

**STATEMENT IN OPPOSITION TO CMS-2328-P PROPOSED RULE 42 CFR  
447.205(d)(2)(iv) ELECTRONIC PUBLICATION OF STATE PUBLIC NOTICE**

5 July 2011

The Honorable Kathleen Sebelius  
Centers for Medicaid & Medicaid Services  
Secretary, Department of Health and Human Services  
Attention: CMS-2328-P  
P.O. Box 8016  
Baltimore, MD 21244-8016

**RE: STATEMENT IN OPPOSITION TO CMS-2328-P PROPOSED RULE 42 CFR  
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Dear Secretary Sebelius:

The following organizations representing newspapers interested in public notice hereby provide comments on the instant proposal. *Public Notice Resource Center (PNRC)*, a nonprofit organization that provides research and public education materials on the use of public notice in newspapers, the *Newspaper Association of America (NAA)*, representing nearly 2,000 newspapers and their multi-platform business in the United States and Canada, the *National Newspaper Association (NNA)*, a 2,300 member trade association for community newspapers, and the *American Court and Commercial Newspapers (ACCN)*, an organization of newspapers in the business of publishing court, legal and commercial newspapers.

These groups, individually and collectively, strongly oppose portions of proposed Rule 42 CFR 447.205, *Electronic Publication of State Public Notice*, as proposed by the *Centers for Medicaid & Medicaid Services (CMS)*, as found in the Federal Register, Volume 76 Issue 88, dated Friday, May 6, 2011. In summary, our opposition is based on these views:

- Overall, any Internet notice is an inadequate substitute for a printed, fixed newspaper notice, although our organizations believe the Internet should be actively used by both *CMS* and newspapers to extend the reach of printed notices.
- State government Internet sites do not have a strong readership. Public notices in a newspaper, particularly when supplemented by a newspaper website, are more likely to be read than notices on a government Internet site.
- Access to the Internet remains limited for many populations. Many in poor, minority and senior citizen communities who may be Medicaid recipients cannot readily view Internet notifications.
- Disability or illness may hinder Medicaid recipients from viewing Internet notifications. Research shows that the infirm are substantially less likely to use the Internet.

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- While *CMS* may attempt to prescribe practices for states, *CMS* has no way to ensure that states will appropriate funds to maintain Internet sites in a fashion, as described below, that permits them to supplant printed, fixed notices.
- Internet site-only notification creates due process problems for reviewing courts, historians, researchers and archivists. Web publications are difficult to archive and maintain in updated fashion without ongoing funding, whereas printed public notice is fixed in form and time and leaves no doubt as to its authenticity.
- *CMS* proposed regulation leaves substantial doubt about the manner and method of providing notice. Even if the above concerns were not at issue, this proposal leaves the public with potentially large gaps in public information.

**I. GOVERNMENT INTERNET SITE NOTICES ARE INEFFECTIVE**

**A. State Government Internet Sites Have Limited Readership Following**

The point of public notice is to put information in places where people not necessarily looking for it are likely to find it. But the proposed regulation fails to consider that state government Internet sites do not have a large following when compared to a daily or weekly newspaper. The *CMS* fails to cite any studies or reports that indicate that state government Internet sites have a following that would justify replacing newspapers as notice vehicles. *CMS* may not be aware of research by the *Pew Center for the Internet and American Life* (*Pew Research Center*), an independent, non-partisan public opinion research organization that studies attitudes toward politics, the press, and public policy issues. Last year the *Pew Research Center*, released shocking statistics, finding that only 40% of adult users have researched online for raw data about government spending and actions.<sup>1</sup> Although this same study found that visits to government Internet sites from the general public are slowly growing, this study did not examine any research specific to the Internet sites that may be visited for public notice searches. Even at a 40% audience level, it must be recognized that studies that measure government Internet site searches—that are non-topic specific to the actual search—covers a generic that includes thousands of government topics and government Internet sites, resulting in an audience viewership percentage that greatly overstates the potential for public notice audiences.

State government Internet sites are typically venues for transactional business—such as applications for permits, licenses, tax payments and the like. They lack the sort of ever-changing information that newspapers carry that draws in the public, such as the sports, local news, weather and political trends. A vast majority of local newspapers are circulated consistently within a timeframe and delivered to a limited geographical area. Most people turn to their local newspapers for current developments in their community and then they find the public notices. State Internet sites cannot easily equal that traffic because their information is static, updates are

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<sup>1</sup>“Government Online,” *Pew Research Center*, April 27, 2010, Internet <http://pewinternet.org/Reports/2010/Government-Online.aspx>

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infrequent, and the general public has to proactively visit government Internet sites—which previously stated the general public seldom does. Therefore, state government Internet site notifications are ineffective at delivering timely notices.

