STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
LAWRENCE G. WASDEN

March 11, 2019

TRANSMITTED VIA HAND DELIVERY

Sara Stover
Senior Policy Advisor
Office of the Governor
Statehouse

Re: Our File No. 19-64914 – Request for Legislation Review of DRELB437 Relating to Medicaid

Dear Ms. Stover:

This letter is in response to your inquiry regarding the proposed legislation DRELB437. Specifically, you have asked: 1) whether proposed Idaho Code § 56-253(3) violates a Medicaid participant's right to free choice of provider; and 2) whether the overall bill meets legal standards. As explained in greater detail below, while the legislation appears to be legally defensible, certain provisions may be difficult to implement, and approval of waivers by CMS is legally uncertain. Based upon the legal uncertainty of CMS granting the State a waiver, it is possible that implementation of these provisions could generate litigation. This office is uncertain of the outcome of any litigation challenging implementation of DRELB437.

1. **Does proposed Idaho Code § 56-253(3) in DRELB437 violate a Medicaid participant's right to free choice of provider?**

Subsection (3) requires any Medicaid participant who is enrolled in a medical home in a Medicaid managed care plan to receive a referral to seek family planning services with a provider outside of the medical home provider. It also authorizes the Department of Health and Welfare to seek federal waivers necessary to implement this section. As explained below, payment to providers of family planning services cannot be restricted without federal waiver of the requirements of the Social Security Act.

P.O. Box 83720, Boise, Idaho 83720-0010
Telephone: (208) 334-2400, FAX: (208) 854-8071
Located at 700 W. Jefferson Street, Suite 210

Section 1902(a)(23)(A) of the Social Security Act (SSA) requires a state plan to provide that any Medicaid participant "may obtain such assistance from any institution, agency, community pharmacy, or person, qualified to perform the service or services required (including an organization which provides such services, or arranges for their availability, on a prepayment basis), who undertakes to provide him such services...." This is commonly referred to as "free choice of provider." That subsection further states that services received pursuant to section 1905(a)(4)(C), which governs family planning services and supplies, cannot be restricted by virtue of a participant's enrollment in a managed care plan or primary care case management. Section 1902(a)(23)(B).[1]

Currently, Idaho's medical home program is run under the authority of section 1932 of the SSA, which governs managed care entities. There is no definition of a managed care plan in Idaho law, but federal law defines managed care entities for purposes of the Medicaid program. According to section 1932(a)(1)(B) of the SSA, a managed care entity includes: (i) a Medicaid managed care organization (MCO), as defined in section 1903(m)(1)(A), that provides or arranges for services for enrollees under a contract pursuant to section 1903(m); and (ii) a primary care case manager (PCCM), as defined in section 1905(t)(2). Under Idaho law, the definition of a medical home is found at Idaho Code § 56-252(10), which states that a medical home "means a primary care case manager designated by the participant or the department to coordinate the participant's care." A "primary care case manager" is further defined at subsection (14) as "a primary care physician who contracts with medicaid to coordinate the care of certain participants." Because the medical home program is considered a PCCM, an enrolled participant must be allowed choice of their family planning service provider. Furthermore, MCOs cannot require a referral to a family planning service provider. 42 CFR § 438.10

In order to implement the proposed referral requirement on participants in the Idaho medical home program, a federal waiver is required. Under section 1115 of the SSA, CMS may waive a section 1902 requirement at a state's request for a pilot or demonstration project if "in the judgment of the Secretary, [the project] is likely to assist in promoting the objectives of title I, X, XIV, XVI, or XIX, or part A or D of title IV, in a State." Thus, CMS can allow for the state to waive any of the requirements under section 1902, including the freedom to choose a provider. It is unclear, however, whether CMS would grant Idaho's request to implement the referral requirement for the PCCM medical home program because CMS has never granted a state's request to waive the freedom to choose a family planning provider under the 1115 authority.[2] The requirement to allow

[1] Section 1902(a)(23)(B) states in relevant part: an enrollment of an individual eligible for medical assistance in a primary care case-management system (described in section 1915(b)(1)), a medicaid managed care organization, or a similar entity shall not restrict the choice of the qualified person from whom the individual may receive services under section 1905(a)(4)(C), except as provided in subsection (g), in section 1915, and in section 1932(a).

[2] Various states have made requests for a waiver in different ways but have been denied. Three states have pending requests for demonstration projects before CMS that ask to waive the freedom of choice of family planning provider.

freedom of choice for family planning services is found throughout Title XIX of the SSA,[3] and it is probable that CMS would find that a project would not assist in promoting the objectives of Title XIX if it requested such a waiver. Furthermore, there exists the potential for litigation if the Medicaid program objectives are not followed by the state and CMS.

