Gmail

Jessie Barrington <jessie@culturalheritagepartners.com>

Urgent Follow-Up on Misapplication of 42 C.F.R. § 438.14 and Procedural Deficiencies in the October 10 Letter

Jessie Barrington <jessie@culturalheritagepartners.com> Thu, Oct 17, 2024 at 9:24 PM
To: "Piner, Kim" <KPiner@oag.state.va.us>
Cc: Ben Grindstaff <b.grindstaff@fishingpointhc.com>, Lance Johnson <l.johnson@fishingpointhc.com>, Neil Crabtree <n.crabtree@fishingpointhc.com>, Hannah James <hannah@culturalheritagepartners.com>, cbrown@brownandpeisch.com, "eguggenheim@oag.state.va.us" <eguggenheim@oag.state.va.us>, jsiegenberg@brownandpeisch.com, Lindsay Naas <lindsaynaas1@gmail.com>, Earl Evans <earl@culturalheritagepartners.com>

Dear Kim,

Thank you again for the conversation today. Following up on our discussion, I am providing a quick summary of the relevant legal issues we covered, with the hope that this email will help guide your internal discussions with your client, DMAS, and assist in preparing for good faith negotiations next week.

While I plan to send a more formal letter soon, I want to ensure that this email provides some immediate clarification to help explain to your client the seriousness of the missteps they have taken. This summary highlights critical procedural flaws, the misapplication of 42 C.F.R. § 438.14, and the legal deficiencies of the current approach. It is essential that these issues are fully understood to ensure DMAS appreciates the legal context before our next meeting.

Misapplication of 42 C.F.R. § 438.14 to Non-Indian Beneficiaries

As discussed, the October 10 letter expressed an "expectation" that non-Indian Medicaid beneficiaries must transition to MCOs. However, this letter cited no legal authority to support such an assertion. Moreover, it was not until today's call that 42 C.F.R. § 438.14 was referenced as a basis for this position—this had never previously been communicated to Fishing Point Healthcare, raising significant concerns about transparency and timing. Additionally, the interpretation that this regulation mandates the transition of non-Indian beneficiaries is legally incorrect and conflicts with existing Medicaid laws and regulations.

1. Medicaid Provider Rights and Federal Recognition of IHCPs

Section 1911 of the Social Security Act, 42 U.S.C. § 1396j, recognizes Indian Health Service (IHS) and tribal 638 facilities as Medicaid providers for both Indian and non-Indian beneficiaries. There is no language in the statute restricting these services solely to AI/AN individuals. **This means that IHCPs, such as Fishing Point Healthcare, are fully authorized to provide services to all Medicaid beneficiaries, regardless of whether they are Indian or non-Indian**, and any state action that restricts or mandates transitions away from IHCPs violates the rights of these providers under federal law.

2. No Restriction on Non-Indian Beneficiaries in 42 C.F.R. § 438.14

42 C.F.R. § 438.14(b) explicitly mandates that MCOs cannot deny payment for services provided by Indian Health Care Providers (IHCPs), whether those services are rendered to American Indian/Alaska Native (AI/AN) or non-Indian beneficiaries. The regulation does not include any language limiting IHCP services to AI/AN patients, and there is no statutory or regulatory distinction that imposes such a limitation. Assuming, *arguendo*, that there is an ambiguity in the application of this regulation, the Indian canon of construction—a well-established principle that requires ambiguities in laws affecting Indian tribes to be resolved in favor of the tribes—would demand that the regulation be interpreted to expand tribal rights. This principle, affirmed by the U.S. Supreme Court in *Bryan v. Itasca County*, 426 U.S. 373 (1976), reinforces the broader interpretation that tribal healthcare providers must be allowed to serve both Indian and non-Indian beneficiaries without restrictions. Any ambiguity must be resolved in a manner that favors tribal sovereignty and the full exercise of tribal healthcare provider rights under Medicaid.