Further, states are not in the business of building readership. Just as governments do not have expertise in bridge-building, and so they outsource bridge construction to contractors, governments do not have expertise in building audience, so they outsource public notices to newspapers. It is in a newspaper's interest to have and continue to build a strong following of readers, both in print and on the Internet. They develop these readerships at great marketing cost. States—particularly in today's tight fiscal environment—have little motivation to allocate scarce financial resources to advertise, promote, or expand their readership; the burden of finding the government Internet sites is on the citizen. It is unreasonable to expect a citizen to be on the hunt for information that may affect him as immediately and intimately as a Medicaid program change. Newspapers are a better choice for public notices given their much broader reach.

In addition, the practices of state agencies with respect to government Internet site management are widely disparate. The *CMS* does not mandate states allocate a certain number of personnel or funds to help comply with the *CMS* proposed regulations on posting Medicaid rate increases. During a time when states continue to search for ways to reduce costs, not mandating that states allocate a certain amount of funds or personnel to monitor compliance may lead to a state's failing to notify Medicaid recipients in a timely manner.

Within the past decade, many newspapers have adopted a marketing strategy that publishes a newspaper issue in print, and the exact publication issue is posted on the newspaper's Internet site daily. Newspapers always list their Internet site address in the printed paper, promoting as much exposure as possible. Also, a newspaper's Internet site's domain name is easy to find because the domain name is often the same name as the newspaper and newspapers seldom change domain names. Newspapers try to replicate the same type of user friendly organization structure that is found in print, on their Internet sites. Each state government, however, has several Internet sites, with many different state agencies and local governments having their own Internet site. The information found on these Internet sites is almost never found in print, meaning there is no double exposure, only confusion as to the location of the information. If states continue to use newspapers to publish Medicaid rate increases—which is the current avenue for providing public notification to Medicaid recipients—there is a strong likelihood that the information is already found in both print and posted on a newspaper's Internet site.

**B. The Poor Will Be Disenfranchised**

According to the *CMS*'s Internet site, Medicaid is available only to certain low-income individuals and families who fit into an eligibility group that is recognized by federal and state

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law.<sup>2</sup> Medicaid recipients fall into a separate economic classification than non-Medicaid recipients; therefore, Medicaid recipients' classification should not be measured equally with non-Medicaid recipients. Currently, Medicaid recipients receive notification of proposed Medicaid rate increases by newspapers.<sup>3</sup> Under the proposed CMS regulations, a Medicaid recipient could receive notices of Medicaid rate increases by a government Internet site posting. The rule would require Medicaid recipient to have basic technical skills, access to a costly computer, and be located in an area where there is a signal for Internet access. If a Medicaid recipient is without even one of those requirements, the Medicaid recipient will not receive notification of Medicaid rate increases—a harsh penalty, especially since the notification will provide very specific and highly important information. Newspapers, however, are easily accessible to Medicaid recipients because a person is not required to possess a costly computer and have technical skills to obtain information from a newspaper that typically costs less than \$1.00 a copy.

### **C. The Rural Will Be Disenfranchised**

Even if a Medicaid recipient has access to a computer, the next hurdle is having access to a signal that delivers Internet access. This past February, the *Department of Commerce's National Telecommunications and Information Administration*, released the "Digital Nation Expanding Internet Usage" report that shows many rural areas use dial-up connections because broadband is unavailable.<sup>4</sup> Broadband provides faster access to the Internet, downloading documents, and Internet sites and is preferred over dial-up Internet access. Dial-up is a form of Internet access that uses the facilities of the public switched telephone network to establish a dialed connection to an Internet service provider via telephone lines. People that use dial-up often find that connecting to the Internet can be time consuming, and once connected; downloading Internet sites or documents is painstakingly slow and the Internet connection can often end abruptly if someone calls in on the telephone line. Another study, issued by the *United States Department of Agriculture*, titled, "Farm Computer Usage and Ownership," reported that 41% of U.S. farms are without Internet access.<sup>5</sup> Whether the rural area has dial-up or no access, either are large barriers to receiving Internet site notifications.

### **D. Minorities, Senior Citizens, the Disabled, and Ill Will Be Disenfranchised**

Survey after survey has shown that particular classes will be disenfranchised if notices are solely placed on Internet sites because certain classes are less likely to have access to the Internet. A recent survey by *George Washington University School of Media and Public Affairs* found that people over 60 years of age face a substantial digital divide with people who are

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<sup>2</sup> CMS Internet site, <http://www.CMS.gov/MedicaidGeninfo/01>, Overview, 22 June 2011.

