New Mexico Hospital Association

March 26, 2020

Via electronic mail: CMS, Dallas Regional Office, RODALDSC@cms.hhs.gov

Re: Request for Waivers under Section 1135 of the Social Security Act Related to COVID-19 Emergency

To Whom it May Concern:

On behalf of all Medicare-participating hospitals in New Mexico, the New Mexico Hospital Association ("NMHA") writes to request approval for certain waivers under section 1135 of the Social Security Act as related to the Novel Coronavirus Disease ("COVID-19") pandemic. As you know, the Secretary of Health & Human Services (the "Secretary") invoked his authority under section 1135 on March 13, 2020 (the "Secretary's 1135 Waiver") in light of the President's declaration of a national emergency earlier that day, and the Secretary's prior declaration of a nationwide health emergency on January 31, 2020. The Secretary has authorized a waiver of modification of certain federal requirements pertaining to Medicare, Medicaid, and the Children's Health Insurance Program ("CHIP") as necessary to ensure that:

- "[S]ufficient health care items and services are available to meet the needs" of beneficiaries in these programs; and
- Providers may be reimbursed for, and protected against sanctions in connection with, services furnished in good faith during the emergency, notwithstanding their inability to comply certain program requirements as a result of the emergency situation created by COVID-19.[1]

This letter serves to:

- Notify the Centers for Medicare & Medicaid Services ("CMS") that Medicare-participating hospitals in New Mexico are exercising the flexibilities granted in the

[1] Waiver or Modification of Requirements Under Section 1135 of the Social Security Act, Public Health Emergency, U.S. Dep't of Health & Human Services ("HHS") (Mar. 13, 2020), https://www.phe.gov/emergency/news/healthactions/section1135/Pages/covid19-13March20.aspx.

Secretary's 1135 Waiver, the blanket waiver issued by CMS on March 13, 2020,[2] as well as any subsequently released blanket waivers; and

- Request that CMS approve certain additional blanket waivers with respect to Medicare-participating hospitals in New Mexico (or nationwide), as described in greater detail below.

Request for Additional Flexibilities under Section 1135

1. **Waive sanctions under section 1867 of the Social Security Act (the Emergency Medical Treatment and Labor Act ("EMTALA")), pursuant to section 1(c) of the Secretary's 1135 Waiver.**

    a. **Allow hospitals to screen or triage patients at a location offsite from the hospital's campus**. CMS has issued guidance permitting hospitals to set up alternate locations to perform medical screening examinations. In an effort to prevent the transmission of COVID-19, hospitals should be permitted to screen in off-campus hospital-controlled sites.

    b. **Allow hospitals to transfer unstabilized patient as necessitated by the public health emergency.** To minimize the spread of infection, it may be necessary to transfer an unstabilized patient to a different facility to separate patients with and without COVID-19.

2. **Waive or modify certain Conditions of Participation ("CoPs") for Medicare-participating hospitals, pursuant to section 1(a) of the Secretary's 1135 Waiver.[3]**

    a. **Suspend the "Physical Environment" requirements for alternate screening or patient care sites** (42 C.F.R. § 482.41). CMS has already granted waivers permitting certain facilities to be reimbursed for services rendered during an emergency evacuation to an unlicensed facility. In a similar vein, CMS should provide assurances to hospitals that are currently in the process of standing up on- and off-campus COVID-19 screening and testing sites, including makeshift facilities. Due to the temporary nature of these facilities, they may be unable to meet certain CoPs pertaining to physical premises. Similarly, if patient demand exceeds licensed capacity, hospitals may need to use area not designed for patient care in order to preserve access to beds for those with the greatest needs. All temporary screening and patient care facilities would ensure patient safety and comfort. Encompassed within this request is the ability for hospitals to provide care to patients in their vehicles at drive-through testing sites.

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[2] COVID-19 Emergency Declaration Health Care Providers Fact Sheet, CMS (Mar. 13, 2020), https://www.cms.gov/files/document/covid19-emergency-declaration-health-care-providers-fact-sheet.pdf.

