



November 24, 2020

Stephen M. Groff
Director
Division of Medicaid and Medical Assistance
Department of Health and Social Services
1901 N. Dupont Highway
New Castle, DE 19720

Dear Mr. Groff:

On March 13, 2020, the President of the United States issued a proclamation that the COVID-19 outbreak in the United States constitutes a national emergency by the authorities vested in him by the Constitution and the laws of the United States, including sections 201 and 301 of the National Emergencies Act (50 U.S.C. 1601 et seq.), and consistent with section 1135 of the Social Security Act (Act) as amended (42 U.S.C. 1320b-5). On March 13, 2020, pursuant to section 1135(b) of the Act, the Secretary of Health and Human Services invoked his authority to waive or modify certain requirements of titles XVIII, XIX, and XXI of the Act as a result of the consequences of the COVID-19 pandemic, to the extent necessary, as determined by the Centers for Medicare & Medicaid Services (CMS), to ensure that sufficient health care items and services are available to meet the needs of individuals enrolled in the respective programs and to ensure that health care providers that furnish such items and services in good faith, but are unable to comply with one or more of such requirements as a result of the COVID-19 pandemic, may be reimbursed for such items and services and exempted from sanctions for such noncompliance, absent any determination of fraud or abuse. This authority took effect as of 6:00 PM Eastern Standard Time on March 15, 2020, with a retroactive effective date of March 1, 2020. We note that the emergency period will terminate, upon termination of the public health emergency (PHE), including any extensions.

In response to the section 1115(a) demonstration opportunity announced to states on March 22, 2020 in State Medicaid Director Letter (SMDL) #20-002,¹ on April 13, 2020, and on April 30, 2020, Delaware submitted 1115 COVID-19 demonstration applications to address the COVID-19 PHE. CMS has determined that the state's applications are complete, consistent with the

¹ See SMDL #20-002, "COVID-19 Public Health Emergency Section 1115(a) Opportunity for States," available at <https://www.medicare.gov/sites/default/files/Federal-Policy-Guidance/Downloads/smd20002-1115template.docx>.

exemptions and flexibilities outlined in 42 CFR 431.416(e)(2) and 431.416(g).² CMS expects that states will offer, in good faith and in a prudent manner, a post-submission public notice process, including tribal consultation as applicable, to the extent circumstances permit.

This letter also serves as time-limited approval of one of the requests included in the state's COVID-19 section 1115 demonstration applications, which will be approved as an amendment under the "Delaware Diamond State Health Plan (DSHP)" section 1115(a) demonstration (Project Number 11-W-00036/4). This authority is hereby authorized retroactively from March 1, 2020, through the date that is 60 days after the end of the PHE (including any renewal of the PHE).

CMS has determined that this amendment – including the expenditure authority detailed below – is necessary to assist the state in delivering the most effective care to its beneficiaries in light of the COVID-19 PHE. The demonstration amendment is likely to assist in promoting the objectives of the Medicaid statute because it is expected to help the state furnish medical assistance in a manner intended to protect, to the greatest extent possible, the health, safety, and welfare of individuals and providers who may be affected by COVID-19.

In addition, in light of the unprecedented emergency circumstances associated with the COVID-19 pandemic and consistent with the President's declaration detailed above – and in consequence of the time-limited nature of this demonstration – CMS did not require the state to submit budget neutrality calculations for the demonstration amendment. In general, CMS has determined that the costs to the federal government are likely to have been otherwise incurred and allowable. Delaware will still be required to track demonstration expenditures and will be expected to evaluate the connection between those expenditures and the state's response to the PHE, as well as the cost-effectiveness of those expenditures. For similar reasons, and due to the highly limited scope of the changes under the amendment, CMS did not revise the Special Terms and Conditions (STCs).

