Forthcoming ___
Sandusky ___
Markham ___
Nanorta ___
Wilmarth ___
Legal ___
Nyce ___

2062

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF PUBLIC WELFARE
P.O. BOX 2675
HARRISBURG, PENNSYLVANIA 17105-2675

RECEIVED
2000 MAR -6 AM 8:48
REVIEW COMMISSION

SHERRI Z. HELLER, Ed.D.
DEPUTY SECRETARY FOR INCOME MAINTENANCE

MAR 0 1 2000

TELEPHONE
(717) 783-3063

Mr. Robert E. Nyce
Executive Director
Independent Regulatory Review Commission
Fourteenth Floor, Harristown 2
333 Market Street
Harrisburg, Pennsylvania 17101

Original: 2062
McGinley
cc: Sandusky
Markham
Nanorta
Wilmarth
Legal

Dear Mr. Nyce:

The Department of Public Welfare's (DPW's) Regulation #14-467, formerly #14-446 (#2062-Omnibus Amendments), withdrawn on October 5, 1999, is now making its way through the approval process. Although we do not ordinarily write to IRRC on the substance of a regulation before resubmission, we thought it appropriate in this situation to alert you to two slight changes in our approach from what we had discussed with your staff in the process of withdrawing this regulation. Our understanding after discussion with your staff in September and October was that we could anticipate approval of this regulation after the Department made the changes we discussed. While we have made all the changes we discussed, with respect to two of them, the resolution of the concern turned out to be slightly more complicated than we anticipated. We are writing to you now not only to alert you to this change, but also to encourage you to contact us now, in advance of the formal resubmission, if you have any questions about this approach.

In our withdrawal letter dated October 5, 1999 we indicated that a cross-reference would be added to 55 Pa. Code §141.61 to identify General Assistance (GA) cash recipients who qualify for Federally-funded Medicaid, which provides more comprehensive Medicaid coverage than is provided under State law. Upon further analysis, we determined that we needed to expand the regulations and that a simple cross-reference was not possible. The number of cross-references that would have been needed was so extensive that it would have made the resulting regulation too complicated and confusing. Instead of numerous cross-references, text has been added to §§141.61(d)(4), 141.71(c)(2) and 141.81(c)(3)(v)(A) to identify individuals who qualify for Federally-funded Medicaid.

Advocates raised a concern that Medically Needy Only (MNO) Medicaid Spend-down regulations found at 55 Pa. Code §181.12(c) are inconsistent with the Medical Assistance Eligibility Handbook (MAEH) used by DPW staff. For an individual whose income exceeds the limits for Medicaid eligibility, medical expenses can be deducted to "spend down" the excess income to qualify the person for MNO Medicaid. A provision added to the MAEH on February 1, 1999 instructs staff to allow the value of medical

care received by an individual and paid by a public program other than Medicaid to be used as a deduction from income, even if the individual never was financially liable for the care. Upon further analysis and Federal guidance on interpretation of Federal Medicaid law, we determined that the handbook revision was too broad in scope and the regulations were too narrow. In response to the advocates' concern and for consistency between DPW regulations and operating guidelines, 55 Pa. Code §§181.14(d)(3) and (e)(6) and the MAEH are being amended. Both will provide a deduction from income for medical expenses paid by a public program that is not financed by any Federal funds when determining eligibility for MNO Medicaid under Spend-down. The cross-reference at §181.12(c)(2) is being revised accordingly. This issue is explained in greater detail in the enclosed issue paper.

I want to thank you for the continued support you have afforded us with this regulation package, including the resolution of these issues. We are always available to discuss these issues with you at your convenience. Please contact Mr. Edward J. Zogby at (717) 787-4081 if you have any questions or concerns.

Sincerely,

Sherri Z. Heller

Sherri Z. Heller

Enclosure

ISSUE PAPER

Issue: Whether medical expenses paid by a public program are allowable medical expenses when determining eligibility for Medicaid.

Background

Under the eligibility requirements for Medically Needy Only (MNO) Medicaid, persons whose income exceeds the income limits may still qualify for Medicaid. Medical expenses can be used as a deduction from income to reduce the person's income to within the income limits to qualify for MNO Medicaid. This process of using medical expenses as a deduction from income is referred to as "Spend-down."

