NHeLP
NATIONAL HEALTH LAW PROGRAM

# NHeLP Exchange and Medicaid Regulation Comments: *Executive Summary*

On February 21, 2013, NHeLP submitted comments to proposed regulations (identification number: CMS-2334-P) from HHS concerning Exchanges and Medicaid. These regulations covered an expansive range of topics, building upon prior regulations proposed in 2012 and also introducing some new issues. The proposed regulation, and NHeLP's comments, deals with eight broad topics. [Bracketed references refer to page numbers in NHeLP's comments.]

1. **Medicaid Plan Administration**

This part of the proposed rule addresses submittal of state plans and state plan amendments. NHeLP's comments commend HHS for some of the proposed policies, but makes additional recommendations to ensure more robust transparency and consumer stakeholder participation. [2-4]

**2. Medicaid General Administration**

The proposed rules address notice and appeals, including permission to delegate authority. NHeLP's comments commend a new proposed policy (previously requested by NHeLP) limiting Medicaid agencies' delegation of appeals to government agencies or other public agencies meeting good standards of oversight. [5] However, NHeLP suggests HHS strengthen requirements for clear written agreements setting out delegated relationships. [6]

NHeLP recommends strengthening the content of notices, to ensure enrollees have all relevant information, and improving the ways appellants can make their appeal. [8] NHeLP suggests important language to ensure that appellants have a full review of their case. [9] NHeLP also commends and makes additional recommendations regarding efforts to improve the hearings and notice system for limited English proficient (LEP) individuals. [7]

NHeLP strongly commends HHS for a critical policy in the proposed rule, allowing an applicant to automatically file two eligibility appeals at once (one for Medicaid, one for Exchange), although NHeLP provides additional suggestions including aligning timeframes. [9] In particular, NHeLP recommends appellants have the choice of which appeal is conducted first. [11, 14] NHeLP reiterates its previously stated concerns about a proposed HHS policy promoting "withdrawal" of appeals. [11, 30, 91] NHeLP also suggests standards to ensure impartial hearing officers [13] and recommends public access to hearing decisions [14].

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NHeLP enthusiastically commends HHS for provisions requiring expedited hearings for individuals with urgent health needs. [12]

### 3. Medicaid Eligibility

NHeLP offers numerous recommendations to improve terminology and underlying eligibility rules for immigrants, including opposing the exclusion of eligibility for individuals granted deferred action by the Department of Homeland Security under the Deferred Action for Childhood Arrivals (DACA) policy. [15-20]

NHeLP commends HHS for shifting its policy and agreeing to "convert" minimum eligibility thresholds from current standards to MAGI equivalents for parents, caretaker relatives, and pregnant women. [21] NHeLP recommends deeming more newborn children eligible for coverage [21] and improving eligibility for foster care children, pregnant women, and other populations [22-23]. NHeLP also recommends policies regarding verification and documentation of citizenship. [24-25]

HHS' proposed rule sets out new policies for MAGI income counting rules. NHeLP reiterates its opposition to HHS' proposed policy to count the income of stepparents under MAGI income counting rules (even though they may not be legally responsible for supporting their stepchildren). [26] NHeLP also opposes HHS' proposed policy to only apply the required 5% income disregard to individuals who need it to become eligible. [26-27]

NHeLP addresses concerns with HHS' effort to simplify eligibility rules for the "medically needy" population and proposed policies for availability of information for individuals who are LEP or have a disability. [28-29] NHeLP also commends HHS and makes addition recommendations regarding policies for application assistance for vulnerable populations. [31-33]

NHeLP recommends ensuring decision notifications provide individuals with full information about the coverage they have been approved eligible for *and* any other coverage they could be eligible for through other channels. [35] NHeLP also repeats prior recommendations to ensure these notices are accessible to vulnerable populations. [34, 36] NHeLP commends the development of electronic notification systems for enrollees, but recommends that written notification also be used for all important critical information, unless the enrollee chooses electronic contact only. [36-37] NHeLP also suggests improving policies regarding authorized representatives. [38]

NHeLP strongly supports HHS' policy to promote continuous eligibility of children. [39]

