



July 28, 2021

The Honorable Xavier Becerra
Secretary
U.S. Department of Health and Human
Services
Hubert H. Humphrey Building
200 Independence Avenue, SW
Washington, DC 20201

The Honorable Janet Yellen
Secretary
U.S. Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, D.C. 20220

RE: (CMS-9906-P) Patient Protection and Affordable Care Act; Updating Payment Parameters, Section 1332 Waiver Implementing Regulations, and Improving Health Insurance Markets for 2022 and Beyond Proposed Rule

Dear Secretary Becerra and Secretary Yellen:

The undersigned members of the Habilitation Benefits (HAB) Coalition appreciate the opportunity to provide comment on the Centers for Medicare and Medicaid Services (“CMS”) and the Department of the Treasury’s proposed rule *Patient Protection and Affordable Care Act; Updating Payment Parameters, Section 1332 Waiver Implementing Regulations, and Improving Health Insurance Markets for 2022 and Beyond* (the Proposed Rule).

The HAB Coalition membership includes national nonprofit consumer and clinical organizations focused on securing and maintaining appropriate access to, and coverage of, habilitation benefits within the category known as “rehabilitative and habilitative services and devices” in the EHB package under existing federal law. The HAB Coalition has worked hard over the past several years to ensure full and appropriate implementation of the ACA’s reforms at the federal and state levels with the ultimate goal of eliminating decision-making based on health status in the individual and small group markets, which disproportionately impacts people with disabilities and chronic conditions.

About Habilitation Devices and Services and History as an Essential Health Benefit

Habilitation services and devices are provided by appropriately credentialed (licensed, accredited, and certified) providers to individuals with many types of developmental, cognitive, physical, and mental conditions that, in the absence of such services, prevent those individuals from acquiring certain skills and functions over the course of their lives. Habilitation services are closely related to rehabilitation services, although there are key differences between the two.



Whereas *rehabilitation services* are provided to help a person regain, maintain, or prevent deterioration of a skill that has been acquired but then lost or impaired due to illness, injury, or disabling condition, *habilitation services* are provided in order for a person to attain, maintain, or prevent deterioration of a skill or function never learned or acquired due to a disabling condition.

The types of habilitation services and devices include, but are not limited to, physician services; physical therapy; occupational therapy; speech, language and hearing therapies; recreational therapy; music therapy and cognitive therapy for people with brain injuries and other conditions; psychiatric, behavioral and other developmental services and supports; durable medical equipment (DME), including complex rehabilitation technologies; orthotics and prosthetics; low vision aids; hearing aids, cochlear implants, and augmentative communication devices; and other assistive technologies and supplies. Habilitation services:

- Improve long-term function and health status and improve the likelihood of independent living and quality of life;
- Halt or slow the progression of primary disabilities by maintaining function and preventing further deterioration of function;
- Enable persons with developmental, intellectual, physical or cognitive impairments to improve cognition and functioning through appropriate therapies and assistive devices.

The ACA created in statute the EHB category of “rehabilitative and habilitative services and devices.” In the February 2015 Notice of Benefits and Payment Parameters Final Rule, the Centers for Medicare and Medicaid Services (CMS) defined “habilitation services and devices” using the definition of “habilitation services” from the National Association of Insurance Commissioners’ *Glossary of Health Coverage and Medical Terms*¹ and explicitly added habilitation devices, as follows:

“Habilitation services and devices— Cover health care services and devices that help a person keep, learn, or improve skills and functioning for daily living. Examples include therapy for a child who is not walking or talking at the expected age. These services may include physical and occupational therapy, speech-language pathology, and other services for people with disabilities in a variety of inpatient and/or outpatient settings.”²

For the first time, this definition established a uniform, understandable federal definition of habilitation services and devices that became a standard for national insurance coverage.

The HAB Coalition Supports The CMS/Treasury Proposal to Rescind the 2018 Guidance on Interpretation of the 1332 Regulations Statutory Guardrails

¹ <https://www.cms.gov/CCIIO/resources/files/downloads/uniform-glossary-final.pdf>.

² <http://www.gpo.gov/fdsys/pkg/FR-2015-02-27/pdf/2015-03751.pdf>, at 10871.



In the Proposed Rule, the Department of Health and Human Services (HHS) and the Department of the Treasury (“the Departments”) invite comments on the Departments’ proposal to rescind the 2018 *State Relief and Empowerment Waivers Guidance*³, and the proposal to repeal part 1 of the 2022 *Payment Notice Final Rule*⁴ which codified the 2018 guidance.