[3] Some of these requested flexibilities may, in addition, be available under section 3 of the Secretary's 1135 waiver, which permits CMS to "modify deadlines and timetables and for the performance of required activities."

b. **Permit hospitals to maintain or grant medical staff privileges without adhering to the approval timelines in 42 C.F.R. § 482.22(a)**. To ensure that hospitals can increase provider capacity to and ensure access to care, hospitals should be permitted to disregard provisions in their medical bylaws relating to the timeframe for renewing privileges that are set to expire or granting privileges to new physicians.

c. **Temporarily suspend discharge planning requirements** (42 C.F.R. §§ 482.43(a)(8); 485.642(a)(8)). This will enable hospitals to discharge patients who no longer need acute care to post-acute providers that can accept them in an efficient manner to free up beds for acutely ill patients.

d. **Allow hospitals to treat medical/surgical patients in non-PPS hospitals (e.g. long-term care hospitals).** This would ensure that psychiatric or rehab units can be utilized for acute care, and that acute care is paid as acute care. CMS has already given hospitals the flexibility to treat medical/surgical patients in distinct part units; this waiver request builds on that existing flexibility.

e. **Allow verbal orders to be used more than "infrequently" (conditional on read-back verification) and extend the timeframe for authentication beyond 48 hours** (42 C.F.R. § 482.24; CoPs A-0407, A-0454, A-0457). This waiver would provide the flexibility for medical staff to work most efficiently.

f. **Temporarily suspend certain requirements relating to patient rights** (42 C.F.R. § 482.13). As patient volume and acuity continue to escalate, hospitals and practitioners would be better positioned to meet keep pace with patient needs if they were temporarily relieved of the obligation to provide each patient with an individual notice of rights on the timeline required under the CoPs. In addition, hospitals should be permitted to prioritize care and safety by temporarily suspending their grievance process for non-urgent concerns. Finally, the high expected demand (including the need to care for patients in non-typical locations) may make it infeasible for hospitals to maintain existing standards with respect to personal privacy rights, visitors, and seclusion.

g. **Relax certain standards relating to protective equipment during sterile compounding** (42 C.F.R. § 482.25). To conserve face masks, which likely are to be in short supply, we request that personnel engaged in sterile compounding be allowed to remove and retain face masks in the compounding area to be re-donned and used throughout a single work shift.

3. **Waive or modify certain certification requirements in 42 C.F.R. Part 491 for Rural Health Clinics ("RHCs") and Federally Qualified Health Centers ("FQHCs"), pursuant to section 1(a) of the Secretary's 1135 Waiver.** Like hospitals, RHCs and FQHCs must meet growing patient demand while seeking to minimize the risk of contagion among patients and staff. Suspending certain certification requirements would permit RHCs to establish additional or alternative temporary locations (which could be regarded as extensions of the originating clinic, or as separate clinics in their own right). This flexibility would support crucial COVID-19 response efforts by safety-net providers in underserved areas.

4. **Waive sanctions under section 1877(g) of the Social Security Act (the "Stark Law," which limits certain types of physician referrals), pursuant to section 1(d) of the Secretary's 1135 Waiver**. This will allow hospitals to ensure adequate coverage by entering into temporary compensation arrangements and engaging in recruitment activities that might otherwise present risks under the Stark Law.
5. **Modify certain deadlines and timetables to minimize non-essential administrative burdens on providers, pursuant to section 3 of the Secretary's 1135 Waiver.**
    a. **Extend the timeframe for hospitals to provide patients with information about advance directives policies** (42 U.S.C. §§ 1396a(a)(54), 1395cc(a)(1)(57), (w); 42 C.F.R. § 489.102). Under current law, hospitals must provide this information to patients "upon admission." This is usually accomplished by the bedside nurse, whose attention may be required to meet other, more immediate patient care needs. This waiver would not apply to the requirement that hospitals *inquire* about the presence of an advance directive.
    b. **Temporarily suspend any non-critical reporting requirements or other administrative deadlines**. All hospital staff—clinical and administrative—should be permitted to dedicate their full attention to the health and safety of their patients and colleagues. CMS should consider suspending any timelines for non-crucial reporting, filing, or other compliance activities.

The contact person for this waiver request is:

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The expected duration of the waiver is March 1, 2020 (the effective date of the Secretary's 1135 Waiver) until the COVID-19 national public health emergency terminates.

Thank you for considering these requests so that New Mexico hospitals can effectively manage this difficult and unprecedented epidemic.

Sincerely,

Jeff Dye, FACHE, CAE
President and CEO
New Mexico Hospital Association