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September 6, 2019

The Honorable Alex M. Azar II  
Secretary  
U.S. Department of Health and Human Services  
200 Independence Avenue SW  
Washington, DC 20201

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

Dear Secretary Azar:

The Medicaid and CHIP Payment and Access Commission (MACPAC) appreciates the opportunity to comment on the Centers for Medicare & Medicaid Services (CMS) proposed rule, Medicaid Program; Methods for Assuring Access to Covered Medicaid Services—Rescission, 84 Fed. Reg. 33722 (July 15, 2019).

MACPAC is a non-partisan legislative branch agency that provides policy and data analysis and makes recommendations to Congress, the Secretary of the U.S. Department of Health and Human Services, and the states on a wide range of topics related to Medicaid and the State Children's Health Insurance Program (CHIP). As described in its authorizing statute, MACPAC is required to review and make recommendations regarding policies affecting access to covered items and services (§ 1900(b)(1) of the Social Security Act). The comments provided below stem from this obligation.

The proposed rule referenced above would rescind the process states currently must use to document whether payments in fee-for-service (FFS) Medicaid are sufficient to ensure access in a manner that is consistent with the equal access provision in the Social Security Act (§ 1902(a)(30)(A)). This change is intended to address the concerns of states regarding the administrative burden associated with the existing requirements. While the Commission has long raised concerns about the administrative capacity constraints of state Medicaid programs, it also has strong concerns about rescinding the existing requirements. A key purpose of the Medicaid program is to provide access to services; the states and the federal government have statutory obligations to ensure sufficient access. The existing approach is an established process for meeting this obligation and should continue until such time as an alternative is developed through a transparent process.

**Ongoing need to monitor access**

Although states would continue to be obligated under the statute to ensure that



payment rates are sufficient to meet the standard established by the equal access provision, the proposed rule would rescind existing requirements for states to monitor access to care under FFS arrangements. If the proposed rule is finalized, states would no longer have to update access monitoring review plans every three years or conduct reviews accompanying any state plan amendment to reduce or restructure Medicaid payment rates. Instead, they would only be required to maintain documentation of payment rates and make them available to CMS upon request.

The rate of provider participation in Medicaid has historically been considered an indicator of access. Research by MACPAC and others have established that payment rates affect providers' willingness to accept new Medicaid patients (Holgash and Heberlein 2019, MACPAC 2013). While factors such as patient non-compliance and paperwork requirements may also affect provider participation, lower rates relative to other payers affect the probability of having any visit with a health care professional and whether beneficiaries can get care in offices versus the emergency department (MACPAC 2013).

As MACPAC noted in Chapter 4 of its March 2017 *Report to Congress on Medicaid and CHIP* and in its May 2018 comment letter on previously proposed changes to access monitoring requirements, monitoring access under FFS remains important for a number of reasons (MACPAC 2018, 2017). First, even though managed care is the dominant delivery system in Medicaid, more than half of Medicaid spending nationally is for services provided under FFS arrangements. Second, the populations that are most likely to remain in FFS Medicaid, such as individuals with disabilities, are among the most vulnerable, and ensuring their access to services is particularly important given their high health needs. Third, even in states with high managed care penetration, certain services, such as long-term services and supports, behavioral health services, and dental services, are often carved out of managed care contracts and provided through FFS arrangements. Furthermore, monitoring access can be used to support assessment of program value, act as a mechanism for accountability, and help identify problems and guide program improvement efforts.

The Supreme Court ruling in *Armstrong v. Exceptional Child Center, Inc.* eliminated the private right of action to contest payment rate changes under FFS, concluding that CMS is better suited than the courts to make determinations related to the adequacy of payment rates.<sup>1</sup> The existing access monitoring rules stem from this obligation and were designed by CMS to strengthen the agency's review and enforcement capabilities. The Commission considers federal enforcement of the equal access provision the primary mechanism for ensuring that Medicaid beneficiaries have sufficient access to care when services are delivered under FFS arrangements. The proposed rule, however, does not indicate how the federal government will fulfill this responsibility. Furthermore, state activities to collect and report data are necessary for the federal government to carry out this obligation. The proposed rule does not provide a clear alternative approach to the existing requirements.

### State administrative capacity

In proposing to rescind the existing monitoring requirements, CMS notes that states have raised concerns regarding the administrative burden of complying with the current rules. The Commission has repeatedly commented that Medicaid agencies at both the state and federal levels are expected to manage a large and diverse set of responsibilities with limited resources. They are also constrained in their ability to collect, analyze,

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<sup>1</sup> *Armstrong v. Exceptional Child Center, Inc.*, 135 S. Ct. 1378 (2015).



and report data, which are important functions for monitoring access in Medicaid. At the same time, lack of clear guidance and procedures regarding monitoring access creates uncertainty about CMS expectations and confusion on how states should deploy their limited resources to meet these expectations. While it is important to recognize the effect of resource constraints on a state's ability to monitor access, resource constraints do not negate the federal obligation to ensure compliance with the equal access provision and the state obligation to provide adequate data to support such an assessment. As discussed in our comments on the 2018 proposed revision, we encourage CMS to develop effective and efficient alternatives based on state experience, rather than eliminate the obligation to monitor access.

## Transparency

In conjunction with finalizing this rule, the Administration anticipates that it will issue a letter to state Medicaid directors describing the data and analysis that states may submit in the future to support compliance with the equal access provision. The information bulletin that accompanied the notice of proposed rulemaking also notes the intention to develop, in partnership with states, a comprehensive approach to monitoring access that will encompass multiple delivery systems, including FFS, managed care, and home- and community-based waivers. While we appreciate that current requirements are still applicable until the proposed rule is finalized and the concurrent guidance detailing a new approach is released, it appears that such changes will be in subregulatory guidance, raising questions about the extent to which all stakeholders will have the opportunity to comment. The Commission urges CMS to make public and transparent both the process for developing any changes to its approach to monitoring access and the data states submit to comply with the equal access provision. Public engagement plays an important role in ensuring accountability, identifying problems, guiding program improvement, and facilitating stakeholder understanding of the standards and processes being used to monitor access.

Because access to care depends upon multiple factors, measuring and monitoring it can be challenging. From its very first report to Congress, MACPAC has noted that the availability of timely data and validated measures are major challenges for states and CMS in monitoring access (MACPAC 2011). We appreciate the stated commitment of CMS to develop more comprehensive and data-driven measures and methods. However, until improved methods are established, it is the Commission's view that existing requirements, which states have already demonstrated their ability to fulfill through submission of monitoring review plans in 2016, provide an ongoing and transparent monitoring approach for federal oversight.

We appreciate the opportunity to provide comments on this proposed regulation.

Sincerely,



Melanie Bella, MBA  
Chair

cc: The Honorable Chuck Grassley, Chairman, Committee on Finance, U.S. Senate  
The Honorable Ron Wyden, Ranking Member, Committee on Finance, U.S. Senate

The Honorable Frank Pallone Jr., Chairman, Committee on Energy and Commerce, U.S. House of Representatives

The Honorable Greg Walden, Ranking Member, Committee on Energy and Commerce, U.S. House of Representatives

The Honorable Anna Eshoo, Chairwoman, Subcommittee on Health, Committee on Energy and Commerce, U.S. House of Representatives

The Honorable Michael Burgess, Ranking Member, Subcommittee on Health, Committee on Energy and Commerce, U.S. House of Representatives

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