



December 30, 2020

SUBMITTED ELECTRONICALLY VIA [www.regulations.gov](http://www.regulations.gov)

The Honorable Alex M. Azar  
Secretary  
U.S. Department of Health and Human Services  
Hubert H. Humphrey Building  
200 Independence Avenue, SW  
Washington, DC 20201

**RE: HHS Notice of Benefit and Payment Parameters for 2022; Updates to State Innovation Waiver (Section 1332 Waiver) Implementing Regulations Proposed Rule (CMS-9914-P; RIN: 0938-AU18)**

Dear Secretary Azar:

The undersigned members of the Coalition to Preserve Rehabilitation (CPR) Steering Committee appreciate the opportunity to comment on the Department of Health and Human Services (HHS) proposed rule for the 2022 Notice of Benefit and Payment Parameters (NBPP).

CPR is a coalition of more than 50 national consumer, clinician, and membership organizations that advocate for policies to ensure access to rehabilitative care so that individuals with injuries, illnesses, disabilities, and chronic conditions may regain and/or maintain the maximum level of health and independent function.

We have significant concerns about several proposals in this rule and believe this rule should be finalized only with major changes to these sections.

**I. Rehabilitative Services and Devices under the ACA**

The Affordable Care Act (ACA) includes statutory language that requires coverage of essential health benefits, including one of ten categories of benefits known as “rehabilitative and habilitative services and devices.” Inclusion of the language in the statute was a major milestone for the rehabilitation and disability community, in that Congress recognized the importance of these benefits to improve the health and functioning of the American people.

In the February 2015 NBPP Final Rule, the Centers for Medicare and Medicaid Services (CMS) defined “rehabilitation services and devices” as follows:

“Rehabilitation services and devices – Rehabilitative services, including devices, on the other hand, are provided to help a person regain, maintain, or prevent deterioration of a

skill or function that has been acquired but then lost or impaired due to illness, injury, or disabling condition.”

For the first time, this regulation established a uniform definition of rehabilitation services and devices that states could understand and consistently implement. This definition became a standard for private insurance coverage and a floor of coverage for individual insurance plans sold on the exchanges. Importantly, the definition includes both rehabilitative services and rehabilitative devices. The adoption of a federal definition of rehabilitation services and devices minimized the variability in benefits across states and uncertainty in coverage for children and adults in need of medical rehabilitation and post-acute care.

The rehabilitation and habilitation benefit under the ACA has been critical to ensuring that individuals with injuries, illnesses, disabilities, and chronic conditions are able to access the care they need. As detailed below, several provisions within the 2022 NBPP proposed rule threaten the stability of this and other benefits within ACA plans, and we urge the Administration to withdraw and reconsider these proposals.

## **II. Expanding Exchange Direct Enrollment Options**

On November 1, CMS approved the State of Georgia’s Section 1332 waiver application, endorsing a dramatic departure from the plan shopping and enrollment experience currently available to individuals nationwide through either the federal exchange website (HealthCare.gov) or state-based marketplaces. If implemented, the approved waiver will end Georgia’s participation in HealthCare.gov, through which half a million Georgians enroll, and instead privatize the enrollment function, allowing consumers to shop for health care coverage only through agents and brokers (leaving individuals particularly dependent on web brokers). This waiver is bound to lead to lower enrollment in comprehensive coverage, through sheer consumer confusion during the transition, brokers’ reluctance to refer individuals to Medicaid or to plans that do not pay commissions, and increased pressure for consumers to enroll in short-term and other sub-par plans.

The proposed rule would allow other states to make this same change, without even undergoing the waiver application and approval process. This would deprive consumers of a public comment period before such a change is made. CPR and other stakeholders representing patients and providers rely on public comment periods to review and examine the potential impact of proposed changes to the marketplace health care plans, which govern the health coverage for millions of beneficiaries nationwide.

Not only would privatizing the marketplace harm consumers, allowing states to do so without a waiver clearly violates Affordable Care Act (ACA) requirements. Under the rule, the state would provide a rudimentary website that displays basic plan information without a means to enroll, then direct people to private websites to complete the application. This is in violation of the statutory requirement in section 1311(d)(2) of the ACA, which requires a marketplace to “make available qualified health plans to qualified individuals.” In general, individuals would not be able to enroll in qualified health plans through the state website.

We are also concerned that allowing private insurers to operate enrollment websites could lead to confusion or inducement to enroll in short-term, limited duration health plans, rather than comprehensive coverage to meet an individual's needs. We have previously expressed our concerns that the continued expansion of these short-term plans would leave adults and children, particularly those with disabilities and chronic health conditions, with less comprehensive coverage and higher out-of-pocket costs or, in some circumstances, no coverage at all. These plans are not subject to consumer protections that have immense value for individuals with disabilities and chronic conditions. This proposal could direct more consumers to these plans without a clear understanding of the limitations of their coverage, a dangerous outcome for individuals who already have or may develop conditions, disabilities, or injuries requiring robust rehabilitation.

