becoming final. 42 CFR 430.70; 42 CFR 430.72(a). Upon receipt of a timely hearing request, the hearing will be convened by the Hearing Officer designated below no later than 60 days from the date of this letter, unless a later date is agreed to by the state and CMS. 42 CFR 430.72(a). The hearing will take place at the CMS Regional Office in Dallas, Texas. 42 CFR 430.72(a). The issue in any such hearing will be whether, in applying the PETI calculation against institutionalized individuals and certain participants of HCBS waiver, Texas HHSC properly deducts from their incomes amounts for incurred expenses for medical or remedial care recognized under State law but not covered under the state plan, in accordance with section 1902(r)(1) of the Act. Please

note that additional issues may be considered at the hearing, provided that the additional issues are sent to the state in writing and published in the Federal Register. 42 CFR 430.74.

Any request for such a hearing should be sent to the designated Hearing Officer. The Hearing Officer also should be notified if the Texas HHSC requests a hearing but cannot meet the timeframe expressed in this notice. The Hearing Officer designated for this matter is:

Benjamin R. Cohen, Hearing Officer
Centers for Medicare & Medicaid Services
2520 Lord Baltimore Drive, Suite L
Baltimore, MD 21244

Should you not request a hearing within 30 days, a notice of withholding will be sent to you and the withholding of federal funds will begin as described above.

IV. Submission of Plan to Come into Compliance

If the Texas HHSC intends to come into compliance with its approved state plan and section 1915(c) waivers, the Texas HHSC should submit, within 30 days of the date of this letter, an explanation of how it plans to come into compliance with federal requirements and the timeframe for doing so. If that explanation is satisfactory, CMS may consider postponing any requested hearing, which could also delay the imposition of the withholding of funds as described above. Our goal is to have the Texas HHSC come into compliance with federal law, and CMS continues to be available to provide technical assistance to the Texas HHSC to achieve this outcome.

If you have any questions or wish to discuss this determination further, please contact:

Bill Brooks
Associate Regional Administrator
Division of Medicaid and Children's Health Operations
CMS Dallas Regional Office, 1301 Young Street, Suite 714
Dallas, TX 75202
214-767-4461

Sincerely,

Seema Verma

cc: Benjamin R. Cohen

Section 1116 of the Social Security Act (42 U.S.C. section 1316; 42 CFR section 430.18) (Catalog of Federal Domestic Assistance program No. 13.714. Medicaid Assistance Program.)

Dated: February 11, 2019

Seema Verma,

Administrator,

Centers for Medicare & Medicaid Services

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