The state will be required to complete a final report, which will consolidate monitoring and evaluation reporting deliverables associated with the approved waiver and expenditure authorities and prior-approved demonstration STCs, no later than one year after the end of the COVID-19 section 1115 demonstration authority. CMS will provide guidance for the evaluation design and final report, specifically developed for the COVID-19 section 1115 demonstration to facilitate state compliance with 42 CFR 431.424(c); an evaluation design will be due to CMS within 60 days of demonstration amendment approval.

The state will test whether and how the approved expenditure authority affects the state's response to the PHE. To that end, the state will use research questions that pertain to the approved expenditure authority. The evaluation will also assess cost-effectiveness by tracking

² Pursuant to 42 CFR 431.416(g), CMS has determined that the existence of unforeseen circumstances resulting from the COVID-19 PHE warrants an exception to the normal state and federal public notice procedures to expedite a decision on a proposed COVID-19 section 1115 demonstration. States applying for a COVID-19 section 1115 demonstration are not required to conduct a public notice and input process. CMS is also exercising its discretionary authority to expedite its normal review and approval processes to render timely decisions on state applications for COVID-19 section 1115 demonstrations. CMS will post all section 1115 demonstrations approved under this COVID-19 demonstration opportunity on the Medicaid.gov website.

administrative costs and health services expenditures for demonstration beneficiaries and assessing how these outlays affected the state's response to the PHE.

Requests CMS is Approving at this Time

Consistent with the flexibilities described in the SMDL #20-002, CMS is approving the following request:

Retainer Payments

Expenditure authority for the state to make retainer payments to providers of personal care services and services provided in adult day health settings using the rehabilitative services benefit as defined under section 1905(a) of the Act to maintain capacity during the emergency. If the state submits and receives approval of an institutional facility bed hold State Plan Amendment (SPA) that is fewer than 30 days, then the state may only make retainer payments authorized under the 1115 authority that is equal to the institutional facility bed hold limit in the SPA. In addition, retainer payments may not exceed the approved rate(s) or average expenditure amounts paid during the previous quarter for the service(s) that would have been provided.

Monitoring and Evaluation Requirements

The state must submit an evaluation design to CMS within 60 days of the demonstration amendment approval. CMS will provide guidance on an evaluation design specifically for the expenditure authorities approved for the COVID-19 emergency, including any amendments. The state is required to post its evaluation design to the state's website within 30 days of CMS approval of the evaluation design, per 42 CFR 431.424(e).

The state will test whether and how the approved expenditure authority affect the state's response to the public health emergency. To that end, the state will use research questions that pertain to the approved expenditure authority. The evaluation will also assess cost-effectiveness by tracking administrative costs and health services expenditures for demonstration beneficiaries and assessing how these outlays affected the state's response to the public health emergency.

The state is required to submit a final report. The final report will consolidate monitoring and evaluation reporting requirements for this demonstration authority. The state must submit this final report no later than one year after the end of the COVID-19 section 1115 demonstration authority. The final report will capture data on the demonstration implementation, lessons learned, and best practices for similar situations. The state will be required to track separately all expenditures associated with this demonstration, including but not limited to, administrative costs and program expenditures. CMS will provide additional guidance on the structure and content of the final report. Should the approval period of these demonstration authorities exceed one year, for each year of the demonstration that the state is required to complete per the annual report required under 42 CFR 431.428(a), the state may submit that information in the Final Report.

Approval of this demonstration amendment is subject to the limitations specified in the flexibilities listed in Attachment K and the previously approved expenditure authorities and

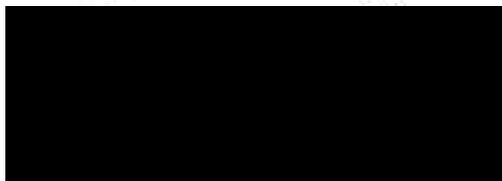
STCs. The guardrail language for retainer payments that is detailed in Attachment K shall also be applicable to the retainer payments approved on September 28, 2020, in the state's previously approved COVID 19 section 1115 Appendix K application. The state may deviate from its Medicaid state plan requirements only to the extent that the requirements have been specifically identified as not applicable for the demonstration as specified in the list of approved authorities. This approval is conditioned upon continued compliance with the previously approved STCs, which set forth in detail the nature, character and extent of anticipated federal involvement in the project.

