Maryland General Assembly
Department of Legislative Services

Proposed Regulations
Department of Health and Mental Hygiene
(DLS Control No. 16-032)

Overview and Legal and Fiscal Impact

The regulations conform current regulations with the guidance provided by the Centers for Medicare and Medicaid Services (CMS) to state Medicaid directors regarding a change in federal "free care" policy. Providers are no longer prohibited from billing Medicaid for services provided free of charge to other patients. The intent of the federal policy change is to "ensure that Medicaid payment is allowed for any covered services for Medicaid-eligible beneficiaries when delivered by Medicaid-qualified providers."

The regulations present no legal issues of concern.

Regulations of COMAR Affected

Department of Health and Mental Hygiene:

Medical Care Programs:
Nurse Practitioner Services: COMAR 10.09.01.06
Physicians' Services: COMAR 10.09.02.07
Home Health Services: COMAR 10.09.04.07
Dental Services: COMAR 10.09.05.07
Freestanding Clinics: COMAR 10.09.08.07 and .10
Medical Laboratories: COMAR 10.09.09.07
Disposable Medical Supplies and Durable Medical Equipment: COMAR 10.09.12.07
Vision Care Services: COMAR 10.09.14.07
Podiatry Services: COMAR 10.09.15.07
Physical Therapy Services: COMAR 10.09.17.06
Oxygen and Related Respiratory Equipment Services: COMAR 10.09.18.07
Nurse Midwife Services: COMAR 10.09.21.07
Free-Standing Dialysis Facility Services: COMAR 10.09.22.07
Early and Periodic Screening, Diagnosis and Treatment (EPSDT) Services: COMAR 10.09.23.05
Home Care for Disabled Children Under a Model Waiver: COMAR 10.09.27.06
Residential Treatment Center Services: COMAR 10.09.29.07
Therapeutic Behavioral Services: COMAR 10.09.34.04
Nurse Anesthetist Services: COMAR 10.09.39.06
Free-Standing Medicare-Certified Ambulatory Surgical Centers: COMAR 10.09.42.06
Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) Audiology Services: COMAR 10.09.51.07
Service Coordination for Children with Disabilities: COMAR 10.09.52.06
Home/Community Based Services Waiver for Older Adults: COMAR 10.09.54.22

Urgent Care Centers: COMAR 10.09.77.06
Increased Community Services (ICS) Program: COMAR 10.09.81.40 and .41
Provider-Based Outpatient Oncology Facilities: COMAR 10.09.82.06
Free-Standing Independent Diagnostic Testing Facilities: COMAR 10.09.87.07
Portable X-ray Providers: COMAR 10.09.88.07
Intensive Behavioral Health Services for Children, Youth, and Families: COMAR 10.09.89.15

Legal Analysis

Background

CMS sent a letter dated December 15, 2014 to state Medicaid directors providing guidance regarding the application of a "free care" policy. The letter explained that the historic CMS guidance on free care generally prohibited Medicaid payment for a service that was available without charge to a beneficiary, with specified statutory and policy exceptions. In response to a challenge to the "free care" policy, the CMS Departmental Appeals Board concluded that the policy was not an "interpretation of either the Medicaid statute or existing regulations." The letter explained that "the free care policy as previously applied effectively prevented the use of Medicaid funds to pay for covered services furnished to Medicaid eligible beneficiaries when the provider did not bill the beneficiary or any other individuals for the services." According to CMS, the "goal of this new guidance is to facilitate and improve access to quality healthcare services and improve the health of communities."

Summary of Regulations

The regulations conform current regulations with the guidance provided by CMS to Medicaid directors regarding a change in federal "free care" policy. Providers are no longer prohibited from billing Medicaid for services provided free of charge to other patients. The intent of the federal policy change is to "ensure that Medicaid payment is allowed for any covered services for Medicaid-eligible beneficiaries when delivered by Medicaid-qualified providers."

If a service is free to individuals not covered by Medicaid, the following providers may charge the Maryland Medical Assistance Program the provider's customary charge for the services and are required to be reimbursed as specified in the appropriate Maryland Medical Assistance Program Provider Fee Manual. A provider is required to be paid the lessor of (1) the provider's customary charge to the general public unless the service is free to individuals not covered by Medicaid or (2) the maximum specified rates according to the appropriate fee schedule. In addition, the regulations repeal language that prohibited the following providers from charging the program for services which are provided to the general public at no charge. The regulations apply to the following:

- Nurse Practitioner Services under COMAR 10.09.01.06
- Physicians' Services under COMAR 10.09.02.07

- Dental Services under COMAR 10.09.05.07
- Freestanding Family Planning and Abortion Clinics under COMAR 10.09.08.07 and .10
- Disposable Medical Supplies and Durable Medical Equipment under COMAR 10.09.12.07
- Vision Care Services under COMAR 10.09.14.07
- Podiatry Services under COMAR 10.09.15.07
- Physical Therapy Services under COMAR 10.09.17.06
- Oxygen and Related Respiratory Equipment Services under COMAR 10.09.18.07
- Nurse Midwife Services under COMAR 10.09.21.07
- Residential Treatment Center Services under COMAR 10.09.29.07
- Nurse Anesthetist Services under COMAR 10.09.39.06
- Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) Audiology Services under COMAR 10.09.51.07
- Home/Community Based Services Waivers for Older Adults under COMAR 10.09.54.22
- Urgent Care Centers under COMAR 10.09.77.06

