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Our File Number: 22TX-150895

Centers for Medicare & Medicaid Services  
Department of Health and Human Services  
Attention: CMS-1523-NC  
P.O. Box. 8012  
Baltimore, Maryland 21244-1850

Re: File Code CMS-1523-NC

To whom it may concern:

We are counsel to more than 50 Medicare hospice providers in the United States. Our clients face cap repayment demands totaling in excess of \$50 million calculated under the current hospice cap regulation, 42 C.F.R. § 418.309(b)(1). We therefore have a significant interest in your proposal, published at CMS-1523-NC (published at 75 F.R. 42944, July 22, 2010), to reform the hospice cap regulation and submit the following comments:

1. Background. When the hospice benefit was established, Congress imposed a retrospective cap on reimbursement to each distinct provider, calculated as the product of the number of beneficiaries on service in a given year and the annual cap amount per beneficiary. Congress was explicit and precise in instructing HHS as to how to calculate the "number of beneficiaries" in any given year:

... the "number of medicare beneficiaries" in a hospice program in an accounting year is equal to the number of individuals who have made an election ... and have been provided hospice care ... in the accounting year, such number to be reduced to reflect the proportion of hospice care that each such individual was provided in a previous or subsequent accounting year or under a plan of care established by another hospice program.

42 U.S.C. § 1395f(i)(2)(C). When HHS promulgated its proposed regulation, however, it declared its intent not to follow the express instruction of Congress:

Although section 1814(i)(2)(C) of the Act specifies that the cap amount is to be adjusted "to reflect the proportion of the hospice care that each such individual was provided in a previous or subsequent accounting year . . ." such an adjustment would be difficult in that the proportion of the hospice stay occurring in any

given year would not be known until the patient dies or exhausted his or her hospice benefits. We believe the proposed alternative of counting the beneficiary in the reporting period where the beneficiary used most of the days of covered hospice care will achieve the intent of the statute without being burdensome.

48 F.R. 38,146 at 38,158 (August 22, 1983). As it declared it would, HHS implemented a regulation that assigned the entirety of each individual's cap allowance to the initial year of service rather than making the required proportional allocation.

2. Cap History. In 2001, HHS sought to expand access to the hospice benefit, recognizing it as both inexpensive and preferred end-of-life care. HHS urged hospices to expand access. Its then Administrator, Nancy-Ann DeParle, issued an open letter to all medicare hospices noting a "disturbing misperception that hospices and beneficiaries will be penalized if a patient lives longer than six months" asserting that, "Nothing could be further from the truth." And, yet, as my clients know all too well, the hospice cap, exacerbated by HHS' unlawful implementation, imposes substantial and critical penalties on hospices that have sought to extend access.

3. Litigation History. More than thirty hospices have filed suits challenging the regulation. To date, HHS has refused to publically acknowledge that this regulation has been repeatedly held unlawful as contrary to statute. To date, at least ten district courts, including Courts in California, Utah, New Mexico, Texas, Oklahoma, and Washington D.C., have held the regulation unlawful; not a single court has spoken in defense of the regulation. Despite repeated findings, with courts now noting the "overwhelming authority" for invalidity of the regulation, HHS has refused to suspend use of the regulation and has even refused to acknowledge the existence of these cases. As a result, many hospices remain unaware of the consistent findings that the regulation is unlawful.

Every government official takes an oath to faithfully execute the laws of the United States; and yet, in this context, numerous government officials including CMS and its Administrator, CMS counsel, HHS counsel, and DOJ attorneys have been working in concert to frustrate or avoid the mandate of Congress to make a proportional allocation of hospice cap allowances. This conduct brings substantial discredit on our government.

4. A New Regulation. In its current publication, HHS proposes, again without acknowledging the existence of the district court rulings, that it may consider a proportional allocation across not more than 2 years; or, that it may, eventually, allow hospices to request reopening for recalculation under a proportional method. But, as HHS has been told by numerous district courts, this is just not what the statute requires.

In Los Angeles Haven Hospice v. HHS, 08 CV 4469 (C.D. Cal.) (7/13/09), the district court held as follows:

... Congress unquestionably required that the number of medicare beneficiaries be reduced to reflect "the proportion" ... of hospice care that "each such individual ... was provided in a previous or subsequent accounting year." (citations omitted.) The regulation in question runs counter to that directive.

Id. at pp. 7-8. See also Lion Health Services, Inc. v. HHS, 09 CV 493 (N.D. Tex.) (2/22/10) (regulation "clearly does not follow the method described in § 1395f(i)(2)(C)" noting that "Instead, it drastically changes it"). In Lion Health, the district court in fact noted that because the statute is so specific, HHS in fact has very little discretion in terms of how to implement it:

The only possible uncertainty is whether the fraction to be used is (i) the number of days that the individual spent in hospice across all accounting years, or (ii) the cost of care attributable to the individual in that year, divided by the total cost of care attributable to that individual across all accounting years. Perhaps the Secretary has the discretion by regulation to clarify this possible uncertainty. However, no reasonable argument can be made that § 418.309(b)(1) could legitimately be considered to be a permissible construction of § 1395f(i)(2)(A) and (C).

Id. at 14. In short, district courts have provided clear guidance to HHS, noting that it must make a true proportional allocation of cap allowances in implementing section 1395f(i)(2)(C).

In spite of this express guidance, though, HHS proposes alternative regulations that again do not comply with the Congressional mandate. We agree with the district court finding in Lion Health that HHS' sole discretion here lies in whether to make the proportional allocation of cap allowances based upon days or dollars.

We submit that neither of the current proposals by HHS would result in a lawful regulation.

In the first proposal, HHS suggests that it might make a proportional allocation across as many as 2 years, but not more. Put another way, HHS is willing to make a partial, but not a true, proportional allocation. As indicated in the cases, this is not what the statute requires. There will be some patients who will leave across more than 2 fiscal years, as death is not subject to a defined government time table. As indicated in other comments, the number of such patients is greater than HHS represents in its current proposal.

Fairness dictates that cap allowances for such patients be given across the actual years of service so that cap allowances will correspond to revenue. Otherwise, as with the current regulation, cap allowances will be over-allocated to earlier years on average (resulting in overstated cap surpluses) and then under-allocated in later years (resulting in overstated cap

repayment demands). By now, three years into this litigation, HHS surely understands this dynamic.

HHS' second proposal to (eventually) permit reopening for an unspecified recalculation is also unsatisfactory. This proposal also fails to require the statutorily-mandated proportional allocation. This means that hospices will be subject to the same overstated demands and must make arrangements to repay such demands, at exorbitant interest, while they pursue reopening – all merely to obtain rights that Congress expressly guaranteed them in the statute.

We do believe that there is a place for reopening in this process. HHS should expressly permit any hospice that was subject to a cap demand on or after February 13, 2008 (the first date that a district court held the current regulation unlawful) to reopen such demands to obtain the statutorily-mandated calculation. Such a gesture would go a long way to re-establishing HHS' credibility, which has been severely damaged with the courts and with the hospice community in the past two years.

We also urge HHS to do the following: (a) immediately suspend use of the current unlawful regulation; and (b) promulgate a proposed rule that conforms to the statute by providing for a true proportional allocation of each patient's cap allowances across years of service, either based upon days or dollars (as described in Lion Health, above).

Very truly yours,



Brian M. Daucher

for SHEPPARD, MULLIN, RICHTER & HAMPTON LLP