



March 31, 2015

Andrew Slavitt
Acting Administrator
Centers for Medicare and Medicaid Services
200 Independence Avenue, SW
Room 445-G
Washington, DC 20201

RE: Final 2016 Letter to Issuers in the Federally-Facilitated Marketplaces

Dear Acting Administrator Slavitt:

On behalf of Kidney Care Partners (KCP), I am writing to urge the Centers for Medicare and Medicaid Services (CMS) to clarify that insurance plans in the Federally-Facilitated Marketplaces (Marketplaces) must accept premium and cost-sharing payments on behalf of enrollees from non-profit charitable organizations, such as the American Kidney Fund (AKF), consistent with its previous guidance on this topic. Patients with kidney failure have relied upon the support and assistance of the AKF for more than 40 years. They should be allowed to continue to do so within the Marketplaces as well.

KCP is an alliance of members of the kidney care community that includes patient advocates, dialysis care professionals, providers, and manufacturers organized to advance policies that improve the quality of care for individuals with both chronic kidney disease (CKD) and irreversible kidney failure, known as End-Stage Renal Disease (ESRD).

AKF is a qualified public charity, founded in 1971, whose mission is to help people fight kidney disease and live healthier lives. One of AKF's core mission components is to help low-income dialysis patients in the United States access health care. One of AKF's grant programs is the Health Insurance Premium Program (HIPP), established in 1997. In reviewing this program, the Office of the Inspector General (OIG) has concluded that AKF is a "bona fide 501(c)(3) charitable and educational organization."¹ The OIG also indicated that AKF reviews patient applications for HIPP assistance based upon "assessment of need and eligibility criteria." HIPP assistance is available to all individuals with kidney failure who rely on dialysis for survival. AKF's HIPP is not a "healthcare provider or commercial entity"² seeking to skew the risk pool, but rather like the Ryan White HIV/AIDS

¹OIG, Advisory Opinion 97-1.

² See 79 Fed. Reg. at 15241.

Program, “a core medical service for eligible low-income people”³ living with a chronic disease.

KCP requests that CMS clarify that Qualified Health Plans (QHPs), including Stand-Alone Dental Plans (SADPs),⁴ must accept payments from the AKF. Prior to last year, there was no restriction on such payments. In November 2013 guidance, for example, CMS did not include non-profit charitable organizations in the list of organizations about which it had concerns when they assist patients with premium payments.⁵ In February of 2014, CMS specifically affirmed this interpretation and stated that “the concerns addressed in the November 4, 2013, FAQ would not apply to payments from private, not-for-profit foundations” if “they are made on behalf of QHP enrollees who satisfy defined criteria that are based on financial status and do not consider enrollees’ health status.”⁶

However, more general statements made later in 2014 have created significant confusion in the Marketplaces. The Interim Final Rule from 2014 stated: “We continue to discourage such third party payments of premiums and cost sharing, and we encourage QHPs and SADPs to reject these payments.”⁷ It appears that “such” refers to “hospitals, other healthcare providers, and other commercial entities,” but the connection is not clear. The language does not address how payments from non-profit, charitable organizations should be treated. The February 2015 letter only adds to the confusion by again staying silent as to the status of such payments.

In light of this sentence, however, Marketplace plans have refused to accept payments from the AKF. This practice has put patients who depend upon the AKF to maintain their insurance at risk of losing their coverage. For example, in Nebraska, BCBS of Nebraska informed its patients that it would no longer accept third-party payments. Premera Blue Cross in Washington has also made a similar announcement. In Oregon, Marketplace plans have been transparent in admitting they do not want to accept third party payments, expressing concerns about the cost of treatment. These plans make no distinction between non-profit charitable organizations and other entities.

While some states, such as Louisiana and New York, have implemented or are working on legislative solutions to protect patients, taking a state-by-state

³ See *Id.* at 15242.

⁴ Having access to dental plans is critically important to people living with kidney failure who are seeking a transplant. These patients must have their dental problems resolved before they can be placed on the transplant list.

⁵ CMS, “Third Party Payments of Premiums for Qualified Health Plans in the Marketplaces” (Nov. 4, 2013) (November Guidance).

⁶ CMS, “Third Party Payments of Premiums for Qualified Health Plans in the Marketplaces” 2 (Feb. 7, 2014) (February Guidance).

⁷ See 79 Fed. Reg. at 15241.

approach is a lengthy process and leaves patients in limbo while the issue is fought out in each state legislature. Given that CMS has already opined in previous guidance, it would be more appropriate for the Agency to issue a clarification and establish a clear and consistent protection for these patients regardless of where they live.

Providing clarification would also align this policy with one of the core components of the ACA — prohibiting discrimination based on health status.⁸ Consistent with previous guidance, individuals who have kidney failure should have access to financial assistance programs provided by non-profit charitable organizations in the same way that individuals living with HIV/AIDS have access to Ryan White funds. Marketplace plans that refuse to accept payments from AKF are making a distinction without merit and discriminating against individuals living with kidney failure. Both the Ryan White HIV/AIDS program and the AKF HIPP program have been acknowledged by the federal government – one through statute and the other through the OIG Advisory Opinion; both provide assistance based upon the financial need of patients seeking help; and both provide a core service to patients living with their respective diseases. Therefore, CMS should clarify that payments from the AKF should be treated the same by QHPs and SADPs as those from the Ryan White HIV/AIDS program.

In the 18 years since AKF launched the HIPP program, AKF has provided premium support and cost-sharing assistance to Medicare beneficiaries so that they can maintain their Medigap policies, as well as their Medicare Part B, COBRA, and other commercial insurance. During these nearly two decades, there have been no questions or concerns raised about this assistance skewing the risk pool for these plans.

People living with kidney failure have come to rely upon AKF's HIPP. In 2014, AKF provided direct assistance to patients in all 50 states, the District of Columbia and every U.S. territory. As the OIG summarized in its Advisory Opinion: "AKF is a bona fide, independent, publicly-funded, 501(c)(3) charitable organization whose charitable purposes include aiding ESRD patients and their families."⁹ There is no evidence to support the conclusion that allowing AKF to continue to provide premium support and cost-sharing assistance to those enrolled in QHPs and SADPs, as it does today with other types of insurance programs, would inappropriately skew the risk pool. Therefore, we strongly encourage CMS to protect the patients living with kidney failure who now and in the future will rely upon AKF's HIPP to assist them with the cost of maintaining coverage, as it has chosen to do for those living with HIV/AIDS.

⁸See, e.g., Public Health Service Act § 2705.

⁹ OIG at 6.

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We appreciate having the opportunity to provide comments on the Interim Final Rule. Please do not hesitate to contact Kathy Lester at klester@lesterhealthlaw.com or at (202) 534.1773 to answer any questions or arrange a discussion.

Sincerely,

A handwritten signature in black ink, appearing to read "Edward R. Jones, M.D.", written in a cursive style.

Edward R. Jones, M.D.

Chairman

Kidney Care Partners

Members of Kidney Care Partners

AbbVie
Akebia Therapeutics, Inc.
American Kidney Fund
American Nephrology Nurses' Association
American Renal Associates, Inc.
American Society of Nephrology
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