



National Association of State Medicaid Directors

an affiliate of the American Public Human Services Association

June 17, 2009

Cindy Mann
Director
Center for Medicaid and State Operations
7500 Security Blvd.
Baltimore, MD 21244

Re: Medicaid Disproportionate Share Hospital Audit and Reporting 73 F.R. 77,904

Dear Ms Mann:

I am writing to you on behalf of NASMD regarding the Medicaid Disproportionate Share Hospital Audit & Reporting (DSH) regulation that was published as a final rule in the *Federal Register* on December 19, 2008. This letter is a follow-up to the discussion we had with you and our Executive Committee as well as our members earlier this month. While the States have been aware of the proposed rule, they were not aware when the rule would be finalized and the speed by which it would be finalized. States also did not anticipate the significant changes that the final rule contained and were not a part of the discussion of the rule prior to its publication.

As you know, this final rule was issued five years after Congress modified the DSH Audit requirement in the MMA on November 2003. The rule was published December 19, 2008, immediately prior to many states' legislatures returning after the holiday season to address monumental budgetary shortfalls and extreme economic crisis. Many of these legislatures have been convening and adjourning and reconvening for the past six months in order to wrestle with unprecedented budget shortfalls. It has been impossible for many states to address the expansive, new requirements that the final rule's language prescribes and, in fact, in many states administrative code, statute, and other regulations require a protracted procurement process in order to contract for such work. It is unreasonable for CMS to have waited more than five years to have published the final rule, which was appreciably, different from the draft rule, and to have then required such a tight timeframe. As such, the states, CMS, and Congress would be well-served by delaying the requirement of 2005 and 2006 audits until April of 2010.

The final rule contains several changes in CMS policy (e.g. that the definition of "uninsured" follows the person and not the service) which are contrary to prior positions taken by the Agency. Since the issuance of the final Rule, states, CPA firms, and various impacted parties have submitted very necessary questions that would serve to clarify

ambiguous, new, changing, and seemingly conflicting language in the Rule. CMS has repeatedly promised to publish needed information on its web site for months. However, to date, these questions remain unanswered. Additionally, there are a number of specific data and process requirements that CMS has not addressed through this final rule nor have they addressed with their state partners. Any state that has procured CPA services and/or embarked on the audit process is doing so without the definitive guidance necessary to ensure that such efforts are, or will be, compliant with guidance that CMS has promised for six months.

The proposed rule did not mention the dual eligible issue (Medicare and Medicaid patients) but the Q&A section of the final rule provides an elaborate method for accounting for dual eligible patients that include reporting all Medicare charges, Medicare payments, Medicaid payments and somehow attributing Medicare, DSH, IME and GME payments to dual eligible patients. Hospitals do not charge Medicare for these Medicare supplemental payments so there is a risk that hospitals will report receiving money without reporting charges - this will result in Medicare overpayments which has nothing to do with Medicaid DSH.

In some states, the charges for Medicare DSH and IME are paid within the DRG amount so the charges for these items are included in the claims submitted by patients for these items. GME is not paid on a patient by patient basis – it is a lump sum paid to each hospital at year end. Medicare GME under the Medicaid DSH rules will somehow have to be distributed to patients by a hospital created formula.

In at least one state, their current audit agent contract expires on June 30, 2009. Therefore, they had to write a Request for Proposals (RFP), select a bidder, and contract with the successful bidder. The RFP was written prior to the finalization of the DSH Audit Rule however it was released shortly before the effective date. Because of timing and the lack of guidance on the "independence" of the auditor, the DSH audits were not part of the RFP however, there is language stating that the successful bidder could provide other services as needed by the Department. Recently, this state learned that the audit agent chosen is considered independent and can perform these audits however the DSH audits cost was not part of the original proposal. This now has to be worked into the draft contract and the cost included as the DSH audit process is complex and will require numerous additional hours of staff time.

States and hospitals have, heretofore, not been required to capture many of the data elements that are required for this audit, or they have not captured such in a manner that would facilitate transmission and verification thereof. Hospital accounting systems, MMIS systems, DSS systems, and various accounting records and systems will have to be revised to create new reports to satisfy CMS' requirements. This will serve to protract the period required to complete the audits, as we have seen in states that have initiated this process. States are working with their hospital associations to inform their members about the new requirements that will now need to be met. Training with the providers will also need to take place due to the increased and very different information that is now required from the hospitals.

The September 30, 2009, date for draft report submission to states by independent auditors is not reasonable. This date has caused concern and consternation among firms that could do the work and among both states and the hospitals industries therein. As long as the required reports and audits are delivered to CMS by the dates due, the September 30 date (in 2009 and all subsequent years) should be immediately redacted.

It would be much more realistic for CMS to publish the specific guidance (answers) that have been promised for six months and to then require that the 2005, 2006, and 2007 audits be provided by December 31, 2010. Another, better, option would be to simply require DSH audits be done for future years and eliminate the retroactivity of the regulations. Procurements and contract negotiations also take a minimum of 120-150 days which means that from the January effective date, many states cannot have auditors start until June or July which is a very tight timeframe.

Thank you for your time and attention to this matter. If you would like to discuss this further with me please call me at 202-682-0100 x299.

Regards,



Ann Clemency Kohler
NASMD Director

Cc: Jackie Garner