<sup>3</sup> CMS 447.205(d), Publication of notice. The notice must (1) Be published before the proposed effective date of change; and (2) Appear as a public announcement in one of the following publications: (i) A State register similar to the Federal Register (ii) The newspaper of the widest circulation in each city with a population of 50,000 or more (iii) The newspaper of widest circulation in the State, if there is no city with a population of 50,000 or more.

<sup>4</sup> "Digital Nation Expanding Internet Usage," *Department of Commerce's National Telecommunications and Information Administration*, February 2011  
[http://www.ntia.doc.gov/reports/2011/NTIA\\_Internet\\_Use\\_Report\\_February\\_2011.pdf](http://www.ntia.doc.gov/reports/2011/NTIA_Internet_Use_Report_February_2011.pdf)

<sup>5</sup> "Farm Computer Usage and Ownership," *United States Department of Agriculture*, August 2009

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younger.<sup>6</sup> The *Pew Research Center*, found that only 26% of the people they surveyed that were 65 years or older, used the Internet.<sup>7</sup> Also, *MediaPost*, a leading news and research resource for media, marketing and advertising professionals, released a survey showing only 4/10 of minorities regularly used the Internet.<sup>8</sup> The evidence is overwhelming that if states are granted the authority to post Medicaid rate increases only on their Internet sites, minorities and senior citizens will disproportionately suffer.

A survey conducted by the *Pew Research Center* found that Americans that live with a disability or illness struggle to gain access to the Internet.<sup>9</sup> One might easily posit that the disabled or ill struggle with the technical skill or aptitude to sort out Internet information, to make their computers work properly or to maintain Internet connections. Putting additional barriers in their paths by requiring them to do what they cannot in order to find the information they need to understand their benefits is counter intuitive. In other words, if the same people that are enrolled in Medicaid are the very people that will not have access to information concerning Medicaid, the purpose of public notice is utterly defeated.

**E. Public Resources Cannot Provide the Disenfranchised With Notifications**

Some mistakenly assume that a Medicaid recipient can always gain Internet access to notifications through local libraries and community centers. This rationale ignores reality that libraries and community centers have a limited—some extremely limited—hours of operation and those sites operate at the pleasure of the local or state governments. With poor economic conditions causing local and state governments to collect less tax revenue, many libraries are forced to reduce their hours of operation or permanently cease operation altogether.

Also, libraries and community centers have limited budgets and can only purchase and maintain a limited number of computers. Long lines and limited hours of operation will not provide a Medicaid recipient with an adequate opportunity to access notices. Considering notices are posted within a limited time frame before an event occurs, time is of the essence. Missing a notification can have a detrimental effect on one's right to express grievances or recalculate his or her budget in order to compensate for the Medicaid rate increase. If a library or community center fails to provide the opportunity for a Medicaid recipient to view a notification, the outcome could be financially devastating and an opportunity lost to express grievances.

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<sup>6</sup> Citizen Use of Digital Media to Connect with Government Yields a Mixed Picture, George Washington University School of Media and Public Affairs, October 27, 2010, Internet <http://smpa.gwu.edu/news/articles/229>

<sup>7</sup> Older Adults and Social Media, Pew Research Center, April 27, 2010 Internet <http://www.pewinternet.org/Reports/2010/Older-Adults-and-Social-Media.aspx>

<sup>8</sup> "Minorities Agree on Importance of Web;" Only 4/10 Regularly Use, *MediaPost*, January 10, 2010, Internet [http://www.mediapost.com/publications/?fa=Articles.showArticle&art\\_aid=120354&passFuseAction=PublicationsSearch.showSearchReslts&art\\_searched=minority&page\\_number=0](http://www.mediapost.com/publications/?fa=Articles.showArticle&art_aid=120354&passFuseAction=PublicationsSearch.showSearchReslts&art_searched=minority&page_number=0)

<sup>9</sup> "Americans living with disability and their technology profile," *Pew Research Center*, January 21, 2011, Internet <http://www.pewinternet.org/Reports/2011/Disability.aspx>

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**II. GOVERNMENT INTERNET SITE POSTING OF NOTICES IS NOT PUBLIC  
NOTICE**

*PNRC* finds that in a long tradition of public notice there are four elements that mark a valid notice. The notice must be published by an independent party, the publication must be archivable, the publication must be accessible, and the publication must be verifiable. If any one of these elements is absent, the public loses.

**A. Public Notice Must Be Published By An Independent Third Party**

A public notice must be published in a forum independent of the government, typically in a local newspaper. An independent and neutral third party has an economic and civic interest in ensuring that the notice law is followed. The *CMS* proposed regulation grants states with the authority to publish Medicaid rate increases on “a web site developed and maintained by the single State agency or other responsible State agency that is accessible to the general public” effectively removing the independence of a third party.<sup>10</sup> Allowing a state to publish the official record removes an extra layer of confidence in the notice that having an independent publisher provides.

