



NATIONAL ASSOCIATION OF
CHAIN DRUG STORES

June 13, 2019

Human Services Department
ATTN: Medical Assistance Division Public Comments
P.O. Box 2348
Santa Fe, NM 87504-2348

Via email: madrules@state.nm.us

Re: Proposed \$2 Dispensing Fee Increase for “Community-Based Pharmacies” under the Centennial Care Program

To Whom It May Concern:

On behalf of our members operating chain pharmacies in the state of New Mexico, the National Association of Chain Drug Stores (NACDS) is writing in response to the May 15 notice wherein the New Mexico Human Services Department (HSD) announced a \$2 increase the dispensing fee for “community-based pharmacies” participating in the Centennial Care program effective July 1. As we understand it, the list of pharmacies that HSD has determined fits the category of community-based pharmacies was compiled based on a series of calls held in 2017 with some pharmacy providers wherein certain independent pharmacies reported below-cost reimbursement at the time. Implementing a differential dispensing fee for this limited group of independent pharmacy providers – arbitrarily favoring one pharmacy type over another – would be unjustified and ill-advised for the numerous reasons outlined below.

Tiered Reimbursement Based on Pharmacy Type Is Unfair, Anti-Competitive and Erroneously Correlates Ownership Type with the Costs of Purchasing and Dispensing Prescriptions

In the May 15 announcement, HSD indicates that the proposed dispensing fee increase for community-based pharmacies (only) is meant to ensure that the payment structure “realistically reflects their buying power, buying volume, and price negotiating limitations...” This rationale erroneously assumes that chains consistently purchase and dispense prescription medications at lower prices than independent pharmacies, failing to take into account that independent pharmacies band together in buying groups to take advantage of economies of scale, mimicking the purchasing power of chain pharmacies. The results of government and private surveys and studies on purchasing costs have been largely inconclusive. In addition, a recent national survey of dispensing costs, supported by the NACDS and the National Community Pharmacists Association found that urban pharmacies bear higher costs than do pharmacies in rural areas, where independents are more likely to be located.

At the same time, at least one federal court has found that tiered reimbursement rates violate the Equal Protection Clause of the United States Constitution and are illegal under federal law. Just as importantly, tiered rates are a flawed policy, as they generally disfavor chain pharmacies, which are the primary providers of Medicaid prescription drugs and services, and largely pay the same product

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and dispensing costs as independent pharmacies. Tiered reimbursement rates are unfair and anti-competitive.

Why Tiered Reimbursement Based on Pharmacy Type Should Not Be Implemented

- **OIG Found No Clear, Consistent Differentials in Pharmacy Acquisition Costs:** When the Department of Health and Human Services' Office of the Inspector General (OIG) in 2001 reviewed differences in the acquisition cost of drugs purchased for sale by urban chain pharmacies, urban independents, rural chains, and rural independents, OIG found that, nationally, rural independents paid lower prices than rural chains for branded and generic drugs, while urban chains paid lower prices than urban independents. However, even those mixed results varied among each of the eight states reviewed in the study, leaving no clear pattern discernible across the states. There were no consistent differentials in what chain and independent pharmacies paid for drugs.
- **National Cost of Dispensing Study Reveals No Consistent Differentials in Dispensing Costs:** National cost of dispensing studies conducted in 2006 and published in 2007¹, and conducted in 2014 and published in 2015², yielded findings that revealed no clear differential in dispensing costs for chain and independent pharmacies. Although the surveys did not directly compare the differences in costs between chain and independent pharmacies, the surveys found that higher volume pharmacies had lower per prescription dispensing costs, and they also determined that pharmacies operating in rural areas where independents are more likely to be located had lower dispensing costs than pharmacies located in urban metropolitan areas.
- **Level of Pharmacy Services Not Recognizably Different:** Some have argued that differences in Medicaid reimbursement rates are justified because independent pharmacies offer more "services" than chains. In reality, both types of pharmacies offer an array of services to Medicaid recipients: 24-hour service in some stores; delivery of medications on request; counseling and medication management; and competitive, market-based prescription prices. Establishing enhanced reimbursement for independent pharmacies specifically threatens the continued economic viability and ability of chain pharmacies to continue providing services it offers to meet the distinct needs of the Medicaid population and other residents in the surrounding community.