3. Freedom of Choice in Medicaid (42 U.S.C. § 1396a(a)(23)

The freedom of choice provision in 42 U.S.C. § 1396a(a)(23) ensures that all Medicaid beneficiaries—Indian and non-Indian alike—have the right to select any participating Medicaid provider, including IHCPs. The October 10 letter's suggestion that non-Indian beneficiaries should be transitioned solely to MCOs directly violates this fundamental right and attempts to undermine the beneficiaries' right to choose their healthcare providers.

Procedural Deficiencies in the October 10 Letter

Beyond the misapplication of federal law, the October 10 letter contains significant procedural defects that render it legally unsound and unenforceable. DMAS's failure to provide clear legal authority, coupled with the lack of proper procedural safeguards, raises serious questions about the legitimacy of the letter and its directives.

1. Lack of Legal Authority or Statutory Citation

The October 10 letter fails to cite any specific Virginia statute or federal regulation that justifies DMAS's "expectation" that Fishing Point Healthcare must transition its patients. Virginia and federal administrative law require that any agency decision affecting Medicaid providers be grounded in clear legal authority. Without such a citation, the letter does not meet the basic legal requirements and is therefore procedurally defective and unenforceable.

The U.S. Supreme Court in *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983), made it clear that agency decisions must be supported by statutory authority and must not be arbitrary or capricious. DMAS's position in this letter falls well below this standard, and without legal backing, the letter holds no enforceable weight.

2. Failure to Provide Notice of Appeal Rights

Virginia law, specifically 12 VAC 30-20-540, mandates that Medicaid providers be given written notice of any adverse actions, including a detailed explanation of the action and the provider's right to appeal. The October 10 letter does not meet these requirements, as it fails to provide either a clear adverse action or the right to appeal. This failure further violates Code of Virginia § 2.2-4021, which guarantees Medicaid providers the right to challenge adverse actions in an administrative hearing.

Similarly, under 42 C.F.R. § 455.23, federal law requires that Medicaid providers receive formal notification of any suspension or modification of payments, including an opportunity to request a hearing or appeal. The letter's failure to include these basic procedural safeguards further emphasizes its legal deficiencies.

3. Expectations Are Not Directives

The language in the letter, stating that DMAS "expect[s]" Fishing Point Healthcare to transition its patients, lacks the legal weight of a formal directive. Expectations, without formal directives or statutory backing, do not carry the force of law. Fishing Point Healthcare is under no legal obligation to act on an informal "expectation" that is not grounded in legal authority or supported by proper procedural safeguards.

Conclusion

The October 10 letter fails to provide any legal or statutory authority for DMAS's "expectation" that Fishing Point Healthcare transitions its patients. This expectation, which lacks the force of a formal directive, is both procedurally and legally unsound. Furthermore, the letter fails to comply with both Virginia law, 12 VAC 30-20-540, and federal regulations, 42 C.F.R. § 455.23, which requires proper notification and appeal rights. Without these procedural safeguards, the letter cannot be enforced.

Additionally, the attempt to use 42 C.F.R. § 438.14 to justify the transition of non-Indian Medicaid beneficiaries is a misinterpretation of federal law. IHCPs are fully authorized to serve both Indian and non-Indian beneficiaries, and the state cannot compel transitions based on informal "expectations" that lack legal standing.

I trust this email will assist in your discussions with your client, DMAS, and help clarify the significant legal and procedural missteps that have occurred. We look forward to entering into good faith negotiations next week, and I remain hopeful that DMAS will approach the matter with a full understanding of the issues at hand.

Please feel free to reach out if you need further clarification or if there are additional matters you would like to discuss. I will be available to talk tomorrow after my meeting with the U.S. Attorney's Office, hopefully around 3:30pm.

Thank you again for your time.
Best,
--
Jessie Barrington
(Citizen of the Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians)
She/Her
Attorney at Law
Cultural Heritage Partners, PLLC
Direct/Text: (503) 422-1080
www.culturalheritagepartners.com