**B. Public Notice Must Be Archivable**

A public notice must be archived in a secure and publicly available format. The *CMS* does not include proposed regulations on how a state must archive its notices of Medicaid rate increases. In fact, there is great concern that once the notification is removed from a state’s Internet site or its platform is updated, there will be no record that the public notice ever existed.

Further, the *CMS* did not propose regulations on how long the Medicaid rate increase notifications must remain on a state government’s Internet site. This means that a state could theoretically publish a notice of Medicaid rate increase one day, remove the notice the next day, and have fulfilled the requirements of the *CMS* proposed regulations because there is no timeframe for a publication to be posted.<sup>11</sup> A notice published in a newspaper is easily archivable. Newspapers are typically archived both by their publishers and by state and local libraries, where they can be easily retrieved for years after date of publication.

**C. Public Notice Must Be Accessible**

A public notice must be capable of being accessed by all segments of society. As discussed above, it is not just a question of physical access but also economic means. Proper public notice of *CMS* actions is important because Medicaid recipients will have to recalculate their personal budgets to absorb the new percentage of cost of services that Medicaid does not cover.

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<sup>10</sup> *CMS* Proposed Rule for Public notice of changes in Statewide methods and standards for setting payment rates, 447.205(d)(2)(iv).

<sup>11</sup> Please note that even the *Department of Justice*’s proposed regulations for consolidation of seizure and forfeiture regulations, as published in the Federal Register, Vol. 76, No. 89, May 9, 2011 on Notice of administrative forfeiture claims, requires that a posting on a seizing agencies Internet site must be published for a least 30 consecutive days.

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**D. Public Notice Must Be Verifiable**

The public and the source of the notice are able to verify that the notice was published and not altered once published. In a newspaper notice, an affidavit is provided by the publisher, which can be used in an evidentiary proceeding to demonstrate that a true copy was published as well as the exact wording that was used. It is difficult and costly to provide authentication of Internet site publications because Internet sites can be and often are edited after initial publication and it becomes virtually impossible to prove that any stakeholder witnessed any particular element of an Internet site at any given time. Under this element, the state will be the sole party both verifying that the notification was drafted, published, not edited once published, and posted on a state government Internet site for a particular length of time.

**III. CMS'S PROPOSED REGULATION LEAVES THE PUBLIC WITH MANY  
QUESTIONS**

The *undersigned organizations* recognize the time and effort CMS has dedicated in drafting proposed regulations to address the growing issue of people using the Internet for information as opposed to newspapers. We believe that more information is always better information, and we do not oppose encouraging agencies to provide the public information notices in all of their venues. Our opposition is simply to permitting the agency notice to serve as the sole notice of record.

Additionally, the proposed regulation for government Internet site publications is vague and will lead to mass confusion. Under the proposed language, if states decide to post Medicaid rate increase notifications on their Internet sites, states are provided with the option to either update the site on a regular and known basis, **OR** the notice includes the actual date it was released, **OR** the content of the issued notice is not modified after the initial publication.<sup>12</sup> The term “**OR**” implies that states can fulfill CMS’s proposed regulatory language by simply fulfilling one of the three options and ignoring the other two. This means so long as a state posts a notification with the actual date it was released, for example, then a state can both change the content of the notice once posted and not update their government Internet site on a regular known basis.

Also, the CMS does not mandate any particular state agency be responsible for the government Internet site postings, only a “State agency that is accessible to the general public.” This vague language could allow, for example, a state human services agency to contract with the fish and wildlife commission to post notifications for Medicaid payment rate increases.

**Newspaper notification must be provided, regardless, because no other venue is as broad-reaching.**

Newspaper notifications are the best form of public notice. They provide notifications that are independent, archivable, accessible, and verifiable. This form of notification is important because newspaper notices are not lost with technological changes, and their content is fixed in form and time so due process is satisfied. Information on government Internet sites is

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<sup>12</sup> CMS Proposed § 447.205(d)(2)(iv)(A)-(C)

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desirable and a valuable supplement to the public record. But the time has not yet arrived when any Internet site—public or private—can supplant printed newspaper notices. Moreover, newspapers are in the best position to draw readership for both print and digital distribution.

The *PNRC*, *NNA*, *NAA*, and *ACCN* appreciate the agency’s consideration of their views with regards to the *CMS* proposed rule 447.205(d)(2)(iv), *Electronic Publication of State Public Notice*. For the foregoing reasons stated hereinabove, the *PNRC*, *NNA*, *NAA*, and *ACCN* respectfully request the agency revise the proposed regulation.

If you have any questions, please call me at (703) 237-9806 or email me at [info@pnrc.net](mailto:info@pnrc.net).

Sincerely,

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