June 3, 2016

Victoria Wachino
Director, Center for Medicaid and CHIP Services
Centers for Medicare & Medicaid Services
U.S. Dept. of Health and Human Services
7500 Social Security Blvd.
Baltimore, MC 21244-1850

Re: EPSDT in the final Medicaid managed care regulations

Dear Vikki:

We write to ask you to address a serious problem contained in the final Medicaid managed care regulations. The proposed regulation required contracts with MCOs, PIHPs, and PAHPs to define medical necessity in a manner that meets EPSDT requirements. 42 C.F.R. § 438.210(a)(5)(ii) (proposed at 80 Fed. Reg. 31098, 31276 (June 1, 2015)). However, in the final regulation, CMS has removed the reference to EPSDT and revised the regulation to provide:

> Each contract between a State and an MCO, PIHP, or PAHP must do the following: … Require that the services identified in paragraph (a)(1) of this section be furnished in an amount, duration and scope that is no less than the amount, duration, and scope for the same services furnished to beneficiaries under FFS Medicaid, as set forth in § 440.230 of this chapter, and for enrollees under the age of 21, as set forth in subpart B of part 440 of this chapter.

42 C.F.R. § 438.210(a)(2) (finalized at 81 Fed. Reg. 27,498, 27,879 (May 6, 2016)). According to CMS, this action was taken to address some commenters' concerns that the EPSDT reference could be taken to apply to adults and their concerns that the provision implied that medical necessity criteria could not be applied to EPSDT. *See* 81 Fed. Reg. at 27634.

The final regulation, as revised, creates the following problems:

1. The regulation now ties coverage for enrollees under the age of 21 to subpart B of part 440. That subpart deals with requirements and limits applicable to all services, particularly services for adults, and is in fact the subpart of the regulations that the previous passage in the new regulation has just discussed—namely, the amount, duration, and scope rules that apply in 42 C.F.R. § 440.230.

2. The relevant preamble discussion refers to subpart B of part 441 of this chapter, *see* 81 Fed. Reg. at 27634, so perhaps the regulation was intended to refer to part 441. The preamble correctly notes that subpart B of part 441 addresses EPSDT for children under age 21. However, the problem cannot be addressed substituting the regulation's reference to part 440 with citation to part 441. The subpart B, part 441 regulations were promulgated prior to the 1989 Medicaid Act amendments clarifying EPSDT coverage. Therefore, they are inconsistent with the Medicaid Act's EPSDT coverage standards on the precise point that the regulation is attempting to address. As you know, the Medicaid Act requires all states (either directly or through their contractors and agents) to provide "[s]uch other necessary health care … and other measures described in subsection (a) of this section [§ 1396d(a)] to correct or ameliorate defects and physical and mental illnesses and conditions discovered by the screening services, whether or not such services are covered under the state plan." 42 U.S.C. § 1396d(r)(5). By contrast subpart B of part 441 mandates states to include only limited coverage beyond their state Medicaid plans. *See* 42 C.F.R. § 441.56(c) (requiring coverage of vision, hearing, dental and immunization services '[i]n addition to any diagnostic and treatment services included in the [state] plan"); *id.* § 441.57 (describing other services as discretionary).

If the regulation is not changed, then the problem that CMS sought to address—an interpretation that the EPSDT requirements could apply to enrollees over 21 years of age – will create just the opposite problem – an interpretation that amount, duration and scope requirements for adults could apply to enrollees under 21 years of age and that the EPSDT standards do not need to be applied in managed care settings.

We cannot overemphasize the confusion that this very issue has caused for children and families over the years. As stated in our comments to the proposed regulations:

> Too often, Medicaid managed care plans are not familiar with their obligations under EPSDT and attempt to apply an adult medical necessity standard, or the standard used for private insurance enrollees, to Medicaid enrollees under 21. Adding specific language requiring plans to comply with EPSDT will go far toward ensuring that child enrollees receive the full scope of services to which they are entitled.

Letter to Victoria Wachino, Director, Center for Medicaid and CHIP Services, from National Health Law Program at 134 (July 27, 2015) (Re: CMS-2390-P).

We recommend that the regulation be amended to refer to the law that must unquestionably guide all stakeholders—the EPSDT provisions of the Medicaid Act. As amended, the regulation, 42 C.F.R. § 438.210(a)(2), should state:

> Each contract between a State and an MCO, PIHP, or PAHP must do the following: … Require that the services identified in paragraph (a)(1) of this section be furnished in an amount, duration and scope that is no less than the amount, duration, and scope for the same services furnished to beneficiaries under FFS Medicaid, as set forth in § 440.230 of this chapter, and for enrollees under the age of 21, as set forth in **42 U.S.C. §§ 1396a(a)(43) and 1396d(r)(5).** ~~subpart B of part 440 of this chapter~~.

Thank you for your attention to this matter. We would appreciate discussing it with you or your staff. If you have questions, please do not hesitate to contact me at perkins@healthlaw.org or (919) 968-6308 (x101).

Sincerely,

Jane Perkins
Legal Director