November 27, 2017

Acting Secretary Hargan  
Centers for Medicare & Medicaid Services  
7500 Security Boulevard  
Baltimore, MD 21244

Submitted electronically: www.regulations.gov

RE: CMS-9930-P  
NPRM Notice of Benefit and Payment Parameters for 2019

Dear Acting Secretary Hargan,

Thank you for the opportunity to comment on the Department of Health and Human Services’ (HHS) proposed Notice of Benefit and Payment Parameters for 2019. The more than 100 national and state-based undersigned organizations representing consumers, patients, and health care providers share the strong belief that everyone in this nation deserves high-quality, affordable health coverage and care. We write to express serious concerns with HHS’ proposed changes to the Essential Health Benefits (EHB) standard, which would reverse the progress that has been made in ensuring people have access to basic health care services and has closed health care coverage gaps that for decades had left individuals underinsured.

Before the Affordable Care Act (ACA), consumers often did not have health coverage for services that are now covered as EHBs. For example, prior to the ACA, one in five people enrolled in the individual market lacked coverage of prescription drugs and mental health coverage was often excluded from health plans.¹ Also, 75% of non-group market plans did not cover maternity care (delivery/inpatient care), and 45% did not cover inpatient/outpatient substance use disorder services.² These services can be a small percentage of the relative benefit costs in commercial market plans, yet scaling


² Gary Claxton et al., *Would States Eliminate Key Benefits if AHCA Waivers are Enacted?*, Kaiser Family Foundation, June 14, 2017,  
back on their coverage would significantly raise out-of-pocket costs for individuals who need them.³

**Proposed Flexibility to Lower the Threshold of Covered Services**

HHS’ proposed changes to the EHB benchmark options, including the proposed definition of a “typical employer plan” would jeopardize adequate coverage of the ten EHB categories and subject enrollees to medical debt. HHS’ proposal strongly emphasizes reducing coverage and lowering premiums, which will result in inadequate coverage of benefits and higher out-of-pocket costs for many consumers. We are concerned that HHS’ proposed EHB benchmark options may lead to the selection of rare, outlier benchmarks, with extremely limited coverage for critical services.

We are concerned with HHS’ proposal to give states three new EHB benchmark options to define the EHBs in the state. In the preamble to the proposed rule, HHS recognizes that under these benchmarks, consumers with specific health care needs may be offered less comprehensive plans that no longer cover certain services.⁴ Under HHS’ proposal, people who rely on services that are no longer considered EHBs will have to pay out-of-pocket for them or forgo the care they need. In addition, the out-of-pocket maximum and annual and lifetime limit consumer protections will no longer apply to services that are not considered EHBs since these protections only apply to EHBs. This will increase health care costs for many, including people with pre-existing conditions.⁵ It will also drive up medical debt and health-related bankruptcies, which have been reduced since the ACA was enacted.⁶

The proposed changes to the EHB benchmarks will also threaten women’s access to comprehensive health care and harm the economic security and well-being of women and their families. Because of the ACA, women now have robust coverage that provides access to essential services, including reproductive health services. Prior to the ACA, women often paid for inadequate coverage that did not meet the full range of their health needs. For example, many plans that covered maternity services were not affordable. One study discovered that many individual plans charged a separate

---


⁴ Id.


deductible for maternity coverage that was as high as $10,000 and some plans forced individuals to wait up to a year before their maternity care would be covered. Coverage of maternity care and newborn care is also critically important for women of color and their children. In 2015, infant mortality rates were particularly concerning for communities of color. HHS' proposed EHB benchmarks will leave many women and their families without the care they need when they need it.

Consumers value the ACA’s comprehensive benefits and consumer protections limiting out-of-pocket costs. Two-thirds of consumers—67%—believe that the top health care priority should be to lower, not increase, their out-of-pocket costs. At least two-thirds of marketplace enrollees—65% or more—reported satisfaction with their qualified health plan in 2014 through 2016 in three separate national surveys. To improve their coverage, most consumers want policymakers to lower the cost of prescription drugs, to ensure that benefits are comprehensive, and to improve network adequacy. The proposed rule does not do this and is a step in the opposite direction.

Public Comment

If states are allowed to select new EHB benchmarks for the 2019 plan year and beyond, states should be required to provide reasonable opportunity for notice and public comment that includes public hearings, a public comment period, and the publication of plan documents and analysis in usable form and understandable formats, along with data (such as actuarial certifications and reports) that must be submitted to HHS.

