September 13, 2019

VIA ELECTRONIC SUBMISSION

The Honorable Seema Verma
Administrator
Centers for Medicare & Medicaid Services
Department of Health and Human Services
P.O. Box 8016
Baltimore, MD 21244-8016

RE: CMS-2406-P2; Proposed Rule: Medicaid Program; Methods for Assuring Access to Covered Medicaid Services-Rescission

Dear Administrator Verma:

As organizations dedicated to promoting the health of our nation's children and pregnant women, we write to oppose the proposed rule by the Centers for Medicare & Medicaid Services (CMS) to rescind the current Medicaid Access Rule that requires states to monitor and document Medicaid payments in fee-for-service (FFS) systems and the impact on beneficiary access to care. We read the proposed rule with great interest, as we believe it will have far-reaching effects on children, pregnant women, and families who receive care through Medicaid. We insist that any sources of children's coverage must ensure access to timely, affordable, high-quality and age-appropriate health care that meets their unique needs, and Medicaid is no exception.

Our organizations strongly opposed the 2018 Notice of Proposed Rulemaking (NPRM) to weaken the Medicaid Access Rule because it would have greatly reduced transparency regarding access in Medicaid FFS. Medicaid is the largest source of public coverage for children and provides coverage for nearly half of all births. Some of the most vulnerable populations are enrolled in Medicaid FFS systems, and even in states where Medicaid managed care is the predominant payment system, certain populations are "carved out" and some or all of their care is covered by Medicaid FFS, such as children with special health care needs or medically complex conditions. Should CMS finalize the proposed rescission, new barriers to access could arise, unseen and unchecked, affecting a huge number of children, pregnant women, and other vulnerable patients.

The proposed rule would erode the federal responsibility to ensure equal access in the Medicaid program, which could make it easier for states to cut provider payment rates in FFS, possibly leading to less provider participation in the program. These changes could leave children and pregnant women, particularly those with serious, chronic, or complex medical and dental needs, with reduced access to the care they need.

We urge CMS to withdraw the proposed rule. After reviewing the October 2019 reports, CMS should work with expert stakeholders to improve the current rule to strengthen access monitoring.

Our specific comments are below.

Access to Care Improves Outcomes

Children make up the single largest group of people who rely on Medicaid. Nearly 36 million children receive Medicaid coverage, including children with special health care needs and those from low-income families. Medicaid also provides comprehensive prenatal care to pregnant women, enabling millions of

pregnant women to have healthy pregnancies and prevent instances of preterm birth, low birthweight, and other complications in infants. Unlike many private health insurance plans, Medicaid guarantees specific benefits designed especially for children. Medicaid's Early and Periodic Screening, Diagnostic and Treatment (EPSDT) benefits are the definitive standard of pediatric care, covering an array of services like developmental, dental, vision and hearing screenings, and allowing health problems to be diagnosed and treated appropriately and as early as possible. Children enrolled in Medicaid are more likely to get check-ups, miss less school, graduate and enter the workforce than their uninsured peers.[1] Simply put: Medicaid coverage works for children.

Child health is a strong predictor of adult health. Addressing health and development during childhood–from birth through adolescence–leads to improved outcomes in many areas of life. Conversely, the inability to access health care services threatens the physical, mental, and social health and well-being of children and their caregivers.[2] Our organizations believe that all children, regardless of their zip code, must have access to the full range of age-appropriate health care providers, subspecialists, and facilities.

The Federal Government Has a Responsibility to Monitor Equal Access

The Supreme Court's 2015 decision in *Armstrong v. Exceptional Child Center, Inc.* held that Medicaid providers do not have a cause of action to challenge a state's Medicaid payment rates. As such, the Supreme Court concluded it is the responsibility of the federal government to enforce the equal access provision found in 42 U.S.C. §1396a(a)(30)(A), which requires that state Medicaid provider payments be "sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area."