NHeLP strongly commends HHS for requiring states to allow self-attestation for eligibility criteria if documentation is not available [39], and makes other suggestions to improve the verification process for various types of information, such as social security numbers, immigration status, or disability. [39-43]

NHeLP commends HHS for various policies supporting presumptive eligibly and payment for presumptive eligibility services [43], and makes some suggestions to improve the system for children [44], others [45-46], and hospitals. [47] However, NHeLP generally opposes and suggests protections and limitations on HHS' proposed expansion of authority for Medicaid premium assistance programs, where states use Medicaid dollars to buy private insurance coverage for eligible individuals. [44]

NHeLP supports HHS' effort to create alignment between Exchange and Medicaid eligibility rules in the 2013 to 2014 transition, and makes suggestions to improve the system. [47-48]

**4. Medicaid Services**

HHS' proposed rule sets out additional details for the "Alternative Benefits Plans" (ABP) that Medicaid Expansion enrollees will generally receive, and how those plans will meet the requirement to cover at least as much as the Essential Health Benefits (EHB) standard.

NHeLP commends HHS for expanding the ability of providers to work to the full extent of their scope of practice. [49]

While most Medicaid Expansion enrollees will receive an ABP benefit, some individuals will be exempt and receive the traditional Medicaid benefit. NHeLP commends HHS for providing exemptions to a wider range of "medically frail" individuals, and recommends expanding exemptions to chronically ill populations on those in need of substance abuse services. [49]

NHeLP strongly commends HHS for providing clear authority for states to add any of a wide range of Medicaid and EHB services to the ABP benefits package using the

Secretary approved coverage option. [50] NHeLP also commends HHS for protections regarding Secretary approved coverage, but suggests one more critical protection. [50]

NHeLP considers it critical that HHS ensure that states follow all existing applicable Medicaid requirements when providing ABPs, and commends HHS for explicitly referencing EPSDT compliance. [51] NHeLP recommends a policy to ensure ABPs cover a wide range of drugs as Medicaid generally does, without the Medicaid authority to limit monthly number of prescriptions that some states have used. [52]

HHS proposed extreme flexibility for states in defining the EHB for their ABP – allowing states to pick an ABP EHB that is different from their Exchange EHB, and to pick multiple different EHBs if they choose to adopt multiple ABPs. NHeLP recommends that states be required to use one consistent EHB for all purposes. [53]

NHeLP commends HHS for including a wide range of preventive services in the ABP, but strongly recommends HHS should apply the same cost-sharing protections to lower income individuals as are required for *higher* income individuals. [53, 69] NHeLP recommends that HHS set a strong definition for habilitative services, with no flexibility for insurers to make up their own definition. [54] NHeLP also makes recommendations to ensure these services comply with nondiscrimination requirements. [55-57]

NHeLP makes numerous suggestions to ensure the ABP is designed and changed through a transparent process including robust stakeholder participation. [57-59]

**5. Medicaid Cost-sharing**

HHS' proposed rule intends to "simplify" current Medicaid cost-sharing rules. While HHS does make some sensible proposals, HHS' proposed policy implements cost-sharing which is gravely detrimental to vulnerable populations and weakens critical Medicaid protections.

NHeLP's comments provide a rich discussion about why copayments are an ineffective, and in fact detrimental, policy for populations near or below the poverty line. [59-61]

NHeLP recommends that any cost-sharing applied to "non-emergency" use of ERs be limited to situations where an acceptable alternative was actually available. [61]

HHS' proposed policy sets a new minimum ("nominal") copay standard of $4 for outpatient services for individuals below the poverty line. NHeLP strongly objects to this standard as creating a massive barrier for low income individuals and HHS must lower it for numerous reasons -- it is above Medicare minimums, above the *highest* current "nominal" minimum, and almost double the current *average* nominal minimum, just to name a few reasons. NHeLP recommends the standard be set at $1.10 – the lowest current Medicare minimum. [62]

NHeLP strongly opposes a policy maintaining an inpatient hospital copayment for individuals below the poverty line at 50% of the first day care. Such an amount could be essentially half of the monthly income of the *wealthiest* individuals living below the poverty line. NHeLP recommends a $10 charge. [63]

