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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:

We are responding to the **CMS-2406-P2** proposed rule that would rescind the “Medicaid Access Rule.” First Focus on Children (First Focus) is a bipartisan advocacy organization dedicated to making children and families the priority in federal policy and budget decisions. We advocate for the millions of children and pregnant women covered by Medicaid and the Children’s Health Insurance Program.

As proposed by CMS, repealing of the Medicaid Access Rule would harm more than 2.5 million children covered by Medicaid providers that are paid on a fee-for-service basis. Under the proposed rule, state Medicaid programs would no longer have to evaluate whether enrolled children have adequate access to covered services, take corrective action if access deficiencies are identified, explain the effects on access if it proposes to reduce payments to pediatric service providers, or monitor the effects on access for kids and other Medicaid recipients if CMS approves a payment cut. Repeal would also eliminate an important source of information for CMS as to the extent to which children and other Medicaid populations have access to needed services. Without that data set, we won’t know if kids can get the care they need and are entitled to.

The most recent data on health insurance coverage in the United States, from the U.S. Census Bureau, show that almost half a million kids lost coverage in 2018 alone. The children’s uninsurance rate, now at 5.5%, is the highest it’s been in years. In fact, 7.8% of children under 100% of the federal poverty level are uninsured and most would qualify for

Medicaid. The rescission of the Medicaid Access Rule would directly affect those most vulnerable kids.¹

The agency's rationale for repeal is that the Access Rule "excessively constrains state freedom to administer the program in the manner that is best for the state and Medicaid beneficiaries in the state." 84 FR at 33722. Saying this proposed rule would ostensibly promote freedom for the state to administer their Medicaid program fails the actual beneficiaries of the Medicaid program. State Medicaid programs should be prepared to analyze whether their clients have access to care and providers. State Medicaid programs are health insurers. They should want to know if their patients have access to care, and as the larger funding partner, so should the federal government.

Medicaid is a health insurance program that provides coverage to the most vulnerable among us. Its purpose is to pay for medically necessary covered services for eligible individuals. Without providers who will serve them, Medicaid beneficiaries including children in foster care and children with special health care needs, will not have access to the services they need. State Medicaid agencies have the responsibility to administer Medicaid, which, in the fee-for-service context, requires provider payment rates sufficient to ensure that beneficiaries have access to needed providers in their geographic area. If state Medicaid agencies do not know whether beneficiaries have access to providers, they cannot properly administer the program and provide the best care for their clients. The Access Rule requires state Medicaid agencies to collect and analyze data relating to beneficiary access and to consider the data in setting provider rates. The Rule does not "constrain state freedom." To the contrary, it enables state Medicaid program staff to do the jobs they were hired to do in ensuring the health and well-being of the millions of people served by the program and to administer the federal/state program in the best possible way.

In lieu of the Access Rule and upon its repeal, CMS "expects" to issue a letter to State Medicaid Directors (SMD) "to provide information on data and analysis that states will submit with [State Plan Amendments] to support compliance with section 1902(a)(30)(A) of the Act." 84 FR at 33723. Data and analyses relating to the sufficiency of provider payments and beneficiary access are precisely what the Access Rule does. It requires state Medicaid agencies to submit an Access Monitoring Review Plan (AMRP) once every 3 years. Even assuming that CMS issues the SMD, whatever requirements it contains would not have the force of the Access Rule, a regulation issued after notice and comment rulemaking. The SMD will not have the strength nor teeth of the Access Rule.

We urge CMS to rescind this proposed rule as it did the March 23, 2018 proposed rule. The Access Rule has not yet been implemented for one full 3-year cycle; the next round of Access Monitoring Review Plans (AMRPs) is not due until October 1, 2019. At a minimum,

¹ Berchick, Edward R., Barnett, Jessica C., and Upton, Rachel D. "Health Coverage in the United States: 2018," *U.S. Census Bureau, Current Population Reports*. September 2019.
<https://www.census.gov/content/dam/Census/library/publications/2019/demo/p60-267.pdf>. Accessed 12 September 2019.

CMS should review the 2019 submissions, compare them with the 2016 submissions, identify any access deficiencies, and work with states to address them. Among other things, this would inform CMS efforts to develop a “new approach to understanding access and ensuring statutory compliance.” CMS should not consider repealing the Access Rule until its “new approach” is in place in a final regulation.