---

8 In 2015, the infant mortality rate per 1,000 live births was 5 percent for Hispanic infants, 8.3 percent for American Indian/Native Alaskan infants, 11.3 percent for Non-Hispanic Black infants, compared to 4.9 percent for non-Hispanic White infants. Infant Mortality, Centers for Disease Control and Prevention, https://www.cdc.gov/reproductivehealth/maternalinfanthealth/infantmortality.htm (last updated Aug. 29, 2017).
Substitution of Benefits

HHS’ proposal to allow issuers to substitute benefits within and between EHB categories will harm consumers by increasing coverage gaps and out-of-pocket costs. This policy will make it easier for issuers to substitute services that certain populations (e.g., individuals with chronic conditions) need and replace them with actuarially equivalent services that are less costly and more likely to attract healthier populations.

This proposal will also make it difficult for consumers to compare health coverage options, making plan selection challenging. In the preamble of the proposed rule, HHS recognizes that this proposal would increase the burden on consumers as they would “need to spend more time and effort comparing benefits offered by different plans in order to determine what, if any, benefits have been substituted and what plan would best suit their health care and financial needs.”

HHS also notes that by allowing substitution between categories, states “may encounter difficulties in ensuring that all categories are filled in such a way that amounts to EHB”. This will lead to inadequate coverage of the ten EHB categories. Therefore, HHS should eliminate any provision allowing issuer flexibility to substitute benefits within EHB categories, and not adopt a rule allowing substitution of benefits between categories.

Conclusion

Thank you for considering our requests. We urge you to protect the coverage gains made under the ACA that have made it possible for consumers to access a wide range of benefits and secure the health care they need in 2019 and beyond. If you have any questions, please contact Michelle Lilienfeld (lilienfeld@healthlaw.org) at the National Health Law Program or Claire McAndrew at Families USA (cmcandrew@familiesusa.org).

Sincerely,

National Organizations

Families USA
National Health Law Program

13 Id.
The AIDS Institute
American Academy of Pediatrics
American Association on Health & Disability
1,000 Days
AIDS United
American Public Health Association
American Nurses Association
Association of Asian Pacific Community Health Organizations (AAPCHO)
Autistic Self Advocacy Network
Center for Law and Social Policy
Center for Medicare Advocacy
Center for Public Representation
Center for Reproductive Rights
CenterLink: The Community of LGBT Centers
Coalition on Human Needs
Community Catalyst
Depression and Bipolar Support Alliance
Eating Disorders Coalition
FORGE, Inc.
GLMA: Health Professionals Advancing LGBT Equality
Global Alliance for Behavioral Health and Social Justice
Health HIV
HIV Medicine Association
The Jewish Federations of North America
Service Employees International Union
Trans Pride Initiative
ZERO TO THREE

**State-Based Organizations**

AIDS Action Baltimore
Anti-Poverty Network of New Jersey
Asian Americans Advancing Justice- Los Angeles
BlueWaveNJ
California LGBT Health and Human Services Network
Center for Independence of the Disabled, NY
Children Now (California)
Colorado Consumer Health Initiative
Colorado Children’s Campaign
Community Legal Services of Philadelphia
Consumer Health First (MD)
Consumers for Affordable Health Care (ME)
Desert AIDS Project (CA)
Equality North Carolina
Everthrive Illinois
Florida Health Justice Project, Inc.
Florida Policy Institute
Georgians for a Healthy Future
Health Access California
Health Care For All (MA)

Health Justice Project, Beazley Institute for Health Law and Policy, Loyola University Chicago School of Law

Health & Medicine Policy Research Group (IL)

Health Reform Resource Project (KS)

Heartland Alliance (IL)

Indivisible Illinois

JCD LGBTQ Caucus (Oregon)

Kentucky Equal Justice Center

Kentucky Voices for Health

Latin American Legal Defense and Education Fund (NJ)

Legal Council for Health Justice

Missouri Health Care for All

Nebraska Appleseed

New Yorkers for Accessible Health Coverage

Northwest Health Law Advocates

Montana Human Rights Network

National Association of Social Workers, West Virginia Chapter

The New Jersey Association of Mental Health and Addiction Agencies, Inc.

New Jersey Citizen Action

NorCal Mental Health America

North Carolina Justice Center

Office of the Health Care Advocate, Vermont Legal Aid, Inc.

Protect Our Care Alaska

Protect Our Care Illinois Coalition
Resource Center, Dallas TX
SC Appleseed Legal Justice Center
Tennessee Health Care Campaign
Tennessee Justice Center
Thresholds (IL)
Universal Health Care Action Network of Ohio
Virginia Organizing
Virginia Poverty Law Center
Voices for Utah Children
Western Center on Law & Poverty
West Virginians for Affordable Health Care
West Virginia Center on Budget and Policy
Women’s Law Project (PA)