



Office of the General Counsel

B-279911

May 8, 1998

The Honorable William V. Roth
Chairman
The Honorable Daniel Patrick Moynihan
Ranking Minority Member
Committee on Finance
United States Senate

The Honorable Thomas J. Bliley, Jr.
Chairman
The Honorable John D. Dingell
Ranking Minority Member
Committee on Commerce
House of Representatives

The Honorable Bill Archer
Chairman
The Honorable Charles B. Rangel
Ranking Minority Member
Committee on Ways and Means
House of Representatives

Subject: Department of Health and Human Services, Health Care Financing Administration: Medicare Program; Scope of Medicare Benefits and Application of the Outpatient Mental Health Treatment Limitation to Clinical Psychologist and Clinical Social Worker Services

Pursuant to section 801(a)(2)(A) of title 5, United States Code, this is our report on a major rule promulgated by the Department of Health and Human Services, Health Care Financing Administration (HCFA), entitled "Medicare Program; Scope of Medicare Benefits and Application of the Outpatient Mental Health Treatment Limitation to Clinical Psychologist and Clinical Social Worker Services" (RIN: 0938-AE99). We received the rule on April 27, 1998. It was published in the Federal Register as a final rule on April 23, 1998. 63 Fed. Reg. 20110.

The final rule conforms the requirements for Medicare coverage of services furnished by a clinical psychologist or as an incident to the services of a clinical

psychologist and for services furnished by a clinical social worker with section 6113 of the Omnibus Budget Reconciliation Act of 1989, section 4157 of the Omnibus Budget Reconciliation Act of 1990, and section 147(b) of the Social Security Act Amendments of 1994 (SSA '94). It also addresses the outpatient mental health treatment limitation as it applies to clinical psychologist and clinical social worker services.

The final rule also conforms the Medicare program to section 104 of the SSA '94, which provides that a Medicare patient in a Medicare-participating hospital who is receiving qualified psychologist services may be under the care of a clinical psychologist with respect to those services, to the extent permitted by state law.

Enclosed is our assessment of HCFA's compliance with the procedural steps required by section 801(a)(1)(B)(i) through (iv) of title 5 with respect to the rule. Our review indicates that HCFA complied or will be taking steps to comply with the applicable requirements, as discussed below.

HCFA notes, in the preamble's discussion of the effective date of the rule, that the rule is a major rule subject to congressional review and, therefore, a 60-day delay in the effective date of the rule following publication in the Federal Register or receipt of the rule by Congress, whichever is later, is necessary. The preamble notes that the effective date is June 22, 1998, but that this date is subject to change because of the above requirement and a notice of a change in the date will be published in the Federal Register.

While the rule was published in the Federal Register on April 22, 1998, it was not received by Congress until April 27, 1998. Therefore, it cannot become effective until June 26, 1998, and the above-mentioned notice should be published in the Federal Register.

If you have any questions about this report, please contact James Vickers, Assistant General Counsel, at (202) 512-8210. The official responsible for GAO evaluation work relating to the Department of Health and Human Services, Health Care Financing Administration, is William Scanlon, Director, Health Financing and Systems Issues. Mr. Scanlon can be reached at (202) 512-7114.

Robert P. Murphy
General Counsel

Enclosure

cc: The Honorable Donna E. Shalala
The Secretary of Health and
Human Services

ANALYSIS UNDER 5 U.S.C. § 801(a)(1)(B)(i)-(iv) OF A MAJOR RULE
ISSUED BY
THE DEPARTMENT OF HEALTH AND HUMAN SERVICES,
HEALTH CARE FINANCING ADMINISTRATION
ENTITLED
"MEDICARE PROGRAM; SCOPE OF MEDICARE BENEFITS AND APPLICATION
OF THE OUTPATIENT MENTAL HEALTH TREATMENT LIMITATION TO
CLINICAL PSYCHOLOGIST AND CLINICAL SOCIAL WORKER SERVICES"
(RIN: 0938-AE99)

(i) Cost-benefit analysis

HCFA estimated the budgetary effect of the legislative changes that removed the site of service restrictions, added coverage for additional providers and eliminated the annual dollar limitation. While in the proposed rule, HCFA estimated that Medicare expenditures would increase by \$260 million in fiscal year 1994, by \$320 million in fiscal year 1995, and by \$390 million in fiscal year 1996, available data show the actual increases to have been \$50 million, \$60 million, and \$30 million, respectively.

(ii) Agency actions relevant to the Regulatory Flexibility Act, 5 U.S.C. §§ 603-605, 607, and 609

The Secretary of Health and Human Services has certified that the final rule will not result in a significant economic impact on a substantial number of small entities since the rule conforms Medicare regulations to statutory provisions and relies on state licensure requirements when determining clinical psychologist qualifications. This should result in negligible economic impact on clinical psychologists, clinical social workers, and other practitioners.

In addition, for the purposes of section 1102(b) of the Social Security Act, the Secretary has certified that the final rule will not have a significant impact on the operations of a substantial number of small rural hospitals.

(iii) Agency actions relevant to sections 202-205 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 1532-1535

The final rule will not impose a federal intergovernmental or private sector mandate of \$100 million or more, as defined in the Unfunded Mandates Reform Act of 1995.

(iv) Other relevant information or requirements under acts and executive orders

Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*

With the exception of one provision, the final rule was promulgated using the notice and comment procedures contained in 5 U.S.C. § 553. On December 29, 1993, a notice of proposed rulemaking was published in the Federal Register. 58 Fed. Reg. 68829. Approximately 740 comments from professional associations, governmental organizations, psychologists, psychiatrists, and clinical social workers were received in response to the notice. In the preamble to the final rule, the comments are discussed and the changes made to the proposed rule based on the comments are outlined.

Subsequent to the issuance of the notice of proposed rulemaking, Congress enacted the Social Security Act Amendments of 1994. Section 104 of the SSA '94 provides that a hospital patient receiving qualified psychologist services may be under the care of a clinical psychologist with respect to services furnished by the clinical psychologist, to the extent permitted by state law. HCFA has found good cause under 5 U.S.C. § 553(b) to waive notice and comment procedures for this portion of the final rule since the revision conforms the rule to the statute which is so specific that it leaves no room for alternative interpretations.

Paperwork Reduction Act, 44 U.S.C. §§ 3501-3520

The final rule contains an information collection that is subject to review and approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act.

The preamble to the final rule contains the required information regarding the collection. The collection is the Provider/Supplier Enrollment Application which is currently approved under OMB approval number 0938-0685 and that approval expires on May 31, 1998. HCFA estimates that the application will impose a one-time burden of 90 minutes for completion of education, training, and experience requirements necessary to participate in the Medicare program as a clinical psychologist.

Statutory authorization for the rule

The final rule was issued pursuant to sections 1102 and 1871 of the Social Security Act, as amended (42 U.S.C. §§ 1302 and 1395hh), sections 1301, 1306, and 1310 of the Public Health Service Act (42 U.S.C. §§ 300e, 300e-5, and 300e-9) and 31 U.S.C. § 9701.

Executive Order No. 12866

The final rule was reviewed and approved by the Office of Management and Budget as an "economically significant" regulatory action under Executive Order No. 12866.