As you know, CMS developed regulations to enforce this provision, effective April 2016, that require states to develop and submit to CMS an Access Monitoring Review Plan (AMRP) that specifies the data elements the state will use in assessing beneficiary access to care in a Medicaid fee-for-service delivery system. The current regulations specify that states' AMRPs must include specific access reviews for primary care, physician specialist services, behavioral health services, pre- and post-natal obstetric services including labor and delivery, and home health services. Although the comprehensiveness of the initial state plans varied, many 2016 plans included data on beneficiary need, provider availability, use of care, population characteristics, and geographic-specific comparative payment information.

The proposed rule would relinquish the federal government's responsibility to monitor access to care for children and pregnant women enrolled in Medicaid. Under the proposed rule, state Medicaid programs would no longer have to analyze whether enrolled children have adequate access to covered services, take corrective action if access deficiencies are identified, explain the effects on access if they propose to reduce payments to pediatric service providers, or monitor the effects on access if CMS approves a payment cut.

Beneficiaries remaining in Medicaid FFS are more likely to be members of vulnerable populations, such as those who are dually eligible, Native Americans, children in foster care or receiving adoption assistance, pregnant women, and individuals with intellectual disabilities or rare diseases. This also includes many Children with Special Health Care Needs (CSHCN), including children with medically complex diagnoses. Access to care for these individuals is critical to optimal health status but can also be more challenging given the special needs of these populations. Further, many states also carve services out of managed care contracts, so that even individuals enrolled in MCOs may access particular services through fee-for-service, such as dental services, prescription drugs, mental health services, and long-term

[1] https://www.macpac.gov/wp-content/uploads/2015/11/EXHIBIT-41.-Use-of-Care-among-Non-Institutionalized-Individuals-Age-0%E2%80%9318-by-Primary-Source-of-Health-Coverage-2015-MEPS-data.pdf
[2] https://www.aap.org/en-us/Documents/BluePrintForChildren.pdf

services and supports. Any rollback of reporting requirements could undermine access to care for these beneficiaries.

If implemented, the proposed rule could also impact children's access to Medicaid's EPSDT benefit. While most children receive these benefits through managed care, states have flexibility in determining how to ensure the provision of these services. According to a Center for Medicaid & CHIP Services (CMCS) Informational Bulletin from January 2017,[3] states may carve out some EPSDT services, or services beyond contracted limits, and retain responsibility for them in FFS coverage. Additionally, if a managed care contract excludes benefits over specified limits, the state retains responsibility for providing necessary services above those limits. As such, children's access to the comprehensive EPSDT benefit may partially be provided through FFS. Without the monitoring and oversight required by the Medicaid Access Rule, children may not have equal access to these essential services.

Importantly, the current regulations also include safeguards that encourage beneficiaries and other stakeholders to provide input regarding any significant proposed change in methods and standards for setting payment rates for services. The current regulations also mandate that as well as the five services categories included in their AMRPs, states monitor additional services for which the state or CMS has received a significantly higher than usual call volume of access complaints from beneficiaries, providers, or other stakeholders.[4] Together, these safeguards give families an outlet to participate in the access monitoring process. Removing the requirement to undertake a public process would deny patients and families the right to comment on state rate reviews or payment rate adjustments. In addition to removing the patient and provider voice from the decision-making process, such a change could eliminate essential qualitative data and testimonials from providers and beneficiaries that inform which services need to be monitored.

Our Organizations Strongly Opposed CMS' 2018 NPRM to Weaken the Medicaid Access Rule

In March of 2018, under the justification of "decreasing administrative burden," CMS proposed to amend the process for states to document whether Medicaid payments in fee-for-service systems were sufficient to enlist providers to ensure beneficiary access to covered care and services consistent with the statute. Specifically, under the 2018 proposed rule, states with an overall comprehensive, risk-based managed care enrollment rate of 85 percent or greater would have been exempt from conducting an access analysis or providing justification when "nominally" reducing or restructuring provider payment rates.

Our organizations submitted detailed comments strongly opposing the 2018 NPRM, arguing that the proposed 85 percent threshold was arbitrary and would result in far less transparency into the accessibility of services for beneficiaries not enrolled in MCOs in these states.[5] While CMS proposed that these exempt states would have to submit an "alternative analysis" with supporting data in order to comply with the regulatory requirement to ensure access when submitting a state plan amendment that proposes to reduce or restructure Medicaid payment rates, we highlighted our concerns that these alternative mechanisms could lead to less robust and insufficient oversight.

