DEPARTMENT OF HEALTH & HUMAN SERVICES
Centers for Medicare & Medicaid Services
7500 Security Boulevard, Mail Stop S2-26-12
Baltimore, Maryland 21244-1850

CENTERS FOR MEDICARE & MEDICAID SERVICES
CENTER FOR MEDICAID & CHIP SERVICES

September 17, 2018

Mr. Dave Richard
Deputy Secretary for Medical Assistance
North Carolina Department of Health and Human Services
1985 Umstead Drive
Raleigh, NC 27699-2501

Re: Hurricane Florence Waiver Requests

Dear Mr. Richard:

In your e-mail dated September 13, 2018, the state detailed a number of federal requirements that posed issues for the North Carolina's health care delivery system. You requested any available flexibility with respect to these requirements.

The Secretary of the Department of Health and Human Services, Alex M. Azar II, has declared a public health emergency for the affected geographic area, and has authorized the Centers for Medicare and Medicaid Services to exercise authority under Section 1135 of the Social Security Act to waive certain requirements of Medicare, Medicaid, and Children's Health Insurance programs during the emergency period. Attached you will find responses to your requests for waiver authorities pursuant to CMS authority under Sections 1135 of the Social Security Act, to the extent needed to respond to the challenges posed by Hurricane Florence.

If you have questions or concerns regarding this correspondence, please contact Trina Roberts 404-562-7418 or by e-mail at Shantrina.Roberts@cms.hhs.gov.

Sincerely,

Timothy B. Hill
Acting Director

North Carolina is requesting CMS' review and approval of a CHIP Disaster Relief SPA in order to make temporary adjustments to enrollment/redetermination policies and cost sharing requirements for children in families living in impacted areas. We are working closely with the state so we can review and process it expeditiously.

The state will also apply the following disaster-related flexibilities authorized under federal regulation that do not require an amendment to the State Plan or Verification Plan. On a case-by-case basis, North Carolina will conduct an assessment of the applicability of these authorities and document the decision to use them in the individual's case record.

- Allow self-attestation for all eligibility criteria (excluding citizenship and immigration status) on a case-by-case basis for Medicaid and CHIP eligible individuals subject to a disaster when documentation is not available as outlined at 42 CFR 435.952(c)(3); 42 CFR 457.380.
- Consider Medicaid and CHIP enrollees who are evacuated from the state as "temporarily absent" when assessing residency in order to maintain enrollment (for home state where disaster occurred or public health emergency exists) as permissible under 42 CFR 435.403(j)(3); 42 CFR 457.320(e); 42 FR 431.52; 42 CFR 457.320.
- Extend redetermination timelines for current Medicaid enrollees subject to a disaster to maintain continuity of coverage as permissible under 42 CFR 435.912(e).
- Waive Pre-Admission Screening and Annual Resident Review (PASSAR Level I and Level II Assessment for 30 Days. Level I screens are not required for residents who are being transferred between nursing facilities. If the nursing facility is not certain whether a Level I had been conducted at the resident's evacuating facility, a Level I can be conducted by the admitting facility during the first few days of admission as part of intake. If there is not enough information to complete a Level I, the nursing facility will document this in the case files. Level II evaluations and determinations are also not required preadmission when residents are being transferred between NFs. Residents who are transferred will receive a post admission review which will be completed as resources become available. (42 CFR 438.106(b)(4).

CMS is granting approval of the following waivers:

1. **EMTALA Waiver:**
   North Carolina is requesting a blanket waiver to be issued for sanctions under Section 1867 of EMTALA for the direction or relocation of an individual to another location to receive medical screening pursuant to an appropriate state emergency preparedness plan; or the transfer of an individual who has not been stabilized if the transfer is necessitated by the circumstance of Hurricane Florence.
   **CMS Response**: Because the EMTALA waiver is limited to the 72-hour period following activation of the hospital's disaster protocol, CMS should be notified about when hospitals activate their disaster protocols. Further, evacuations and mass relocations of patients are not covered under EMTALA. We encourage hospitals to manage the movement of patients in a manner that best meets the needs of the patients, hospital, and community. If a hospital believes it needs relief under this waiver, even retroactively, it is encouraged to contact the CMS Atlanta Regional Office.

Please reference https://www.cms.gov/About-CMS/Agency-Information/Emergency/downloads/Consolidated_Medicare_FFS_Emergency_QsAs.pdf

2. **Critical Access Hospital (CAH) with 25-bed limit and length of stay to 96 hours:** North Carolina requested a blanket waiver for CAHs and will notify CMS Regional Office to ensure prompt payment.

