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July 21, 2022

VIA ELECTRONIC FILING

William N. Parham, III
Director, Paperwork Reduction Staff
Office of Strategic Operations and Regulatory Affairs
Centers for Medicare and Medicaid Services
Department of Health and Human Services
7500 Security Boulevard
Baltimore, Maryland 21244

Re: Comment on June 22, 2022, Notice Regarding Instructions for Form CMS–2552–10

Dear Mr. Parham:

This comment concerns the notice regarding CMS–2552–10 that the Centers for Medicare & Medicaid Services (“CMS”) published in the Federal Register on June 22, 2022. 87 Fed. Reg. 37,338. In particular, we write to comment on CMS’s proposed revisions to the cost report instructions for Worksheet S-2, including revisions to Line 24 of that form, and instructions for the filing of new cost report Exhibit 3A. We specifically request that CMS revise its instructions to clarify that patient days for newborns receiving inpatient hospital services while the Medicaid eligible mother remains in the hospital are to be included on Worksheet S-2, Line 24, Columns 1 through 5. As written, the instructions are inconsistent and do not make clear whether such days can be included in Worksheet S-2 and therefore potentially violate the Medicare DSH and Medicaid statutes and accompanying regulations. *See* 42 U.S.C. § 1396a(e)(4); 42 U.S.C. § 1395ww(d)(5)(F)(vi)(II); 42 C.F.R. § 435.117; 42 C.F.R. § 412.106(b)(4).

The instructions for the new Exhibit 3A on which hospitals would be required to list their Medicaid eligible days are unclear about how or whether newborn days occurring prior to the Medicaid eligible mother’s discharge are to be reported on Worksheet S-2, Line 24. Based on those instructions, hospitals would report in Column 9 of that exhibit the specific column on Worksheet S-2, Line 24 where their Medicaid

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eligible days would be recorded. The vast majority of those days would be reported in Column 10 of the new exhibit, including the number of days for newborns remaining in the hospital *after* the Medicaid eligible mothers are discharged. The hospitals' number of labor and delivery days would be reported in Column 11 of the new exhibit, and "the number of newborn baby days occurring prior to the Medicaid eligible mother's date of discharge" would be included in Column 12.

The conflict in instructions arises where CMS instructs providers on how to aggregate the days listed in those various columns of the new Exhibit 3A on Worksheet S-2, Line 24, Columns 1-6, which are totaled to calculate the numerator of the Medicaid fraction. The instructions for Column 9 indicate that newborn baby days reported in Column 12 should be included on Worksheet S-2, Line 24. Those instructions provide that "[f]or each entry in columns 10 *and* 12, or column 11, *enter the Worksheet S-2, Part I, column number where the days were reported.*" (Emphases added). This language indicates that newborn days prior to the mother's discharge listed in Column 12 of the new exhibit should be included on Worksheet S-2, Line 24. But the instructions for Column 10 state that the number of days included on Worksheet S-2, Line 24, Columns 1-5 must equal the total number of days reported in Column 10, which appears to exclude the newborn days separately reported in Column 12. The instructions for Column 10 also state, however, that "the sum of the days summarized by each column reported in column 9 must equal the days reported in the respective column on Worksheet S-2," which would again seem to include the newborn days separately reported on Column 12. Thus, CMS's proposed instructions are inconsistent and do not clarify how or whether newborn days occurring before the Medicaid eligible mother's discharge are to be reported on Worksheet S-2, Line 24.

To the extent that CMS seeks to exclude Medicaid eligible days for newborns while the mother is in the hospital from Worksheet S-2 and, in turn, the Medicaid fraction, its proposal is inconsistent with the Medicare DSH and Medicaid statutes and the implementing regulations. The Medicaid statute provides that "[a] child born to a woman eligible for and receiving medical assistance under a State plan on the date of the child's birth shall be deemed to have applied for medical assistance and to have been found eligible for such assistance under such plan on the date of such birth and to remain eligible for such assistance for a period of one year." 42 U.S.C. § 1396a(e)(4). The implementing regulation similarly provides that "[t]he child is deemed to have applied and been determined eligible under the Medicaid State plan effective as of the date of birth, and remains eligible regardless of changes in circumstances until the child's first birthday" 42 C.F.R. § 435.117(b)(3). Accordingly, the days associated with

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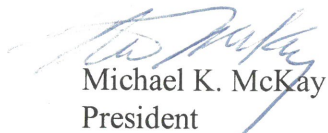
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newborns while the Medicaid eligible mother is in the hospital must be considered Medicaid days. Those days must, in turn, be included in the DSH Medicaid fraction pursuant to the Medicare DSH statute and accompanying regulation. *See* 42 U.S.C. § 1395ww(d)(5)(F)(vi)(II) (providing that the numerator of the Medicaid fraction consists of days for patients who were both eligible for medical assistance under the Medicaid statute and “not entitled to benefits under part A” of the Medicare statute); 42 C.F.R. § 412.106(b)(4) (same). To the extent that CMS’s proposed instructions would potentially exclude such days from the Medicaid fraction, those instructions are not authorized by any statute or regulation and are *ultra vires*. *See Fresno Cmty. Hosp. & Med. Ctr. v. Azar*, 370 F. Supp. 3d 139, 152 (D.D.C. 2019), *aff’d sub nom. Fresno Cmty. Hosp. & Med. Ctr. v. Cochran*, 987 F.3d 158 (D.C. Cir. 2021) (observing that an action is *ultra vires* where the agency “patently misconstrues a statute, disregards a specific and unambiguous statutory directive, or violates a specific command of a statute” (quoting *Hunter v. Fed. Energy Regul. Comm’n*, 569 F. Supp. 2d 12, 16 (D.D.C. 2008))); *Kaiser Found. Hosps. v. Sebelius*, 708 F.3d 226, 231-32 (D.C. Cir. 2013) (setting aside agency’s payment decision because it conflicted with the agency’s regulation); *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (setting aside agency action that is inconsistent with a “regulation’s plain language or by other indications of the Secretary’s intent at the time of the regulation’s promulgation”).

In short, we request that CMS revise its instructions to clarify that Medicaid days for newborn children before the Medicaid eligible mother is discharged from the hospital are to be included in Worksheet S-2, consistent with the plain language of both the Medicare DSH and Medicaid statutes, as well as the accompanying regulations.

Thank you for allowing us to submit this comment.

Sincerely,



Michael K. McKay
President