Many 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 satisfactory 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.

Along with other organizations, we submitted comprehensive 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.² 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 inadequate oversight. We include those comments here to add them to the administrative record.

Access to needed services is essential for children who are enrolled in Medicaid.

Since the proposed rule would repeal all of the mechanisms for monitoring and ensuring access to care for children enrolled in Medicaid, we are strongly opposed to it.

Low-income children and children in foster care are at greater risk for unmet health and behavioral health care needs than children in middle- or upper-income families. The Medicaid program is designed to address those needs and it has been largely successful. Services furnished through the Medicaid pediatric benefit, Early and Periodic Screening, Diagnostic, and Treatment (EPSDT) services, mean that low-income children enrolled in Medicaid have fewer unmet medical and dental needs than low-income, uninsured children. But without providers willing to deliver needed services to Medicaid

² Kress, Marielle. “RE: CMS-2406-P; Proposed Rule: Methods for Assuring Access to Covered Medicaid Services-Exemptions for States With High Managed Care Penetration Rates and Rate Reduction Threshold.” *American Academy of Pediatrics*. 22 May 2018. <https://downloads.aap.org/DOFA/SKGAccessComments.pdf>. Accessed 12 September 2019.

beneficiaries, children and other Medicaid beneficiaries will not be able to receive the services they need, and the promise of EPSDT will not be realized.

Payment rates are an important determinant of provider participation in Medicaid.

There is strong evidence on the relationship between provider payment rates and provider participation in Medicaid. The research shows that reductions in Medicaid provider payment rates result in reduced access to care by beneficiaries. The research also shows that increases in Medicaid provider payment rates result in improved access to care. In short, payment rates are an important determinant of whether providers are willing to accept Medicaid beneficiaries as patients. The head of your agency agrees with these research findings. In a recent op-ed in the *Washington Post*, CMS Administrator Seema Verma, citing a Health Affairs study, wrote that “Medicaid payment rates [in 2012] were even lower than Medicare rates...[t]hat’s why a substantial proportion of providers do not accept new patients on Medicaid.”³

The Medicaid statute requires that provider payment rates be sufficient to ensure equal access to needed services.

For over 30 years, the Medicaid statute has recognized the relationship between payment rates and provider participation.⁴ Section 1902(a)(30)(A) of the Social Security Act requires that payments to providers be “consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available under the [state Medicaid program] at least to the extent that such care and services are available to the general population in the geographic area.” It is the responsibility of CMS to ensure that state Medicaid agencies comply with this state Plan requirement.

Repeal of the Access Rule would undercut the ability of CMS to monitor and enforce compliance with section 1902(a)(30)(A) of the Medicaid statute to the detriment of millions of children enrolled in fee-for-service Medicaid programs.

Currently, ten states use fee-for-service (FFS) delivery systems to furnish covered services to Medicaid beneficiaries: Alabama, Alaska, Arkansas, Connecticut, Idaho, Maine, Montana, Oklahoma, South Dakota, and Wyoming. According to CMS data, over 2.5 million children in those states — over half of the total FFS Medicaid beneficiaries — are enrolled in Medicaid or CHIP (a breakdown by Medicaid and CHIP is not available). The remaining 40 states and the District of Columbia used risk-based managed care to deliver covered services to some, or in some cases, all Medicaid beneficiaries. Data are not available to show how many Medicaid children in these managed care states currently remain in FFS, but data from the 2016 AMRPs submitted by the states suggest that the number is between

³ Verma, Seema. “I’m the administrator of Medicaid and Medicare. A public option is a bad idea.” *The Washington Post*, 24 July 2019. https://beta.washingtonpost.com/opinions/a-public-option-for-health-insurance-is-a-terrible-idea/2019/07/24/fb651c1a-ae2e-11e9-8e77-03b30bc29f64_story.html. Accessed 12 September 2019.

⁴ United States. Cong. House. Omnibus Budget Reconciliation Act of 1989. 101st Congress. H.R.3299. Section 6402(a). GPO. <https://www.congress.gov/bill/101st-congress/house-bill/3299>. Accessed 12 September 2019.