In the 2018 guidance, the Departments explained that they would evaluate waivers based on whether coverage that is both comprehensive and affordable is *available* to residents, regardless of whether residents actually enroll in such coverage. Furthermore, the guidance also stated that the Departments would consider section 1332 waivers to satisfy the coverage guardrail requirement if at least as many state residents were projected to be enrolled in comprehensive and less comprehensive health plans combined under the waiver as would be enrolled without the waiver, which would promote enrollment in less comprehensive coverage. As we have in the past, the HAB coalition opposes the 2018 guidance because the relaxation of the guardrails allows states to implement less comprehensive plan offerings, including short-term limited-duration insurance (STLDI) and association health plans (AHPs), which ultimately will limit benefits for some consumers, mainly for individuals who have pre-existing conditions, chronic conditions, or disabilities.

The HAB coalition is especially concerned that if the guardrail flexibility were to remain in place that states using the new flexible 1332 waiver process could decide to cover only nominal habilitative services and devices, or otherwise limit the scope of these benefits. Using the Section 1332 waiver guidance to expand access to STLDI plans and AHPs that can choose not to offer these necessary benefits would negatively impact patient access to comprehensive care.

For all these reasons, the HAB coalition is supportive of the Departments’ proposal to rescind the 2018 guidance on 1332 waivers, and the codification of the guidance in part 1 of the 2022 *Payment Notice Final Rule*. We agree with the Departments’ belief that policies that expand coverage, lower costs, and make high quality health care available for all Americans, including individuals with disabilities should be adopted.

Furthermore, we applaud the Departments’ focus on ensuring that 1332 waivers take into account the effects that they will have across different populations, and, in particular, effects on vulnerable and underserved residents. This includes individuals with serious health issues or those who have a greater risk of developing serious health issues, and people of color and others who have been historically underserved, marginalized, and adversely affected by persistent poverty and inequality. Many individuals who have come to rely on habilitation services are individuals who have a disability or chronic condition, who without these services could face additional loss to their health or functional ability. Limiting access to habilitation benefits could also create significant cost barriers for many individuals.

³ 83 FR 53575.

⁴ 85 FR 6138.



Proposal for CMS to Also Rescind Benchmark Plan Selection Flexibilities

In line with the Departments' belief that policies should be adopted that expand coverage, lower costs, and make high quality health care available for all Americans, including individuals with disabilities, the HAB coalition also asks that the Departments rescind the benchmark plan selection flexibilities and benefit substitutions between EHB categories included in the *2019 Notice of Benefit and Payment Parameters Regulation*.⁵ The benchmark flexibilities and benefit substitutions established in this regulation allow states to select another state's EHB plan or replace one or more EHB categories. These changes will allow states to select a more limited benefit package, rather than the current benefit standard in their state's benchmark plan and can discourage the enrollment of high-risk individuals. These decisions may be made without sufficient regard to those in need of habilitative services and devices in their state.

Enactment of the EHB package in 2010 dramatically increased access to habilitation services and devices for children and adults. Coverage gains for habilitation services and devices were hard fought but necessary to meet the needs of a wide variety of children and adults with autism, cerebral palsy, congenital deficits, disabilities, and other chronic and progressive conditions. Through the ACA, individuals and families have come to rely on coverage of habilitation services and devices by their plans. Any change in the benchmark allowed through these flexibilities could have a significant impact on individuals who have a disability or chronic condition and require habilitation services and devices to improve, maintain, or prevent the loss of their health and functional ability. To fully ensure that high-quality healthcare is affordable and accessible for everyone, the EHB flexibilities must also be rescinded.

The HAB Coalition Supports Efforts to Maintain ACA Compliant Coverage Options

Our organizations remain steadfast in our support of regulatory efforts that have a positive impact on habilitation coverage, including rolling back federal rules and guidance that allow less-expensive, lower quality insurance such as short-term, limited-duration insurance and employer association health plans that do not guarantee coverage of the EHB package or meet other ACA consumer protections.

The HAB coalition looks forward to working with you and your staff in the coming years. If we can be of any assistance, please do not hesitate to contact the HAB coordinators, Peter Thomas, and Taryn Couture, at 202-466-6550 or by email at Peter.Thomas@PowersLaw.com and Taryn.Couture@PowersLaw.com.

⁵ 83 FR 16930.



Sincerely,

The Undersigned Members of the HAB Coalition

ACCSES

American Academy of Physical Medicine and Rehabilitation

American Association on Health and Disability

American Cochlear Implant Alliance

American Music Therapy Association

American Network of Community Options and Resources

American Occupational Therapy Association

American Physical Therapy Association

American Speech-Language-Hearing Association

American Therapeutic Recreation Association

Children's Hospital Association

Christopher & Dana Reeve Foundation

Family Voices

Lakeshore Foundation

National Association for the Advancement of Orthotics & Prosthetics

National Association of Councils on Developmental Disabilities

CC: Administrator Chiquita Brooks-LaSure