



NATIONAL ASSOCIATION OF
CHAIN DRUG STORES



NCPA®
NATIONAL COMMUNITY
PHARMACISTS ASSOCIATION



WSPA
WASHINGTON STATE PHARMACY ASSOCIATION

December 18, 2020

VIA E-MAIL

Seema Verma
Administrator
Centers for Medicare & Medicaid Services
Center for Medicaid and CHIP Services
7500 Security Boulevard
Baltimore, MD 21244

RE: Adoption of Proposed Decision of the Presiding Officer in *Washington State Health Care Authority v. CMS (Washington Medicaid SPA Denial)*

Dear Administrator Verma:

The National Association of Chain Drug Stores¹ (NACDS), [the National Community Pharmacists Association² (NCPA) and the Washington State Pharmacy Association³ (WSPA)] write in strong support of CMS’ adoption of the July 31, 2020 Proposed Decision of the Presiding Officer in the Reconsideration of Disapproval of Washington Medicaid State Plan Amendment (SPA) 17-0002 (“Proposed Decision”). In the Proposed Decision, the Presiding Officer found that CMS’ disapproval of the Washington State SPA was “appropriate”⁴ and recommended that it be “upheld.”⁵ As detailed more fully below, the Presiding Officer accurately reviewed the state’s SPA and related record before it to properly concluded that the Washington SPA failed to show that it satisfied the requirements of Section 1902(a)(30)(A) of the Social Security Act (“Section 30(A)”) and to provide a professional dispensing fee as defined under the new Covered Outpatient Drugs

¹ NACDS represents traditional drug stores, supermarkets, and mass merchants with pharmacies. Its nearly 100 chain member companies include regional chains with a minimum of four stores to national companies. Chains operate more than 40,000 pharmacies and employ a total of more than 3 million employees, including 152,000 pharmacists. They fill more than 3 billion prescriptions yearly and have annual sales of over \$750 billion. NACDS members operate over 850 pharmacies in Washington State, employing nearly 69,000, including over 3,300 pharmacists.

² NCPA is the voice for the community pharmacist, representing more than 21,000 pharmacies that employ 250,000 individuals nationwide and representing a \$74 billion healthcare marketplace. There are 286 independent community pharmacies in Washington State, providing over 2,600 full time jobs and filling almost 17 million prescriptions last year.

³ WSPA exists to advocate on behalf of its members to ensure pharmacy professionals are engaged and valued as essential to the healthcare team to optimize patient outcomes. The WSPA represents all areas of pharmacy practice in Washington including Community Practice, Ambulatory Care, Health Systems, and Long Term Care.

⁴ Proposed Decision at 1, Section II (Summary of the Proposed Decision).

⁵ *Id.* at 15, Section VII. (Proposed Decision).

final rule (“CMS Final Rule”), 42 C.F.R. § 447.500, *et seq.*⁶ We agree with the Proposed Decision upholding the SPA disapproval. Therefore, we respectfully request that the Proposed decision be adopted and, when a cost-based dispensing fee is implemented in Washington State, that pharmacies be retroactively reimbursed.

OVERVIEW OF PROPOSED DECISION

Section 30(A) requires state Medicaid plans to ensure that provider payment rates are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area.⁷ To maintain that Medicaid standard of access in the context of Medicaid’s move to acquisition cost-based reimbursement, CMS implemented reimbursement requirements through the CMS Final Rule to ensure that reimbursement to pharmacies adequately reflects the true cost to acquire and dispense prescription drugs to Medicaid beneficiaries.⁸ For that reason, the CMS Final Rule mandates the states to provide to CMS “adequate data such as a State or national survey of retail pharmacy providers or other reliable data other than a survey to support any proposed changes to either or both components of the reimbursement . . .”⁹ However, when Washington State submitted its SPA to implement the final rule in which it moved to cost-based product reimbursement, it failed to meet its legal obligation to simultaneously adjust for a cost-based professional dispensing fee as well.¹⁰

During the differing stages of the SPA review process, CMS made multiple inquiries of Washington State asking it to explain how this unchanged professional dispensing fee met the requirements of ensuring patient access under Section 30A.¹¹ In response to that, Washington State acknowledged CMS’ expectation for cost-based information in support of its unchanged dispensing fee. However, Washington State declined to provide it, taking the position that it had no obligation to do so.¹² Consequently, CMS justifiably lacked confidence that Washington State’s purported professional dispensing fee in the SPA reflected the cost to dispense by Washington pharmacies and, as a result, would be sufficient to ensure patient access under Section 30(A).¹³ For those reasons, CMS rightfully disapproved Washington’s State SPA in September 2018.¹⁴

Thereafter, Washington State requested a reconsideration of its denied SPA.¹⁵ NACDS, NCPA and WSPA joined in that review as *amici*, supporting CMS’ disapproval of the

⁶ The basis of the Presiding Officer’s recommendation aligns with the arguments presented by NACDS, NCPA, and WSPA consistently since 2017 in its advocacy before CMS to disapprove Washington State’s SPA.

