



Michael R. Pence, Governor
State of Indiana

Office of General Counsel
402 W. WASHINGTON STREET, ROOM W451, MS27
INDIANAPOLIS, IN 46204-2744

REQUEST FOR RULEMAKING AND FAMILY IMPACT CERTIFICATION

PURPOSE FOR RULE

- The proposed rule amends the Indiana Administrative Code to align with an adverse court ruling in *Bontrager v. FSSA*, 697 F.3d. 604 (7th Cir. 2012), which effectively removed the \$1,000 annual cap on dental services.
- FSSA – OMPP has been complying with the court order and is now seeking to amend its rules to align with current FSSA – OMPP policy.

REQUESTED RESPONSE TIME

FSSA anticipates an effective date for this rule of October 1, 2016. Given this effective date, FSSA respectfully requests a response to this submission on or before **October 30, 2015**.

Thank you for your attention to this matter. Should you have any questions regarding this submission, please feel free to contact me at (317) 232-1244 or kim.crawford@fssa.in.gov.

I5762337.2





Michael R. Pence, Governor
State of Indiana

Indiana Family and Social Services Administration
402 W. WASHINGTON STREET, P.O. BOX 7083
INDIANAPOLIS, IN 46207-7083

TO: Micah Vincent, Director
Office of Management and Budget

FROM: John J. Wernert, M.D., Secretary, 
Family and Social Services Administration

RE: Request to Proceed with Rulemaking – Medicaid Dental Benefit Changes

DATE: September 29, 2015

The Indiana Family and Social Services Administration (“FSSA”) Office of Medicaid Policy and Planning (“OMPP”) intends to amend the Indiana Administrative Code concerning its coverage limitations and policies for the dental benefit. Pursuant to Executive Order 13-3 and the Financial Management Circular 2013-01, FSSA submits this justification and asks that the Office of Management and Budget (“OMB”) Director approve its request to proceed with rulemaking.

Background

The proposed rule amends a section of the Indiana Administrative Code to align FSSA policy with an adverse court ruling in *Bontrager v. FSSA*, 697 F.3d. 604 (7th Cir. 2012). Under *Bontrager*, the plaintiff challenged OMPP’s \$1,000 annual cap on dental services, which was included in the Indiana Administrative Code. The plaintiff alleged that she could not receive a medically necessary dental procedure because the dental procedure cost more than \$1,000 which was the limit allowed under the cap and she could not afford to pay the difference. The District Court ruled that the limitation violated federal Medicaid law and the Seventh Circuit Court of Appeals agreed. The United State Supreme Court denied FSSA’s request to hear the matter. As a result, FSSA entered into a Consent Decree to resolve outstanding issues and to implement the court’s ruling. FSSA – OMPP has been complying with the court order for several years and is now seeking to amend its rules to align with current policy. The proposed rule removes the dental cap and makes several other small changes to the dental benefit.

Compliance with Court Order Exception

Section 6.d. of Executive Order 13-3 excepts any “rules necessary to avoid a violation of a court order or federal law that would result in sanctions by a court or the federal government against the state for failure to conduct the rulemaking action” from the moratorium. The adverse ruling in *Bontrager* necessitates a change to the rules dealing with FSSA – OMPP’s dental coverage



policy. Specifically, FSSA – OMPP’s coverage scheme must not “effectively deny” coverage of medically necessary and covered services by placing a hard coverage cap on dental benefits. FSSA – OMPP must amend the now obsolete rule to reflect current policy, to make it consistent with the judicial ruling, and to eliminate potential administrative and consumer confusion, which could result in a lawsuit against FSSA. Thus, FSSA believes that the proposed rule meets the requirements for this exception.

Health Exception

Additionally, Section 6.g. of Executive Order 13-3 exempts any rule from the rulemaking moratorium “whose predominant purpose and effect [is] to address matters of . . . health . . .”. The proposed rule updates the dental benefit section of the Indiana Administrative Code to align it with current policy and the court ruling. The changes to the cap and the other small changes all relate to matters of health. Thus, FSSA believes that the proposed rule meets the requirements for this exception.