2. Is the proposed legislation legally sound?

A. The Legislation Appears Constitutionally Defensible.

There are two types of constitutional challenges that a litigant can make to a statute: "facial challenges" and "as-applied" challenges. Facial challenges seek to have a statute declared unconstitutional "on its face." This standard presents an extremely high bar because a plaintiff must show that the statute is unconstitutional *in all* possible applications and situations. Does 1-134 v. Wasden, No. 1:16-CV-00429-DCN, 2018 WL 2275220, at *4 (D. Idaho May 17, 2018) (citing Diaz v. Paterson, 547 F.3d 88, 101 (2d Cir. 2008) (finding "a facial challenge to a legislative Act is ... the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.")). As-applied challenges, on the other hand, do not look at the text, or face, of the statute, but rather argue that even if a law is valid on its face, it may nonetheless—as the name suggests—be unconstitutionally applied. The question in an as-applied challenge is whether the statute is unconstitutional when applied in a particular case. Id. (citing Tsirelman v. Daines, 19 F. Supp. 3d 438, 447–48 (E.D.N.Y. 2014), *aff'd*, 794 F.3d 310 (2d Cir. 2015)). With respect to the proposed legislation, the provisions on page 4, lines 15-20 and 37-41, do not appear to raise a facial constitutional concern at this time. Any potential as applied challenge to these provisions would need to be analyzed under specific facts in the future, once the statute is applied.

---

[3] For example, 42 CFR § 431.51 regarding free choice of providers states in relevant part:

(a)*Statutory basis.* This section is based on sections 1902(a)(23), 1902(e)(2), and 1915(a) and (b) and 1932(a)(3) of the Act. ...

(3) Section 1915(b) of the Act authorizes waiver of the section 1902(a)(23) freedom of choice of providers requirement in certain specified circumstances, but not with respect to providers of family planning services.

(4) Section 1902(a)(23) of the Act provides that a beneficiary enrolled in a primary care case management system or Medicaid managed care organization (MCO) may not be denied freedom of choice of qualified providers of family planning services.

(5) Section 1902(e)(2) of the Act provides that an enrollee who, while completing a minimum enrollment period, is deemed eligible only for services furnished by or through the MCO or PCCM, may, as an exception to the deemed limitation, seek family planning services from any qualified provider.

(6) Section 1932(a) of the Act permits a State to restrict the freedom of choice required by section 1902(a)(23), under specified circumstances, for all services except family planning services.

B. The Legislation Could Be Confusing To Implement.

Overall, there were no obvious constitutional impairments in DRELB437, however, there are a few areas of concern relating to the construction of the proposed legislation that could lead to confusion or difficulty in its implementation.
First, the addition of Idaho Code § 56-253(8) relates to the Medicaid expansion population as described in Idaho Code § 56-267. While subsection (8) directs the Director to apply for several federal waivers, all actions are related to the expansion population in section 56-267, and that section is more germane to the subject matter than the overall duties of the Director in administering the entire Medicaid program. Furthermore, section 56-253(8)(b) requires the Director of IDHW and the Director of the Idaho Department of Insurance to work together if necessary to apply for a waiver to allow individuals who are above 100% of the federal poverty level to apply for the Advanced Premium Tax Credit (APTC). However, the title of section 56-253 relates to the powers and duties of the IDHW Director as related to the Medicaid program. The inclusion of subsection (8) in section 56-253 could later create confusion over whether the subject matter would not be more appropriately addressed in the statute related to the expansion population at section 56-267.

In addition, there are several terms or phrases that are ambiguous and vague in proposed section 56-253(8) as well as in the proposed changes to section 56-267 that make it difficult to construe the intent of the legislature.

> The literal words of a statute are the best guide to determining legislative intent. Only where the language is ambiguous will this Court look to rules of construction for guidance and consider the reasonableness of proposed interpretations. Statutory language is not ambiguous merely because the parties present differing interpretations to the court. Rather, statutory language is ambiguous where reasonable minds might differ or be uncertain as to its meaning. Marquez v. Pierce Painting, Inc., 164 Idaho 59, 63–64, 423 P.3d 1011, 1015–16 (2018).

Matter of Adoption of Doe, 164 Idaho 482, 432 P.3d 31, 33 (2018)

For example, in section 56-263(c)(i)(3) the word "volunteering" could have several meanings in practice. The dictionary definition of "volunteering" means to "freely offer to do something." Because "something" could be subject to several different interpretations by reasonable minds, further clarification should be provided to the Department.

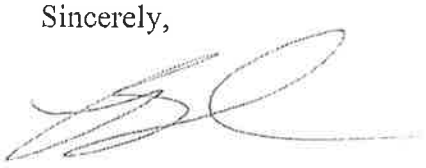
Next, the phrase "physically or intellectually unfit for employment" in section 56-263(c)(ii)(3) is difficult to implement without some requirement that a doctor or other professional certification that the individual is unfit for employment. Without adding this language, the Department could easily be challenged in its implementation of the work requirements.

Furthermore, proposed section 56-267(4) requires that if section 1905(y) is amended, then the Legislature must repeal the entirety of section 56-267. However, there is no description of what kind of amendment would lead to this action, which restricts the legislature's discretion. If the amendment were to increase the federal match to Idaho's advantage, the legislature would still be required to repeal the act.

Finally, as stated above, CMS can grant requests for 1115 demonstration projects regarding the work requirements in subsection (8) if it finds that the request is in line with the objectives of the Medicaid program. CMS issued guidance to the states in a State Medicaid Director letter, SMD#18-002, in January 2018 where it changed its long-standing policy that eligibility for Medicaid should not be predicated on work and community engagement programs. Instead, CMS now invites states to submit waiver requests for work and community engagement programs as a condition of eligibility. However, the states that have enacted work and community engagement requirements pursuant to the new CMS policy have been subjected to litigation on the basis that the programs do not meet the objectives of Title XIX, and Idaho or CMS would likely see that occur here as well.

I hope that you find this analysis helpful.

Sincerely,



Brian Kane
Assistant Chief Deputy

BK:kw