Why Tiered Reimbursement Based on Pharmacy Type Is Unjustified and Ill-Advised

- **Federal Courts: Tiered Reimbursement Violates Equal Protection, Federal Law:** A strongly worded 1999 federal District Court decision found that Arkansas Medicaid's use of a tiered reimbursement approach violated not only the federal Medicaid statute, but also the Equal Protection Clause of the U.S. Constitution. The U.S. District Court for the Eastern District of Arkansas concluded, in *Wal-Mart Stores, Inc. v. Kurt Knickrehm*,³ that there was no justification for differential reimbursement of chains and independents. The *Knickrehm* court declared that tiering reimbursement based on the characteristics of the dispensing pharmacy is "arbitrary, capricious, and contrary to the Medicaid Act." In concluding that tiered reimbursement also

¹ Grant Thornton National Cost of Dispensing Study.

² MPI Group National Cost of Dispensing Study.

³*Wal-Mart Stores, Inc. v. Knickrehm*, 101 F. Supp. 2d. 749 (June 7, 2000).

violates the Equal Protection provisions of the U.S. Constitution, the Court found that the tiered approach is not “rationally related to a legitimate state interest.”

- **Congress Opposes Reimbursement Tiered on The Basis of Pharmacy Type or Size:** Members of Congress also have, in the past, expressed concerns with the tiered reimbursement approach. The federal legislation that funded the Medicaid program in fiscal year 2001 contained language that expressed concern with tiered reimbursement schemes and instructed the Centers for Medicare and Medicaid Services (CMS, then known as HCFA) to enforce its own guidelines by requiring states to provide credible documentation before making changes in Medicaid pharmacy reimbursement.
- **Tiering Reimbursement Creates an Unfriendly and Unfair Business Environment:** Efficient businesses are better able to make substantial investments in the surrounding community, provide additional jobs for local residents, and pay more taxes on profits. Reimbursement should not be set in an anti-competitive manner that discriminates against larger businesses or to discourage business growth.
- **Definition of “Chain” is Often Arbitrary:** Where states have set tiered Medicaid pharmacy reimbursement schemes based on pharmacy type, they have defined “chain” in various ways: alternately as an entity operating “4 or more stores” and as an entity operating “15 or more stores.” This arbitrary approach clearly illustrates that there has been no supportive finding that larger operations of a certain and specific size enjoy an undue advantage in purchasing prescription drugs.

Flawed Process for Determining Which Community-Based Pharmacies Qualify for the Increased Dispensing Fee and Implementing the Proposal

In addition to the above issues, we are concerned that HSD’s process for pursuing and implementing the increased dispensing fee for community-based pharmacies is flawed. Notably, HSD neglected to go through a formal rulemaking process and did not establish a clear standard to identify which pharmacies fall into the category of community-based pharmacies. Furthermore, HSD did not conduct a reimbursement cost study to determine if the dispensing fee increase is appropriate. This will be problematic when HSD submits the required State Plan Amendment to the Centers for Medicare & Medicaid Services (CMS), as we understand that HSD expects to use federal matching funds to cover a substantial portion the \$60 million reimbursement rate increases planned. CMS will require this type of justification when considering whether to approve (and fund) the dispensing fee increase.

The Differential Dispensing Fee for Community-Based Pharmacies Will Result in Some Out-of-State Pharmacies Being Reimbursed Higher Dispensing Fees than Most In-State Pharmacies

We note that there are a number of pharmacies located outside of New Mexico that have been included on HSD’s list of community-based pharmacies, yet most in-state pharmacies have been excluded from this list. If implemented, this targeted dispensing fee increase will result in most in-state pharmacies being reimbursed a dispensing fee that is less than those out-of-state pharmacies.

Conclusion

Government studies have failed to find a consistent differential in the product acquisition costs of chain versus independent pharmacies, as independent pharmacies achieving increased discounts through purchasing groups. In addition, recent national surveys of dispensing costs revealed similarly inconclusive findings regarding those costs. Furthermore, federal courts have raised doubts about the legality and constitutionality of tiered reimbursement schemes, and Congress has expressed its displeasure about the tiering of reimbursement. Paying a higher reimbursement to smaller providers based solely on their size is anti-competitive and creates an unfriendly and unfair business environment.

Medicaid reimbursement for prescription drug product and dispensing costs should be based on the cost of the product delivered and the costs incurred in dispensing that product, not on the size or nature of the pharmacy providing beneficiary services. **Given that HSD's intent with the enhanced Medicaid payment rates is to "recognize and strengthen the state's partnership with those who deliver care and services to the most vulnerable New Mexicans," we urge HSD to apply the \$2 dispensing fee increase fairly across all pharmacy types.**

Sincerely,

A handwritten signature in black ink that reads "Mary Staples". The signature is written in a cursive, flowing style.

Mary Staples
Regional Director, State Government Affairs