Advocates raised a concern that the regulations under review did not reflect a provision in the Medical Assistance Eligibility Handbook (MAEH). The MAEH was revised to allow an income deduction for medical care which never was an expense to the individual. This MAEH revision was an overly broad interpretation of the provision in the statute.

Statute: 42 U.S.C. §1396a(a)(17)(D)

The section that is relevant to the advocates' concern provides, in part: "... a State Plan for medical assistance must ... provide for flexibility in the application of such standards with respect to income by taking into account, except to the extent prescribed by the Secretary, the costs (whether in the form of insurance premiums, payments made to the State under Section 1396b(f)(2)(B) of this title, or otherwise and regardless of whether such costs are reimbursed under another public program of the State or political subdivision thereof) incurred for medical care or for any other type of remedial care recognized under State law;"

The Health Care Financing Administration (HCFA) has not promulgated any regulation that clarifies this provision in the statute regarding income deductions for medical expenses reimbursed by another public program. In the absence of regulations, states rely on the State Medicaid Manual (issued by the US Department of Health & Human Services) as guidance, with further clarification via memos and letters from HCFA.

HCFA State Medicaid Manual

The State Medicaid Manual, Part 3 – Eligibility, provides the following guidance on what are allowable medical expense deductions when determining MNO Medicaid eligibility using Spend-down:

"3268. Deduction of Incurred Medical and Remedial Care Expenses (Spend-down)

The following definitions are used for purposes of this section...

Incurred Expenses – Expenses for medical or remedial services:

. recognized under State law....

. for which the individual is liable in the current accounting period or was liable in the 3-month retroactive period described in 42 CFR §435.914...

State or Territorial Public Program – A program that is operated (i.e., administratively controlled) by a state or territory (including a political subdivision thereof).

State or Territorially-Financed Program – A state or territorial public program whose funding, except for deductibles and coinsurance amounts required from program beneficiaries, is either:

. appropriated by the state or territory directly to the administering agency; or

. transferred from another state or territorial public agency to the administering agency...

3628.1 Expenses That Must Be Deducted – Deduct from countable income the medical or remedial care expenses listed below that are not subject to payment by a third party. (Such deductions are allowable even if the expenses are paid by a public program (other than the Medicaid Program) of a state or territory if the program is financed by the state or territory.)"

These provisions are contradictory in that they provide that the deduction is for "expenses ... for which the individual is liable," and the expenses are deductible only if they are not subject to payment by a third party, but go on to say expenses are deductible if the third party paying them is a public program of a state or territory."

MAEH (Handbook Revision)

On February 1, 1999, the MAEH §361.5 was revised to include the following:

"Reminder: Federal policy states that incurred medical and remedial care expenses which are paid by a public program (other than Medicaid) of a state are to be deducted in the Spend-down computation."

HCFA Memorandum (copy attached)

In response to DPW's inquiry in November 1999, HCFA provided DPW with a memorandum that had been issued to HCFA Regional Administrators on May 31, 1994 in response to an inquiry from the State of Iowa. This memo set forth HCFA's interpretation of the meaning of this provision. The memorandum requires that states treat health care expenses paid by a state or territorially-financed public program as incurred expenses. Health care paid for by a program that receives Federal funds, which includes Pennsylvania's CHIP Program, Medicare and Medicaid, is not an expense that is deductible from the individual's income.

Discussion

Upon review of the advocates' concern, we agree that a revision to current regulations is appropriate. The reminder that was recently inserted into the handbook was too broad in scope and the current regulations were too narrow; both did not accurately reflect HCFA's interpretation of this provision in the statute. The handbook will be revised to incorporate the provisions in 42 U.S.C. §1396a(a)(17)(D) in advance of the promulgation of regulations. For your convenience, the following language is presented to illustrate the regulations that will be part of Regulation 14-467 when it is submitted:

§181.14. Eligibility under MNO-MA Spend-down.

(d) Deductible medical expenses include:

(3) Medical and remedial expenses paid by a public program if:

(i) the public program is not financed by any Federal funds;

(ii) the expenses are wholly financed by a state or a subdivision of the state; for example, county or municipality;

(iii) the expenses have been paid in the month of application, or any month in the retroactive period, or a combination of both, for which the individual is applying; and

(iv) the expenses have not been previously used as a deduction in the determination of eligibility for a prior authorization of MA.

