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United States Senate

SPECIAL COMMITTEE ON AGING
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Mr. Michael Nardone
Director, Disabled and Elderly Health Programs Group
Centers for Medicare and Medicaid Services (CMS)
U.S. Department of Health and Human Services
7500 Security Blvd
Baltimore, MD 21244

Dear Mr. Nardone:

We write to express concern regarding implementation of the home and community-based services regulation issued by the Centers for Medicare and Medicaid Services (CMS) in March 2014. We appreciate CMS's ongoing efforts to ensure that Medicaid beneficiaries receiving home and community-based services are fully integrated into their communities, and that the settings where home and community-based services are delivered are non-institutional. We are hearing from our constituents, however, that certain aspects of the rule lack clarity and that more specific guidance is needed to ensure a smooth transition process and to avoid unintentional barriers to seniors' accessing important home and community-based services, including those provided in assisted living communities.

Under the Social Security Act, states are required to provide long term care services and supports in institutional settings, but all 50 states and the District of Columbia also exercise an option to provide home and community-based services to certain Medicaid beneficiaries who would otherwise require an institutional level of care. It is our understanding that in the home and community-based services regulation, CMS sought to improve individual choice and promote community integration in order to ensure that beneficiaries have full access to the benefits of community living and are able to receive services in the most integrated setting appropriate to their needs. As part of this effort, the final rule established new criteria for home and community-based care settings in order to be eligible for federal Medicaid reimbursement.

In the rule, CMS stated an intent to define home and community-based settings by the "nature and quality of individual's experience," instead of relying exclusively on "a setting's location, geography, or physical characteristics." CMS also presumes, however, that certain settings are ineligible to provide home and community-based services unless such settings are able to meet a heightened standard of proof. Settings that are presumed ineligible under the rule include: (1) settings located in a building that is also a publicly or privately-owned facility providing inpatient institutional treatment; (2) settings located in a building on the grounds of or immediately adjacent to a public institution; and (3) settings which isolate individuals receiving Medicaid home and community-based services from the broader community. States bear the responsibility for ensuring that home and community-based services are delivered in eligible

settings, and must develop a plan to bring any non-compliant programs into compliance by March 17, 2019.

We are concerned about reports that the absence of guidance explaining CMS' interpretation of the new requirements has led to a lack of clarity and created confusion among providers that may ultimately limit their ability to serve Medicaid beneficiaries. In particular, we seek more information regarding the criteria for basing whether certain settings are presumed ineligible and how affected providers can complete the heightened scrutiny process to reverse such a determination, including for: (1) secured memory care units; (2) assisted living communities located in rural areas; and (3) assisted living communities that are located in a separate or converted section, or on the campus of a nursing home.

Many seniors may find themselves unable to locate another appropriate non-institutional setting should CMS ultimately determine that many of the assisted living settings presumed ineligible under the rule are not eligible for federal financial participation. Because seniors may have needs that can no longer be met through home health care alone, they may be forced to transition into higher cost and more restrictive institutional settings, which seems contrary to CMS's intent. There is strong demand among seniors for many of the specific characteristics of these settings that are subject to heightened review. Many seniors, for example, prefer to live near a nursing home or other such facility where more intense services are readily available should they be needed. This can ease transitions for individuals with conditions that might not follow a predictable trajectory, and may allow married couples to live near one another in cases where care needs differ. Additionally, many seniors prefer to live in rural areas and doing so may actually increase their proximity to loved ones.

We appreciate your prompt consideration of the concerns we have raised regarding challenges faced by providers and seniors under the rule and look forward to your response.

Sincerely,

Susan M. Collins
Chairman

Claire McCaskill
Ranking Member