⁷ Prop. Dec. at 3, Section IV (Substantive Legal Authority).

⁸ *Id.* at 4-7.

⁹ *Id.* at 7 (*citing* CMS Final Rule).

¹⁰ *Id.* at 7, Section V.A. (Factual Background) (noting the dispensing fees contained in the state’s SPA were \$4.24-\$5.25, the same rate for the past 11 years).

¹¹ *Id.* at 7-10 (asking the State to support its dispensing fee based on cost data).

¹² *Id.* at 8-10.

¹³ *Id.* at 10.

¹⁴ *Id.* at 11.

¹⁵ *Id.* at 11, Section V.B. (Appeal Request)

Washington State SPA.¹⁶ After a hearing and review of the administrative record, the Presiding Officer found fault with the state's failure to provide CMS with information it asked for "regarding the actual cost to dispense prescriptions" and the state's sole reliance "upon a fee based study."¹⁷ Importantly, he also found that CMS' request to Washington State for a cost of dispensing study was "most reasonable."¹⁸ And absent the requested information, the Presiding Officer found that Washington State failed to show that it met the requirements of Section 30(A), thus making the SPA "not approvable."¹⁹ As a result of this all, the Presiding Officer upheld the disapproval of the SPA.²⁰

ADOPTION OF THE PROPOSED DECISION IS JUSTIFIED AND ADVISABLE

Based upon the following, CMS should adopt the Proposed Decision. Such action is supported solidly by the facts and the law. Indeed, relying on its 11-year old dispensing fee of \$4.24-\$5.25 with absolutely no consideration of cost in the move to cost-based reimbursement under the CMS Final Rule places Washington State far outside its legal requirements. Further, the Proposed Decision should be adopted to validate and to reinforce all of the hard work undertaken by most other states to bring themselves into compliance with the cost-based requirements for both products and professional dispensing fees under the CMS Final Rule. After all, Washington State's refusal to provide cost-based data to CMS, much less to undertake any effort to provide Washington pharmacies the legally required cost-based professional dispensing fee, makes it an outlier among its peers. As a result, CMS is advised to take this opportunity to make Washington State an example for other states to ensure none erroneously conclude that neither Section 30(A) nor the CMS Final Rule require them to provide nor rely upon cost-based data to support their professional dispensing fees. Lastly, adoption of this decision is needed to require Washington State to move ahead as quickly as possible to come into compliance with the law by implementing a cost-based dispensing fee, based, for instance, on a state cost to dispense study, and taking the steps to remedy years of unlawful underpayment to Washington pharmacies.²¹

¹⁶ *Id.* at 12.

¹⁷ *Id.* at 13, Section VI (Discussion: Findings of Facts and Conclusions of Law).

¹⁸ *Id.*; *See also, id.*, at 14 (highlighting that the CMS Final Rule "includes very specific elements regarding the reasonable costs associated with a pharmacist's time, so that states should expect CMS to require data on professional dispensing fees to evaluate change to aggregate rates.")

¹⁹ *Id.* at 15 (adding that the failure to provide the requested information also prevented CMS from ensuring the SPA complied with the CMS Final Rule).

²⁰ *Id.* at 15, Section VII (Proposed Decision).

²¹ In its Exceptions to the Proposed Decision, the State takes issue with Amici's position that once a cost-based professional dispensing fee is adopted by the State, it must be applied retroactively to April 1, 2017. Washington Exceptions at 16-17. Amici stand by their arguments made in their post-hearing brief, at pages 11-12, for CMS to require retroactive application of Washington's cost-based professional dispensing fee. In addition, NACDS notes that the vast majority of SPAs implementing the CMS Final Rule and its related reimbursement adjustments, including cost-based professional dispensing fees, which have been approved by CMS have an effective date of April 1, 2017. *See, e.g.*, CMS approval of Pennsylvania SPA, July 30, 2018 with an effective date of April 1, 2017 found at <https://www.medicaid.gov/State-resource-center/Medicaid-State-Plan-Amendments/Downloads/PA/PA-17-0010.pdf>. Pharmacies have been bearing the burden of the below cost professional dispensing fee with cost-based product reimbursement while doing their best to continue to

For all the reasons above, we encourage CMS to adopt the Proposed Decision. Please contact Mary Ellen Kleiman at mkleiman@nacds.org or (703) 837-4327 if you have any questions.

Sincerely,



Steven C. Anderson, FASAE, CAE, IOM
President and Chief Executive Officer



Karry K. La Violette
Senior Vice President of Government Affairs & Director of the Advocacy Center
National Community Pharmacists Association



Jenny Arnold, PharmD, BCPS
Chief Executive Officer
Washington State Pharmacy Association

cc: Maude Shepard, HHS
Janet Freeman, HHS
Bill Stevens, State of Washington

serve their patients in their communities, especially during the current public health crisis caused by the corona virus pandemic. To help to ensure their continued ability to serve their communities, the state should be required to bridge the reimbursement gap for the past few years stemming from lack of compliance with the law.