1 and 2 million. Repeal of the Access Rule will undercut the ability of CMS to monitor and enforce state compliance with the statutory access requirement, leaving these children, as well as the 2.5 million in the ten FFS states, with no effective remedy for poor access to needed services.

State	Medicaid/CHIP Child Enrollment	Total Medicaid/CHIP Enrollment	Percentage of Children in Medicaid/CHIP
AL	655,420	918,238	71%
AK	96,256	217,793	44%
AR	429,645	851,540	50%
CT	338,013	867,305	39%
ID	193,675	271,203	71%
ME	106,230	261,896	41%
MT	127,388	278,685	46%
OK	506,152	772,323	66%
SD	78,888	116,561	68%
WY	38,647	57,835	67%
Total	2,570,314	4,613,379	56%

As CMS stated in the November 2, 2015 preamble to the Access Rule, the purpose of the Rule's data collection and monitoring requirements is not simply to assist states in improving access in their Medicaid programs. The Rule also helps CMS enforce compliance with the statutory access requirement: "This final rule with comment period will provide more transparency on access in Medicaid fee-for-service (FFS) systems than ever before and allow us to make informed data-driven decisions and document our decisions when considering proposed rate reductions and other methodology changes that may reduce beneficiaries' abilities to receive needed care." 80 FR at 67578. Repeal of the Rule would eliminate transparency on access and undercut CMS's ability to make data-driven decisions regarding the compliance of provider rates with section 1902(a)(30)(A). The foreseeable result will be reduced access for vulnerable children, parents, and other beneficiaries enrolled in Medicaid. There seems to be no reasonable motivation for why this rule would be repealed.

Beneficiaries remaining in Medicaid FFS even in managed care states 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 services and supports. Any rollback of reporting requirements could undermine access to care for these beneficiaries.

It is important to know that children who are in foster care, through their state child welfare agencies, are covered by Medicaid and most likely covered via FFS. A study comparing children receiving Medicaid who were in foster care with those who were not in care showed that youth in the foster care system “had much higher rates of developmental disorders, certain medical disorders (e.g., vision disorders, teeth and jaw disorders), and a number of behavioral disorders, including attention deficit and adjustment disorders.”⁵ It also showed that youth aged 12 through 17 in foster care had three times as many behavioral/mental health diagnoses and were more than twice as likely to require inpatient care of any kind compared to youth not in foster care.⁶

Access Monitoring Review Plans (AMRPs) are essential tools for state Medicaid agencies, CMS, and stakeholders to identify and correct access deficiencies; repealing the requirement that states develop and periodically update them will make it difficult for CMS to determine whether states comply with the statutory access requirement.

The Access Rule requires that state Medicaid agencies develop an AMRP that presents the agency’s analysis as to whether beneficiaries have sufficient access to care. States have the flexibility to decide which data sources, methodologies, and measures to use in conducting their analyses, but they must include an analysis of access for each of the following types of services (among others): (1) primary care services, (2) physician specialist services, (3) behavioral health services, and (4) pre- and post-natal obstetric services. Access to each of these services is critical to the health and well-being of children enrolled in Medicaid; collecting and analyzing data relating to access to these services is therefore foundational to administering the Medicaid program in the best interests of children and families.

We urge CMS to rescind this proposed rule and allow the original Access Rule to remain in place. The next round of state AMRPs are due on October 1, 2019 and can be compared to the 2016 reports. By repealing this rule without a new plan in place and without reviewing those new reports and comparing data sets from 2016/2019, a wealth of knowledge about access to care and services for the most vulnerable among us will be lost. However, with that information, state Medicaid Directors could see where kids are missing out on care or specialty services, make changes to their program and improve care and health outcomes in their states.

⁵ “Diagnoses and Health Care Utilization of Children who are in Foster Care and Covered by Medicaid.” U.S. Department of Health and Human Services; Substance Abuse and Mental Health Services Administration Center for Mental Health Services. 2013. <https://store.samhsa.gov/system/files/sma13-4804.pdf>. Accessed 12 September 2019.

⁶ Ibid, 3.

Thank you for reviewing our comments. If you have questions about our comments, please feel free to contact me at 202-657-0650 or BruceL@firstfocus.org.

Sincerely,

A handwritten signature in blue ink that reads "Bruce Lesley". The signature is written in a cursive style with a large, stylized "L" and a long, sweeping underline.

Bruce Lesley
President