NHeLP also objects to HHS' proposed $4 to $8 copayments for prescription drugs for individuals below 150% of the poverty line, and recommends HHS model the copayments on the Medicare system. [64] NHeLP also recommends ensuring that individuals pay the lowest cost-sharing rate possible if they need a "preferred" medication for clinical reasons, and suggests electronic systems facilitate the ability of providers to make these indications. [65]

NHeLP objects to proposals allowing up to $8 copays for hospital ER use for individuals up to 150% of the poverty line, since this amount is illegally above the "nominal" limit for individuals below 100% of poverty, and is exorbitant (twice the nominal amount) for individuals from 100% to 150%. NHeLP also opposes no limit for individuals above 150%. NHeLP recommends: maximums of $3.30 (below 100%), $6.30 (100-150%), and $12 (above 150%). [66-67]

NHeLP's comments identify legal requirements which must be added to HHS' proposed policy for Medicaid premiums, and makes other recommendations to improve premiums. [68]

NHeLP makes important recommendations to eliminate the use of cost-sharing for individuals with chronic illness, in need of home and community based supports, or who are victims of medical errors. [70-71]

NHeLP expressed special concern over a provision which (perhaps unintentionally) eliminates one of the most important cost-sharing protections for some low income individuals. Medicaid law says that individuals below the poverty line never have to pay

more than 5% of their income towards cost-sharing, but the new regulation eliminates this protection for some individuals. [71-72]

HHS has given some states permission to ignore Medicaid cost-sharing rules for no clear legal reason. NHeLP recommends language to ensure that Medicaid cost-sharing rules are followed unless a state provides a satisfactory legal basis. [73]

### 6. Children's Health Insurance Program

HHS' proposed rule includes provisions to increase transparency in the Children's Health Insurance Program (CHIP). While NHeLP supports many of these provisions, NHeLP makes numerous suggestions to further strengthen transparency and promote robust consumer stakeholder participation. [74-76] NHeLP also recommends that enrollment assistance, information, and application requirements be made accessible for populations who are LEP or have disabilities. [76-78]

NHeLP strongly supports HHS' policies to promote continuous eligibility of children and inform families of other programs their children may be eligible for. [78-79] NHeLP recommends clarification that children are eligible for presumptive eligibility. [79]

NHeLP strongly commends HHS proposals to protect children who are being disenrolled, most importantly by reviewing their eligibility for other programs. [79] However, NHeLP continues to strongly oppose "waiting periods" delaying CHIP enrollment for children who recently had some other type of coverage. [80-82]

### 7. Exchange standards

NHeLP strongly commends HHS' general requirement that Exchanges comply with Medicaid notice and hearing requirements when conducting Exchange hearings, as well as the requirement that the hearing system be accessible to persons who are LEP or have disabilities. [82]

NHeLP makes various recommendations to improve terminology regarding immigrant status and improve consumer assistance and application counseling for vulnerable individuals, including persons who are LEP or have disabilities. [83-86] NHeLP also suggests improving the rules for establishing authorized representatives for enrollees. [87-89]

NHeLP offers numerous recommendations to improve the notices sent to consumers, including critical content notices must contain and accessibility protections for persons who are LEP or have disabilities. [89]

HHS' proposed rule sometimes bases calculations (such as those for affordability) on the cost of *individual* insurance, when in fact sometimes *families* will be purchasing the insurance. In all cases, NHeLP recommends that HHS require both individual and family insurance be affordable. [90]

NHeLP repeats its opposition to HHS' proposal to allow Exchanges to invite individuals to withdraw applications. However, if HHS maintains that policy, NHeLP supports HHS' second proposal that at least the application is automatically reinstated if an appeal is filed later. [11, 30, 91] NHeLP also makes recommendation supporting a proposal to reduce disenrollments of individuals during temporary absences from a state. [92]

NHeLP provides numerous recommendations to improve the eligibility process by reducing the need for individuals to re-attest to information, reducing the system delay times, and increasing timeframes for individuals struggling to demonstrate they are eligible. [92-96] In particular, NHeLP supports reducing the burden on individuals to produce evidence of their eligibility (especially when no evidence is available) and promoting the acceptability of attestations without additional steps. [94] NHeLP also recommends HHS reduce state contacts to an individual's employer in the eligibility process. [96-97]