The award is subject to CMS receiving written acceptance of this award within 15 days of the date of this approval letter. Your project officer is Mr. Thomas Long. Mr. Long is available to answer any questions concerning implementation of the state's section 1115(a) demonstration amendment and his contact information is as follows:

Centers for Medicare & Medicaid Services
Center for Medicaid and CHIP Services
Mail Stop S2-25-26
7500 Security Boulevard
Baltimore, Maryland 21244-1850
Email: Thomas.long@cms.hhs.gov

We appreciate your state's commitment to addressing the significant challenges posed by the COVID-19 pandemic, and we look forward to our continued partnership on the Delaware Diamond State Health Plan section 1115(a) demonstration. If you have any questions regarding this approval, please contact Ms. Judith Cash, Director, State Demonstrations Group, Center for Medicaid and CHIP Services, at (410) 786-9686.

Sincerely,



Anne Marie Costello
Acting Deputy Administrator and Director

Enclosure

cc: Talbatha Myatt, State Monitoring Lead, Medicaid and CHIP Operations Group

Attachment K- – Time-limited Expenditure Authority and Associated Requirements for State’s Response to COVID-19 Public Health Emergency (PHE)

1. Retainer payments. Expenditure authority for the state to make retainer payments to providers of personal care services and services provided in adult day health settings using the rehabilitative services benefit as defined under section 1905(a) of the Social Security Act to maintain capacity during the emergency.

If the state is interested in utilizing retainer payments for multiple (up to three) episodes of up to 30 days per beneficiary, it will be expected to abide by the following guardrails:

- Limit retainer payments to a reasonable amount and ensure their recoupment if other resources, once available, are used for the same purpose. In terms of setting a reasonable amount, a retainer payment cannot exceed the payment for the relevant service; the state may specify that a retainer payment will be made at a percentage of the current rate, or a state may specify retainer payments will not be made to a setting until attendance is below an identified percentage of the enrollment (e.g., 75 percent).
- Collect an attestation from the provider acknowledging that retainer payments will be subject to recoupment if inappropriate billing or duplicate payments for services occurred (or in periods of disaster, duplicate uses of available funding streams), as identified in a state or federal audit or any other authorized third party review. Note that “duplicate uses of available funding streams” means using more than one funding stream for the same purpose.
- Require an attestation from the provider that it will not lay off staff, and will maintain wages at existing levels.
- Require an attestation from the provider that they had not received funding from any other sources, including but not limited to unemployment benefits and Small Business Administration loans, that would exceed their revenue for the last full quarter prior to the PHE, or that the retainer payments at the level provided by the state would not result in their revenue exceeding that of the quarter prior to the PHE. o If a provider had not already received revenues in excess of the pre-PHE level but receipt of the retainer payment in addition to those prior sources of funding results in the provider exceeding the pre-PHE level, any retainer payment amounts in excess would be recouped.
- If a provider had already received revenues in excess of the pre-PHE level, retainer payments are not available.
- If the state utilizes retainer payments for one period that is the lesser of 30 consecutive days or the number of nursing facility bed-hold days will have the option of requiring providers to comply with these guardrails.

- 2. Evaluation Design.** The state must submit an evaluation design to CMS within 60 days of the demonstration amendment approval. CMS will provide guidance on an evaluation design specifically for the expenditure authority approved for the COVID-19 emergency, including any amendments. The state is required to post its evaluation design to the state's website within 30 days of CMS approval of the evaluation design, per 42 CFR 431.424(e). The state will test whether and how the approved expenditure authority affects the state's response to the public health emergency. To that end, the state will use research questions that pertain to the approved expenditure authority. The evaluation will also assess cost-effectiveness by tracking administrative costs and health services expenditures for demonstration beneficiaries and assessing how these outlays affected the state's response to the public health emergency.