***We strongly oppose this proposal.***

The proposed rule would encourage Navigators and Certified Application Counselors to use direct enrollment entities. This additional form of privatization of HealthCare.gov functions would direct assisters to web brokers that could sell products other than qualified health plans (QHPs) in ways that might be confusing to less experienced assisters and consumers. Likewise, these avenues are not guaranteed to facilitate enrollment in plans that do not pay a commission, leading assisters on a time-consuming chase across websites to enroll in the right plan.

The Administration's justification for the proposal is that these websites have additional functionality that would be useful to assisters. Rather than shifting to a more privatized model, this points to the need to further invest in HealthCare.gov to expand its functionality for assisters and consumers. ***CPR opposes this provision, which could limit the availability of critical assistance for individuals as they navigate the marketplace and result in less comprehensive coverage.***

### **III. Reducing the Marketplace User Fee**

The proposed rule would decrease the federal marketplace user fee by 25 percent, from 3 percent to 2.25 percent, and would decrease the user fee for state-based marketplaces that use the federal platform from 2.5 percent to 1.75 percent. We oppose this proposal.

The marketplace user fee – a fixed percentage of premium revenue paid by insurers – supports critical functions, including the operation and improvement of the HealthCare.gov website, the marketplace call center, the Navigator program, consumer outreach, and advertising.

The proposed rule's rationale for this cut is that the lower user fee would be sufficient to fund current marketplace activities, but these current activities are wholly inadequate. Under the current Administration, CMS has virtually ceased marketing and outreach and has slashed funding for Navigators, core marketplace functions funded by user fees. Rather than cutting the user fee, it should be *increased* to 3.5 percent (the level in effect prior to 2020) to restore outreach and enrollment assistance programs and improved customer service.

Especially for the patients we represent, those with complex conditions, disabilities, or injuries requiring high levels of rehabilitation care, the Navigator program is critical for ensuring that

beneficiaries understand their coverage and are able to select comprehensive plans that will meet their needs. ***CPR opposes this proposal, which would continue to weaken this critical program and other services necessary to the successful operation of the marketplaces.***

#### **IV. Codifying Innovation Waiver Guidance and Weakening Section 1332 Protections**

The 1332 waiver's statutory guardrails require that waivers cover at least as many people, with coverage at least as comprehensive and affordable as without the waiver, without increasing the federal deficit. In 2018 guidance, the Administration attempted to undercut these statutory requirements in several ways. It then issued a concept paper encouraging states to submit waiver proposals that would weaken protections for people with pre-existing conditions, cut financial assistance for consumers with low incomes and/or older people, and/or increase out-of-pocket costs, implying that such waivers might be approvable under the new guidance.

For patients in need of rehabilitation, the coverage of essential health benefits is a critical element of health care coverage. Weakening the guardrails protecting this coverage from waiver actions from narrowing coverage would threaten the availability of these services for the patients who need them most. ***We urge the Administration to reconsider this proposal.***

The proposed rule attempts to codify the 2018 guidance, for the most part, by reference rather than by crafting concrete regulatory language. Codifying this non-regulatory policy by reference is not only bad policy on the merits but is also legally dubious (as is the guidance itself, which deviates from the plain meaning of the statute). ***CPR opposes this provision.***

#### **V. Calculating Premium Tax Credits**

The proposed rule also continues the Administration's 2019 change in the formula used to calculate premium tax credits, which cut financial assistance for millions of people. If continued, the formula change will have an even greater impact in 2022, raising premiums by an estimated 4.7 percent for most subsidized marketplace consumers after accounting for their tax credits (compared to about 2.7 percent this year). That amounts to a \$360 annual premium increase for a family of four with \$80,000 in income.

The same formula change also increases the limit on consumers' total out-of-pocket expenses, which applies to both marketplace and employer plans. In 2022, that limit will be \$400 higher for an individual, and \$800 higher for families, than if the 2019 change were reversed. ***CPR strongly encourages CMS to reverse the 2019 formula change.***

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Access to rehabilitative and habilitative services and devices is essential for the health and livelihood of people with disabilities and others in need of medical rehabilitation and post-acute care. These services are also critical for reducing downstream costs to the health care system for unnecessary disability and dependency. In order for these services and devices to be accessible,

beneficiaries must be able to access information regarding their plan options that is presented clearly, in accordance with the statutory language and intent of the ACA.

CPR urges CMS to preserve access to rehabilitative and habilitative services and devices in the Final Rule in order to reduce costs to the health care system and ensure that children and adults can maximize their health and independence through access to these benefits.

We greatly appreciate your attention to our concerns involving this proposed rule. Should you have further questions regarding this information, please contact Peter Thomas and Joe Nahra, coordinators for CPR, by e-mail at [Peter.Thomas@PowersLaw.com](mailto:Peter.Thomas@PowersLaw.com) and [Joseph.Nahra@PowersLaw.com](mailto:Joseph.Nahra@PowersLaw.com), or by calling 202-466-6550.

Sincerely,

**The Undersigned Members of the Coalition to Preserve Rehabilitation Steering Committee**

Brain Injury Association of America  
Center for Medicare Advocacy  
Christopher & Dana Reeve Foundation  
Falling Forward Foundation  
National Multiple Sclerosis Society  
United Spinal Association