The regulations in §§181.12(c)(2) and 181.14(e)(6) have been revised to reflect that this change also applies when determining eligibility for retroactive MNO Medicaid coverage.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF PUBLIC WELFARE
P.O. BOX 2675
HARRISBURG, PENNSYLVANIA 17105-2675

SHERRI Z. HELLER, Ed.D.
DEPUTY SECRETARY FOR INCOME MAINTENANCE

TELEPHONE
(717) 783-3063

OCT 05 1999

Mr. Robert E. Nyce
Executive Director
Independent Regulatory Review Commission
Fourteenth Floor, Harristown 2
333 Market Street
Harrisburg, Pennsylvania 17101

Original: 2062
McGinley
Copies: Sandusky
Markham
Nanorta
Wilmarth

Dear Mr. Nyce:

Thank you for your comments and suggestions, discussed at the meeting of September 27, 1999, regarding the Department of Public Welfare's (DPW's) Regulation #14-446 (#2062-Omnibus Amendments). This is to inform you, pursuant to discussion at that meeting, that DPW is withdrawing the regulation so we can make several changes we discussed.

We will delete language in §177.21 that exempts educational savings accounts as a resource only when determining eligibility for General Assistance (GA). By removing the qualifier "for GA only," this resource exemption will apply to both the GA and Temporary Assistance for Needy Families (TANF) categories. As we explained to IRRC staff, when these regulations were prepared, TANF was not yet in place, and the predecessor program, Aid to Families with Dependent Children (AFDC) did not permit this exemption for AFDC without a Federal waiver, which Pennsylvania did not receive. The Notices of Rule Change (NORCs) which announced the policy changes that Regulation 14-446 places into the Pa. Code implemented State law changes that predate TANF. The revision to §177.21 will reflect a change implemented with the TANF program in 1997 and implemented via the NORC that implemented the TANF program. By adding a TANF change to this pre-TANF regulation, we are also adding another effective date for one component of these regulations.

In addition, we will revise §141.61 to add a cross-reference to sections of the Pa. Code that indicate that notwithstanding 62 P.S. §442.1(a)(3)(i) (which provides that GA cash recipients receive medically needy benefits), individuals who receive or qualify for GA cash receive categorically needy medical assistance (a larger benefit package) if they qualify for Federally-funded medical assistance on any basis. This includes children, pregnant women, persons with disabilities or awaiting a determination of eligibility for disability benefits under Title II or Title XVI of the Social Security Act.

We also will make a revision to the Regulatory Analysis Form and preamble of the regulations to reflect the conclusion of litigation in Warrick et al. v. Snider, Nos. 98-3010 and 98-3011, U.S. Ct. of Appeals, 3d Cir., which concluded (on the merits) after the regulations were submitted.

Our final reason for withdrawing these regulations is to address a concern raised regarding §181.12(c). Advocates requested that §181.12(c) be revised to add a provision that applicants for retroactive medical assistance on a spend-down basis be permitted an income deduction for the value of medical care they received that was paid for by a public program other than Medicaid. As was discussed with IRRC staff, the Federal regulation cited by advocates does not exist, but there is a provision in the Medical Assistance Eligibility Handbook that could be interpreted this way. We are exploring the basis for this provision of the handbook and any Federal provision or guidance that may have generated it, after which we will determine what language is appropriate in this section.

It is our understanding that the changes outlined above would address the Commission's concerns, and that DPW can reasonably anticipate the approval of this regulation package when resubmitted.

Sincerely,

Sherri Z. Heller

cc: The Honorable Harold F. Mowery
The Honorable Vincent J. Hughes
The Honorable Dennis M. O'Brien
The Honorable Frank L. Oliver
David J. DeVries, Chief Deputy Attorney General
Howard Burde, Deputy General Counsel
John Nanorta, IRRC

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF PUBLIC WELFARE

OFFICE OF INCOME MAINTENANCE
BUREAU OF POLICY

FAX TRANSMISSION SHEET

Date: 10-5-99

Number of Pages: 3
(Including Cover Sheet)

To: Richard Sandusky

FAX Number: 3-2664

From: Ed Zogby

FAX Number: (717) 787-6765

Comments:

Please call Donna Goodell at (717) 783-8478 if you have any problems with this FAX transmission.