CMS Proposes to Rescind Without Replacing

CMS now proposes to completely rescind the Medicaid Access Rule that ensures equal access in the Medicaid program without a fully formed replacement plan. CMS justifies this proposal by claiming that States have raised concerns over the administrative burden associated with the current regulatory

[3] https://www.medicaid.gov/federal-policy-guidance/downloads/cib010517.pdf
[4] https://www.macpac.gov/wp-content/uploads/2017/03/Monitoring-Access-to-Care-in-Medicaid.pdf
[5] https://downloads.aap.org/DOFA/SKGAccessComments.pdf

requirements. The Administrative Record notes that about 150 organizations and individuals from 30 states and DC commented on the 2018 NPRM that would have relaxed the current regulations governing the Medicaid Access provision.[6] Of these, the overwhelming majority opposed the proposal. Notably, none of the commenters urged repeal of the Medicaid Access Rule altogether.

The current Medicaid Access Rule has not yet been implemented for one full 3-year cycle, and the next round of AMRPs are not due until October 1, 2019. At a minimum, CMS should review the 2019 submissions, compare them with the 2016 submissions, identify any access deficiencies, and work with states to address them. Rescinding the rule entirely without a replacement would be irresponsible.

The NPRM outlines a "new strategy" that will "focus on developing a more uniform methodology for analyzing Medicaid access data for all states and will be led by CMS working in partnership with states and other stakeholders." We disagree with CMS's suggested pathway to first rescind the Medicaid Access Rule and then convene stakeholders to develop a new approach; the current monitoring and oversight should remain in place while CMS works with states and other stakeholders to improve the strategy. Given that children make up almost half of the total Medicaid population, we believe that any such stakeholder group must include children's health organizations, provider groups, and beneficiaries.

The proposed rescission of the Medicaid Access Rule is even more troubling considering that trends in children's coverage are heading in the wrong direction. From 2017 to 2018, Medicaid and the Children's Health Insurance Program saw an enrollment decrease of more than 828,000, or 2.2 percent, of children.[7] Similarly, recently released data from the U.S. Census Bureau shows that in 2018, 4.3 million children in the United States were uninsured – an increase of 425,000 uninsured children in a single year. According to the Census data, this decline is not due to commensurate gains in private coverage and can instead be largely attributed to the decline in Medicaid enrollment.[8]

Children's coverage is susceptible to changes in federal and state policies and operations, and changes to Medicaid and CHIP policies, like the proposed rescission, can create uncertainty and unnecessary barriers to accessing coverage.[9] Rescinding the Medicaid Access Rule would create more problems than solutions as it relates to children's coverage. As such, we wholeheartedly oppose CMS's proposal to rescind the Medicaid Access Rule.

In conclusion, our organizations appreciate this opportunity to submit comments on this proposed rule. We urge CMS to retain and strengthen the current access monitoring regulations. If you have any questions, please do not hesitate to contact Stephanie Glier at the American Academy of Pediatrics, at 202-347-8600 or sglier@aap.org.

Sincerely,

American Academy of Pediatrics
Children's Defense Fund
Children's Dental Health Project
Children's Hospital Association
Family Voices
First Focus on Children
Georgetown Center for Children and Families
March of Dimes
National Association of Pediatric Nurse Practitioners

[6] https://www.regulations.gov/searchResults?rpp=25&po=100&s=CMS-2406-P&fp=true
[7] https://data.medicaid.gov/Enrollment/State-Medicaid-and-CHIP-Applications-Eligibility-D/n5ce-jxme/data
[8] https://www.census.gov/library/stories/2019/09/uninsured-rate-for-children-in-2018.html
[9] https://www.aap.org/en-us/about-the-aap/aap-press-room/Pages/StatementonPublicHealthInsuranceEnrollmentNumbers.aspx