



July 13, 2007

Leslie V. Norwalk, Esq.  
Acting Administrator  
Centers for Medicare and Medicaid Services  
U.S. Department of Health and Human Services  
200 Independence Avenue, SW  
Washington, DC 20201

Attention: **CMS-2258-FC**

**Re: Final rule with comment period: Medicaid Program; Cost Limit for Providers Operated by Units of Government and Provisions To Ensure the Integrity of Federal-State Financial Partnership**

Dear Ms. Norwalk:

The American Public Human Services Association (APHSA) and its affiliate, the National Association of State Medicaid Directors (NASMD), respectfully submit this comment letter on the final rule regarding the public provider cost limit that was published in the May 29, 2007 edition of the Federal Register for the Centers for Medicare and Medicaid Services (CMS).

As noted in our March 19, 2007 comment letter to the proposed rule published in the January 19, 2007 edition of the Federal Register (72 FR 29,784), the state Medicaid agencies share the federal government's strong commitment to protecting the fiscal integrity of the Medicaid program. However, the comments expressed in our March 19, 2007 letter regarding the agency's proposed rule hold equally true to nearly all provisions of the final rule and CMS' response to comments. We continue to hold that the regulation is a fundamentally flawed approach to achieve the stated goal.

In addition, APHSA and NASMD question the appropriateness of the timing of CMS' actions in publishing the final rule given Congress's staunch opposition to the agency taking any further action. As noted in our March 19, 2007 comment letter, a bipartisan majority of Members of Congress had contacted Secretary Leavitt regarding their opposition to the changes contained within this proposed rule. Subsequently, on May 24, 2007, both bodies of Congress approved language in Section 7002 (a)(1) of the U.S. Troop Readiness, Veterans' Health Care, Katrina Recovery and Iraq Accountability

Appropriations Act of 2007 (P.L. 110-28) that imposed a moratorium on any action related to the regulation under discussion. Enactment of the statutory language preceded publication of the final rule on May 29, 2007 (72 FR 29,784).

It is disconcerting that in light of the concerns of Congress, CMS would proceed to publish this regulation, and, in essence, cause an impasse in the agency's ability to further discuss this issue. The timing of enactment and CMS' steps to submit the final rule to the Office of the Federal Register provide reasonable justification to question the legality of the agency's actions and, as a result, the standing of the final rule.

For these reasons, we request that CMS withdraw the final rule. We believe that CMS should not move forward with this new regulation as currently written. In addition, states are concerned that, once the moratorium expires, CMS will not have had an opportunity to thoroughly consider any further deliberations and review by Congress.

In the interim, we wish to respond to CMS' request for comments on the definition of unit of government.

#### **§ 433.50 Unit of Government Definition**

We recognize that CMS attempted to provide some flexibility by permitting states to make the initial determination of governmental status and its clarification that university teaching entities may be considered a governmental entity for purposes of Medicaid financing and payment determinations. However, the concerns of our March 19, 2007 letter hold in light of CMS' rote response to commenters' questions and suggestions regarding the definitions of governmental unit.

Despite the assertion that the final rule will clarify the universe of governmentally operated health care providers for purposes of Medicaid financing and payment, we states still submit that CMS exceeds its authority by intervening in the states' unique role in defining the criteria for a unit of government. We recognize that CMS made some minor changes, yet the final rule still inappropriately limits the types of entities that could be considered a unit of government and fails to accommodate the various legitimate governmental authority arrangements established by individual states.

Specifically, we believe that the agency has improperly interpreted and applied Section 1903(w)(6) of the Social Security Act in issuing the interim final regulation. This section does not limit which providers can participate in the non-federal share of Medicaid expenditures. As a result, under the interim final regulation, the Medicaid expenditures of many providers and entities are likely to be inappropriately prohibited from being counted as the non-federal share. Further, the agency's application of Section 1903(w)(6) will reverse innovative – and appropriate – efforts by states, providers, and other entities

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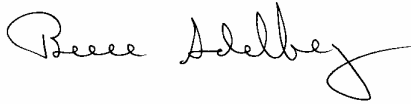
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to implement and pursue sustainable funding sources for their respective Medicaid programs.

In addition, states believe that the justification provided in the response to commenters fails to consider Section 5(b) of P.L. 102-234. This section granted states the authority to use public funds as the non-federal share of Medicaid expenditures. No restriction was included that explicitly states or could reasonably be interpreted to limit the source of the non-federal share of Medicaid expenditures to tax-generated funds.

We ask that the agency review this section in conjunction with further development of the regulation and specifically with the definition of unit of government. We would be happy to provide you with additional information on our comments as you go forward. Please contact Martha Roherty, Directory of NASMD, at (202) 682-0100 if we can be of further assistance.

Sincerely,



Bruce Goldberg  
Chair, Policy Committee  
American Public Human Services Association



David Parrella  
Chair, Executive Committee  
National Association of  
State Medicaid Directors