For notice and enrollment, HHS' proposed rule understandably is modeled around the normal billing cycle of health plans. However, NHeLP makes recommendations that focus on ensuring individuals do not suffer unnecessary gaps in coverage due to these health plan billing cycles. [98] NHeLP also recommends that states repeat an annual eligibility redetermination for an individual who did not actually enroll. [99]

HHS' proposed rule proposes a "combined eligibility notice" for individuals who may be applying to multiple programs at the same time. NHeLP strongly supports this streamlined approach and makes recommendations to improve HHS' proposed system, most notably recommending more complete information about Medicaid eligibility and appeals information. [99] NHeLP also supports provisions improving enrollment of low income immigrants. [100]

While most individuals will be required to enroll into Exchange coverage during an annual enrollment period, under some circumstances individuals will qualify for a special

enrollment period. NHeLP recommends that HHS create uniformity in the timeframe for an individual's special enrollment period (as opposed to different windows for different plans or different program features). [100] NHeLP also recommends special enrollment periods for some immigrants. [101]

NHeLP recommends that HHS must develop a choice-based solution to the problematic situation where women in the Exchange may become Medicaid eligibility due to pregnancy. [102]

NHeLP also suggests numerous technical recommendations to improve the terminology for Exchange appeals. [102-103]

NHeLP commends HHS for developing broadly applicable due process rights, so that individuals do not have different appeals systems, including requirements that Exchange appeals entities meet the fair hearing standards that apply to Medicaid appeals and meet the high due process standards of the landmark legal decision in the Supreme Court's *Goldberg v. Kelly* case. [103-104] NHeLP also supports HHS' proposed provision that the appeals processes must be accessible to individuals who are LEP and have disabilities. [105]

NHeLP supports provisions requiring clear agreements between agencies administering appeals processes and makes recommendations to strengthen compliance with Medicaid and CHIP requirements for notice to beneficiaries, including the content of notices and accessibility for individuals who are LEP or have a disability. [106] NHeLP also supports provisions allowing appeals to be accepted based on generous Medicaid timeframes and filed by multiple methods (mail, phone, internet, etc.). [109]

NHeLP supports HHS' proposed rule to provide notice to individuals filing appeals [107], including confirmation of whether their appeal has been accepted or is invalid. [110] Specifically, NHeLP recommends notice be accessible to individuals who are LEP or have disabilities. [108, 111] NHeLP also supports requirements for interagency communication about appeals status. [110] NHeLP especially commends HHS for proposing continuing eligibility pending appeal in some circumstances. [112]

NHeLP recommends that HHS implement common sense improvements to its proposed provisions allowing dismissal of appeals under certain circumstance. [112] NHeLP also recommends HHS strengthen notice requirements for any dismissals, including making them accessible for individuals who are LEP or have a disability. [114]

HHS' proposed rule proposes an opportunity for a pre-hearing informal review of an appeal to help solve problems without need to go to appeal hearings. NHeLP supports this concept, but makes numerous recommendations to ensure it is optional, does not additionally burden the appellant, and does not delay or foreclose any other appeals rights. [114-116]

NHeLP supports provisions setting appeal scheduling requirements and formats for hearings (in person, telephonic, etc.) and NHeLP recommends that notice, reviews, and hearings must be accessible for individuals who are LEP or have a disability. [116] NHeLP also supports the proposal that appeals must be conducted by impartial hearing officers, and recommends that the appeals process be modeled on Medicaid with respect to this and other issues, including a legal standard requiring full review of the case. [117-118]

NHeLP supports the creation of an expedited appeals process and recommends stronger notice requirements for appellants. [118-119] NHeLP also makes recommendations regarding the information and evidence that can be used to make an appeals decision, and the process and notice for communicating that decision. [120-121] NHeLP commends HHS for requiring decisions to be retroactive to the date of the mistake being appealed and publically available. [121] NHeLP also recommends that HHS allow employees the right to appeal a change in eligibility reflected in a notice generated by a filing be their employer. [122]

**8. Collection of Info Requirements**

NHeLP supports provisions making collection of information accessible for individuals who are LEP or have a disability. [123-124]