FOLEY HOAG LLP

1717 K Street, N.W.
Washington, DC 20006-5350

202.223.1200 main
202.785.6687 fax

Attorney-Client Privileged
Confidential

Memo

Date:	May 3, 2021
To:	Rory Howe Acting Director, Financial Management Group, CMCS Amber MacCarroll Acting Deputy Director, Financial Management Group, CMCS
cc:	
From:	Thomas R. Barker, Partner Haider Andazola, Associate
Regarding:	Implementation of Section 9817 of the American Rescue Plan Act of 2021

Our client, the American Association of Homecare (AAHomecare), is the national trade association for home medical equipment providers and manufacturers, and other organizations in the homecare community. AAHomecare has asked us to review the scope of the increase to state Medicaid programs' federal matching assistance percentage (FMAP) pursuant to section 9817 of the American Rescue Plan Act of 2021.[1] In particular, AAHomecare has asked us to analyze whether the FMAP increase enacted in section 9817 applies to state Medicaid expenditures for durable medical equipment (DME) generally, or whether it applies only to expenditures for DME furnished in the context of "home and community-based services" (HCBS) under section 1915 of the Social Security Act (the Act).

Based on our review of the statutory language, we conclude that the only possible reading of section 9817 is that the FMAP increase may apply to *both* expenditures for DME under section 1905(a)(7) of the Act *and* for DME that may be furnished in connection with a state Medicaid program's HCBS waiver under section 1915 of the Act. Accordingly, the Center for Medicaid and Children's Health Insurance Program Services (CMCS) should issue clarifying guidance to state Medicaid programs in the form of a State Medicaid Director Letter (SMDL) stating that States may leverage the 10% FMAP increase to offset expenditures for DME even outside of an approved 1915 HCBS waiver.

[1] "American Rescue Plan Act of 2021," Pub. L. No. 117-2, (March 11, 2021).

We discuss our legal analysis in more detail below.

I. BACKGROUND

A. Section 9817 of the American Rescue Plan Act of 2021

In response to the unprecedented COVID-19 pandemic and the financial strain it caused on state Medicaid programs, Congress enacted section 9817 of the American Rescue Plan Act of 2021 to provide for a temporary 10% increase in the State's FMAP for "home and community-based services" as specifically defined by section 9817(a)(2)(B). Section 9817(a)(2)(B) defines "home and community-based services" to include "any" of the following:

> (i) home health care services authorized under paragraph (7) of section 1905 of the Social security Act
> …
> (iv) Home and community-based services authorized under [section 1915 of the Act], such services authorized under a waiver under section 1115 of such Act, and such services through coverage authorized under section 1937 of such Act (42 U.S.C. 1396u-7)….

To qualify for the increased FMAP, however, States must comply with "HCBS program requirements," which are defined in section 9817(b). The "HCBS program requirements" under section 9817(b)(1)-(2) require that States (1) supplement, not supplant, the level of State funds expended for "home and community-based services" for eligible individuals through programs in effect as of April 1, 2021, and (2) implement, or supplement the implementation of one or more "activities"[2] to enhance/expand/strengthen "home and community-based services" under the State Medicaid program.

The temporary 10% FMAP increase applies for the period between April 1, 2021 through March 31, 2022.[3]

II. DISCUSSION

A. Section 9817 unambiguously authorizes State Medicaid programs to use the 10% FMAP increase to offset expenditures for DME generally.

Although the phrase "home and community-based services" is commonly used to generally describe Medicaid services furnished under section 1915 of the Act, section 9817 of the American Rescue Plan Act defines "home and community-based services" more broadly for the purposes of the 10% FMAP increase. Specifically, section 9817 defines "home and community-based services" to include *either* "home health care services" under section 1905(a)(7) of the Act *or* "home and community-based services" as authorized under section 1915 of the Act.

[2] The law does not define "activities."
[3] § 9817(2)(a)(i)-(ii), American Rescue Plan Act of 2021.

Home health care services have been broadly interpreted by the Centers for Medicare & Medicaid Services (CMS) to encompass durable medical equipment, among other medical supplies and equipment. CMS implemented its interpretation of section 1905(a)(7) at 42 C.F.R. § 440.70(b) wherein the agency defined "home health services" to include "medical supplies, equipment, and appliances for use in any setting in which normal life activities take place…."[4] The regulations define "supplies" as health care related items that are consumable or disposable, or cannot withstand repeated use by more than one individual….".[5] As for defining "equipment," the regulations borrow from the definition of DME applicable to Medicare, but clarify that "State Medicaid coverage of equipment and appliances is not restricted to the items covered as durable medical equipment in the Medicare program."[6]

By its own unambiguous language, section 9817 applies to home health care services under section 1905(a)(7) of the Act, even if, for the purposes of the 10% FMAP increase, section 9817 folds these services under the broader phrase of "home and community-based services." As a result, state Medicaid programs may apply the 10% FMAP increase to expenditures for DME under the state plan without regard to whether the expenditures are associated with expenditures authorized under section 1915 of the Act.

III. CONCLUSION

CMS should issue a SMDL to States setting forth the agency's interpretation of section 9817 and specifically clarify that it allows the 10% FMAP increase to be applied to expenditures for DME under the state plan without regards to whether such expenditures are associated with a section 1915 HCBS waiver.

[4] 42 C.F.R. § 440.70(b)(3).
[5] *Id.* at § 440.70(b)(3)(i).
[6] *Id.* at § 440.70(b)(3)(ii).