North Carolina
Healthcare Association

Uniting hospitals, health systems and
care providers for healthier communities

September 13, 2018

Ms. Amber Cronk May
North Carolina Rules Review Commission
Raleigh, North Carolina

Re: 10A NCAC 22J.0106
10A NCAC 22F.0301

Submitted by email: rrc.comments@oah.nc.gov

Dear Ms. May:

On behalf of the North Carolina Healthcare Association (NCHA), please find our comments objecting to the revisions to the following two rules: 10A NCAC 22J.0106 and 10A NCAC 22F.0301. NCHA represents 130 hospitals and health systems in this State, including 26 critical access hospitals and numerous safety net hospitals.

NCHA understands and acknowledges the need in 10A NCAC 22J.0106 to inform Medicaid patients in advance if the provider does not accept the patient as a Medicaid patient and therefore will bill the patient in lieu of billing Medicaid. However, the proposed revisions to the rule go beyond this and put hospitals at risk for not being able to bill the patient due to an inadvertent billing error. It is our understanding that the Division of Health Benefits interprets the rule to prohibit providers from billing a patient who has no Medicaid coverage for the services provided if the patient meets the definition of "a patient accepted as a Medicaid patient." Under subsection (b), it appears that providers are deemed to have accepted the patient as a Medicaid patient if they file a claim with Medicaid for the services provided.

Providers in North Carolina saw 46 million visits from Medicaid patients last year. A significant number of Medicaid patients coming to the hospital (nearly one out of every 8 beneficiaries) have limited coverage – just for family planning services, not actual Medicaid coverage. However, these patients have been issued a Medicaid ID card and present to the hospital with that card. The resulting confusion for hospital registration personnel and billing systems sometimes leads to hospitals billing the Medicaid program inadvertently. These patients are typically uninsured and will likely fall under the hospital's charity or financial assistance policy. Nevertheless, the patient may still be responsible for some portion of the bill. The hospital should be able to properly bill these patients for the services provided when Medicaid has determined there is no actual Medicaid coverage for these services. The same is true when Medicaid is inadvertently billed for a patient covered under Medicaid but whose treatment or procedure was not covered by Medicaid.

We are aware of no prohibition under federal Medicaid law requiring states to prohibit providers from properly billing the patient in the above situations. We also see no basis of authority for the Division to prohibit patient billing in these limited situations where Medicaid does not cover the patient or the service. Because this rule is not authorized by federal or state law, it is objectionable under N.C.G.S. § 150B-21.9(a)(1) and should not be approved.

Rule 10A NCAC 22F.0301 revises the definition of abuse in the Provider Abuse section of the rules. NCHA supports a strong Medicaid fraud and abuse program to ensure program integrity. However, rules regarding fraud and abuse, including the definition of what constitutes abuse, must be clear and fairly applied. It is unclear from the rule's wording ("Program abuse by providers as used in this Chapter *includes*:") whether the list of 8 areas constituting abuse is exhaustive or a list of examples. Our understanding is that the Department and the Attorney General have the latter interpretation. This broad interpretation leaves too much discretion for the agency to decide what actions constitute abuse, particularly given that civil or criminal penalties may be applied to conduct labeled as abuse. Providers should have fair notice of what conduct the Department considers abusive and subject to penalties. The rule should be revised, at a minimum, to state one of the following:

- Program abuse by providers as used in this Chapter *includes only:*
- Program abuse by providers *means:*[1]
- Program abuse by providers *includes the practices specifically enumerated in this section:*[2]

In addition, item 5 on the list of practices that the Division may determine constitutes abuse is "violation of the Provider Participation Agreement." NCHA has worked with the Department of Health and Human Services and the Attorney General's Office in the past on the wording of the Provider Participation Agreement. The Agreement is broad and covers a number of requirements, including such issues as the time limit on filing a claim and reporting changes in a provider's phone number to the Department. In incorporating the proposed Rule by reference and providing no qualifying materiality standard, the rule potentially subjects providers to discretionary determinations that minor issues and issues not impacting Medicaid program integrity are abusive, thereby invoking potential penalties against providers. Again, providers need fair notice of what the Department considers abuse.

NCHA believes the overbreadth of 10A N.C.A.C. 22F.0301 is not authorized by federal law and is beyond any authority delegated to the agency by the General Assembly, making it objectionable under N.C.G.S. § 150B-21.9(a)(1). In addition, this rule is objectionable under N.C.G.S. § 150B-21.9(a)(2) because it is not "clear and unambiguous" given its open-ended nature.

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[1] See, for example, the federal definition of abuse for Medicaid: 42 CFR 455.2 ("Abuse *means* provider practices…")

[2] See, for example, NY State Medicaid regulations, Title 18, sec. 515.2 ("An unacceptable practice is conduct which constitutes fraud or abuse and *includes the practices specifically enumerated in this subdivision*:

For these reasons, NCHA respectfully objects to the above two rules.

With best regards,

Linwood Jones
Senior Vice President and General Counsel

cc: Ms. Virginia Niehaus, DHB Rulemaking Coordinator
(virginia.niehaus@dhhs.nc.gov)