For the following providers, the regulations repeal language that prohibited the providers from charging the program for services which are provided to the general public at no charge:

- Home Health Services under COMAR 10.09.04.07
- Medical Laboratories under COMAR10.09.09.07
- Free-Standing Dialysis Facility Services under COMAR 10.09.22.07
- Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) Services under COMAR 10.09.23.05
- Therapeutic Behavioral Services under COMAR 10.09.34.04
- Free–Standing Medicare-Certified Ambulatory Surgical Centers under COMAR 10.09.42.06
- Service Coordination for Children with Disabilities under COMAR 10.09.52.06
- Provider-Based Outpatient Oncology Facilities under COMAR 10.09.82.06
- Free-Standing Independent Diagnostic Testing Facilities under COMAR 10.09.87.07
- Portable X-ray Providers under COMAR 10.09.88.07
- Intensive Behavioral Health Services for Children, Youth, and Families under COMAR 10.09.89.15

If a service is free to individuals not covered by Medicaid, the following providers may charge the Maryland Medical Assistance Program the provider's customary charge for the services and are required to be reimbursed as specified in the appropriate Maryland Medical Assistance Program Provider Fee Manual. In addition, for the following providers, the provider's reimbursement is not limited to the provider's customary charge:

- Home Health Care for Disabled Children Under a Model Waiver under COMAR 10.09.27.06

- General Medical Assistance Provider Participation Criteria under COMAR 10.09.36.01 and .03

For a provider of Home Health Services under COMAR 10.09.04.07, the provider is required to be paid the lessor of (1) the provider's customary charge to the general public unless the service is free to individuals not covered by Medicaid or (2) the rate in accordance with the department's fee schedule. In addition, the department is required to pay home health providers for medical and other supplies which are used during a covered home health visit as part of the treatment ordered by the recipient's attending physician at a rate that is the lesser of the (1) provider's customary charge to the general public unless the service is free to individuals not covered by Medicaid or (2) the Medicaid rate for the supply or pharmaceutical under COMAR 10.09.12 and 10.09.03.

For a provider under the Home and Community-Based Options Waiver under COMAR 10.09.54.22, the provider is required to be paid the lessor of (1) the provider's customary charge to the general public unless the service is free to individuals not covered by Medicaid or (2) the rate established according to the fee schedule published by the department.

For a transition services provider, a qualified environmental assessment provider, an environmental accessibility adaptations provider, and an assisted living services provider providing services in accordance with the Increased Community Services Program under COMAR 10.09.81, the provider is required to be paid the lessor of (1) the provider's customary charge to the general public unless the service is free to individuals not covered by Medicaid or (2) the rate established in COMAR 10.09.81.41. If a service is free to individuals not covered by Medicaid, the provider (1) is authorized to charge the program; and (2) is required to be reimbursed in accordance with the appropriate fee schedule. The reimbursement of a provider is not limited to the provider's customary charge.

Legal Issues

The regulations present no legal issues of concern.

Statutory Authority and Legislative Intent

The Department of Health and Mental Hygiene cites §§ 2-104, 15-103, 15-105, 15-129, and 15-132 of the Health – General Article as statutory authority for the regulations. Section 2-104(b)(1) authorizes the Secretary of Health and Mental Hygiene to adopt regulations to carry out the provisions of law that are within the jurisdiction of the Secretary. Section 2-104(b)(2) requires the Secretary to adopt regulations to govern the siting of community residences for special populations. Section 2-104(n) authorizes the Secretary to adopt regulations establishing fees not to exceed an amount sufficient to cover the administrative costs associated with specified inspections or investigations and specified permits, licenses, certifications, or registrations. Section 15-103 requires the Secretary to administer the Maryland Medical Assistance Program. Section 15-105 requires the Secretary to adopt regulations for the reimbursement of providers under the program.

To determine whether the prices charged for durable medical equipment provided to program recipients are reasonable, § 15-129 requires the department to establish regulations and procedures for reviewing the prices of durable medical equipment every three years. Section 15-132 requires the department to adopt regulations to carry out provisions of law relating to the determination of an individual to be medically eligible to receive home and community based services under a home- and community-based services waiver under § 1915(c) of the federal Social Security Act. In consultation with representatives of the affected industry and advocates for waiver candidates, and with the approval of the State Department of Aging, § 15-132 requires the department to adopt regulations to implement provisions of law relating to the Medicaid waiver.

This authority is correct and complete. The regulations comply with the legislative intent of the law.

Fiscal Analysis

Medicaid expenditures (60% federal funds, 40% general funds) may increase by an indeterminate but likely minimal amount beginning in fiscal 2017.

Agency Estimate of Projected Fiscal Impact

The regulations update language to reflect repeal of the previous prohibition against providers billing Medicaid for services provided free of charge to other patients. This conforms with a recent change in federal policy. The regulations allow Medicaid to reimburse providers for services given at no charge to the public – services that are not currently reimbursable. The department advises that Medicaid expenditures (60% federal funds, 40% general funds) may increase beginning in fiscal 2017. However, given that few providers deliver services at no charge, the impact is anticipated to be minimal. The Department of Legislative Services concurs.

Impact on Budget

Medicaid expenditures (60% federal funds, 40% general funds) may increase by an indeterminate but likely minimal amount beginning in fiscal 2017.

Agency Estimate of Projected Small Business Impact

The department advises that the regulations have minimal or no economic impact on small businesses in the State. The Department of Legislative Services concurs.

Contact Information

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