Accordingly, FSSA believes that the proposed rule meets the foregoing exceptions to the rulemaking moratorium and asks that the OMB Director approve FSSA’s request to proceed with the rulemaking. Should the OMB Director like to discuss this proposed rule further before making any decision, FSSA would be happy to make a subject matter expert available at the Director’s convenience.

Office of the Secretary of Family and
Social Services



John J. Wernert, M.D.
Secretary

CC: Brandon Shirley, FSSA Deputy General Counsel
Allison Taylor, FSSA General Counsel
Amanda Alvey, Office of Medicaid Policy of Planning



Michael R. Pence, Governor
State of Indiana

Indiana Family and Social Services Administration
402 W. WASHINGTON STREET, P.O. BOX 7083
INDIANAPOLIS, IN 46207-7083

FSSA's Family Impact Statement for Proposed Rule – Medicaid Dental Benefit Changes

Executive Order 13-05 (the "Order") requires the Family and Social Services Administration ("FSSA") to assess a policy or proposed rule's impact on family formation and general well-being and to certify its compliance with the Order. FSSA hereby submits this certification that it has assessed the proposed rule's impact on family formation and general well-being based on the enumerated considerations listed in the Order.

Background and summary of the rule

The proposed rule amends a section of the Indiana Administrative Code to align FSSA policy with an adverse court ruling in *Bontrager v. FSSA*, 697 F.3d. 604 (7th Cir. 2012). Under *Bontrager*, the plaintiff challenged OMPP's \$1,000 annual cap on dental services, which was included in the Indiana Administrative Code. The plaintiff alleged that she could not receive a medically necessary dental procedure because the dental procedure cost more than \$1,000 which was the limit allowed under the cap and she could not afford to pay the difference. The District Court ruled that the limitation violated federal Medicaid law and the Seventh Circuit Court of Appeals agreed. The United State Supreme Court denied FSSA's request to hear the matter. As a result, FSSA entered into a Consent Decree to resolve outstanding issues and to implement the court's ruling. FSSA – OMPP has been complying with the court order for several years and is now seeking to amend its rules to align with current policy. The proposed rule removes the dental cap and makes several other small changes to the dental benefit.

Impact of the proposed rule on the family well-being or family formation

FSSA assessed the proposed rule's impact on family formation and well-being in light of the six considerations enumerated in the Order. The proposed rule codifies existing policy pursuant to the aforementioned consent decree. Accordingly, FSSA expects that the proposed rule will have a **neutral** impact on family well-being or family formation. FSSA's response to the enumerated measures is as follows:

- 1) Whether or not this action by government strengthens or erodes the stability of the family and the marital commitment.**

Response: The proposed rule will align the Indiana Administrative Code with the consent decree entered into by FSSA and make small updates to coverage of fluoride treatment. FSSA has operated without a dental cap for several years and has no evidence to suggest



that the policy eroded or strengthened the family and marital commitment. Furthermore, FSSA does not expect the minor change to the fluoride treatment section to negatively impact family or the marital commitment. Therefore, the proposed rule does not directly strengthen or erode the stability of the marital commitment.

2) Whether or not this action encourages or discourages non-marital childbearing.

Response: The proposed rule will align the Indiana Administrative Code with the consent decree entered into by FSSA and make small updates to coverage of fluoride treatment. FSSA has operated without a dental cap for several years and has no evidence to suggest that the policy encouraged or discouraged non-marital childbearing. FSSA does not expect the minor change to the fluoride treatment section to positively or negatively impact non-marital childbearing. Therefore, the proposed rule does not encourage or discourage non-marital childbearing.

3) Whether or not this action respects or inhibits the rights of parents to raise their children and make the best choices about their children's education, health, and well-being.

Response: The proposed rule will align the Indiana Administrative Code with the consent decree entered into by FSSA and make small updates to coverage of fluoride treatment. FSSA has operated without a dental cap for several years and has not implemented any requirements that interfere with parental choice. Parents remain free to decide whether and to what extent their children can receive these services. Therefore, the proposed rule does not inhibit the rights of parents to raise their children and make parental choices.