   **CMS Response:** CMS approves this waiver request.

   Please reference Blanket Waivers for Hurricane Florence at https://www.cms.gov/About-CMS/Agency-Information/Emergency/Downloads/Blanket-waiver-Florence-2018.pdf

3. **Waiver of Three day Prior hospitalization for Skilled Nursing Facility Coverage:** North Carolina is requesting a blanket waiver allowing skilled nursing facility coverage of hospital transfers absent a qualifying three-day admission and for people who were evacuated, transferred or otherwise dislocated due to Hurricane Florence.
   **CMS Response:** CMS approves this waiver request. Skilled Nursing Facilities utilizing this flexibility should use the "DR" (Disaster Related) condition code for Medicare claims filed for Medicare beneficiaries receiving care under this waiver. Specific billing questions may be directed to the Medicare Administrative Contractor.

   Please reference Blanket Waivers for Hurricane Florence at https://www.cms.gov/About-CMS/Agency-Information/Emergency/Downloads/Blanket-waiver-Florence-2018.pdf

4. **State Request. The State requests the flexibility to allow enrollees more than 120 days (for managed care appeals) or 90 days (for fee-for-service eligibility) request a fair hearing.**
   **CMS Response**: 42 CFR 438.408(f)(2) establishes the requirement that a beneficiary in a managed care plan must request a state fair hearing within 120 calendar days from the date of the notice of resolution from the plan. CMS acknowledges the state's request to temporarily provide managed care enrollees with additional time to request state fair hearings on or after September 7, 2018 through the termination of the emergency declaration for at least 90 days and up to 180 days (up to the last day of the emergency period under Section 1135(e) of the Social Security Act) for beneficiaries with a permanent residence in a the geographic area of the public health emergency declared by the Secretary. CMS recommends that the state clearly describe in writing to managed care plans the additional time granted to enrollees to request state fair hearings and the plans expectations for honoring the resolution of the appeal.

5. **Waiver of prior authorization in fee-for-service:** North Carolina is requesting a waiver from pre-approved prior authorization processes outlined in the State Plan to allow for an extension of prior authorizations that were effective on September 7, 2018 and through the termination of the emergency declaration period.

**CMS Response**: Prior authorization and medical necessity processes in fee-for-service delivery systems are established, defined and administered at state/territory discretion and may vary depending on the benefit. The State of North Carolina may have indicated in their approved state plan specific requirements about prior authorization processes (42CFR §440.230(b)) for benefits administered through the fee-for-service delivery system. We interpret prior authorization requirements to be a type of pre-approval requirement for which waiver and modification authority under Section 1135(b)(1)(C) is available. If prior authorization processes are outlined in detail in the State of North Carolina's state plan for particular benefits, CMS is using the flexibilities afforded under Section 1135(b)(1)(C) that allow for waiver or modification of pre-approval requirements to permit services provided on or after September 7, 2018 through the termination of the emergency declaration for at least 90 days and up to 180 days (up to the last day of the emergency period under Section 1135(e) of the Social Security Act) for beneficiaries with a permanent residence in a the geographic area of the public health emergency declared by the Secretary.

6. **HIPAA:** North Carolina is requesting to temporarily suspend application of sanctions and penalties arising from non-compliance with HIPAA related to: obtaining a patient's agreement to speak with family members or friends; honoring a request to opt out of the facility director; distributing a notice; the patient's right to request privacy restrictions; and the patient's right to request confidential communications.

**CMS Response:** With regards to the HIPAA waiver request, CMS will waive such sanctions and penalties described in the 1135 waiver in the emergency area for 72 hours beginning on implementation of a hospital disaster protocol. The waiver of HIPAA requirements is effective only if actions under the waiver do not discriminate on the basis of a patient's source of payment or ability to pay. Also, the waiver only applies if the hospital has implemented its hospital disaster protocol. The HIPAA sanctions and penalties that may be waived when an 1135 waiver is issued are specified in the 1135 waiver document. **An 1135 waiver does not waive HIPAA in its entirety**. Even without an 1135 waiver, there are various flexibilities and exceptions that may apply to permit covered entities to share protected health information during a PHE.

Please reference https://www.cms.gov/Medicaid/Provider-Certification/SurveyCertEmerPrep/Downloads/PHE-Questions-and-Answers.pdf

You may also reference http://www.hhs.gov/ocr/hipaa/emergencyPPR.html for more information about the application of HIPAA during public health emergencies (whether or not the Secretary makes a formal PHE declaration under section 319 of the PHS Act, or issues an 1135 waiver.

Providers must resume compliance with normal Medicare fee-for-service rules and regulations as soon as they are able to do so and, in any event, the waivers or modifications a provider was operating under are no longer available after the termination of the emergency period.

We acknowledge the devastation providers are currently experiencing, however we hope these waiver provisions will provide the relief requested so provider personnel can focus on the health and safety of those impacted by the Hurricane.