4) Whether or not this action increases or decreases private family earnings or the incentive for parents to provide materially and emotionally for their children.

Response: The proposed rule will align the Indiana Administrative Code with the consent decree entered into by FSSA and make small updates to coverage of fluoride treatment. FSSA has operated without a dental cap for several years and has no evidence to suggest that the policy depleted family earnings or induced parents not to provide materially or emotionally for their children. In fact, by lifting the dental cap, FSSA has made reimbursement of dental services more readily available to a small population of Medicaid recipients. FSSA expects the changes to the fluoride section to have the same neutral impact. Therefore, the proposed rule neither increases nor decreases family earnings or the incentive for parents to provide for their children.

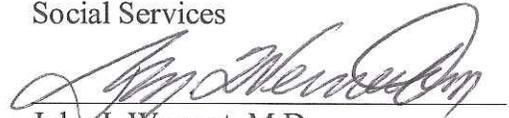
5) What message, intended or otherwise, does this program send to the public concerning the status of the family?

Response: The proposed rule will align the Indiana Administrative Code with the consent decree entered into by FSSA and make small updates to coverage of fluoride treatment. FSSA has operated without a dental cap for several years and has no indication that the policy sent a negative message to the public concerning the family. The provision of dental services is available to eligible recipients, regardless of the composition of the family. Therefore, the proposed rule does not send any message, positive or negative, concerning the status of the family.

6) What message does the action send to children about the relationship between their present choices and their future well-being?

Response: The proposed rule will align the Indiana Administrative Code with the consent decree entered into by FSSA and make small updates to coverage of fluoride treatment. FSSA does not believe that the proposed rule sends a negative message to children that materially impacts their life choices. FSSA believes that those receiving these services are in a better position to make positive choices both presently and in the future regarding their dental care. Therefore, the proposed rule does not send a negative message to individuals concerning the relationship between present choices and future well-being.

Office of the Secretary of Family and
Social Services



John J. Wernert, M.D.

Secretary



Family Impact Assessment

Documentation of new Policies and Rules

Pursuant to Section 2(a)-(f) of Executive Order 13-05:

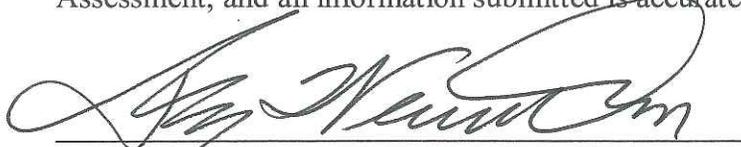
In formulating and implementing policies and rules that may have a significant impact on family formation and general well-being, the agencies listed in Section 1 of Executive Order 13-05 shall assess such measures in light of the following considerations:

- 1) **Whether or not this action by government strengthens or erodes the stability of the family and the marital commitment.**
- 2) **Whether or not this action encourages or discourages non-marital childbearing.**
- 3) **Whether or not this action respects or inhibits the rights of parents to raise their children and make the best choices about their children's education, health, and well-being.**
- 4) **Whether or not this action increases or decreases private family earnings or the incentive for parents to provide materially and emotionally for their children.**
- 5) **What message, intended or otherwise, does this program send to the public concerning the status of the family?**
- 6) **What message does the action send to children about the relationship between their present choices and their future well-being?**

These assessments should be answered on a separate document attached to this submission form and clearly marked as answers to considerations 1-6. If an agency does not think that a consideration applies to their proposal, the agency must include an explanation of why the consideration does not apply. Additionally, if the proposal contains a potentially negative impact on family well-being or family formation, the agency must include an explanation of why the proposal is necessary.

This submission form and the agency assessments should be submitted simultaneously with the proposed policy or rule to the Office of Management and Budget.

By signing below, the agency head certifies that they are aware of the Family Impact Assessment, and all information submitted is accurate to the best of their knowledge.



John J. Wernert, M.D., Secretary

10/2/15
Date

FSSA
Agency