May 20, 2020

Seema Verma
Administrator
Centers for Medicare and Medicaid Services
Department of Health and Human Services
P.O. Box 8016
Baltimore, MD 21244-8016


Dear Administrator Verma:

The Bazelon Center submits these comments in response to the above-captioned proposed rule concerning the Preadmission Screening and Resident Review (PASRR) process. The Bazelon Center is a national non-profit organization founded in 1972 to advance the rights of people with mental disabilities. The Center conducts litigation and policy advocacy to promote equal opportunities for people with psychiatric disabilities and intellectual disabilities in all aspects of life, including community living, health care, employment, education, housing, parental and family rights, voting, and other areas. The Center has extensive experience with the PASRR process in states across the country.

Some of the technical changes proposed by CMS to bring the regulations up to date, take account of changes in law and in the fields of mental health and intellectual disability, clarify particular points, and address inconsistencies make sense and would improve the PASRR process. We are particularly concerned, however, about the proposed creation of a new category of “provisional” admissions that would be exempted from pre-admission screening. This proposal is plainly inconsistent with the statute and would further decrease the effectiveness of a process that is already failing to achieve Congress’s goals in enacting the PASRR provisions. There are modifications that CMS should make to the proposed rule that would improve the process and better align it with congressional intent.

Despite Congress’s intentions to stop the warehousing of individuals with psychiatric disabilities and those with intellectual disabilities in nursing homes when they could live successfully in community settings, the PASRR process in most states diverts a very small number of people from nursing home placement and instead functions to screen them in rather than out of nursing facilities. Such placements are typically poor service settings for addressing mental health and intellectual disability needs, and drain resources that could be spent on better and less costly services in the community. The underinvestment in and scarce availability of community services creates pressure on PASRR evaluators to find individuals appropriate for nursing home admission due to a lack of other options. The bar for meeting a nursing facility level of care in
most states is low, and consequently nursing home placement is a ready option that is widely used for the very individuals that Congress intended to divert. Even when community services are available, many PASRR screeners are unaware of intensive community mental health services and HCBS waiver services and the range of individuals they serve. Finally, even when PASRR evaluations determine that individuals could live in the community, those individuals are frequently admitted anyway because they meet the “nursing facility level of care” standard and community services are either unavailable or cannot be arranged in time to prevent nursing home admission. CMS should strengthen, rather than weaken, the ability of the PASRR process to divert individuals to community services.

“Provisional Admissions.” The statute is clear and requires preadmission screening for all individuals with a mental illness or intellectual disability prior to admission to a nursing facility, with the exception of acute hospital discharges. That is important because once an individual is admitted to a nursing facility, even if a post-admission evaluation is conducted, it is far more difficult to get the person out. The person may lose eligibility for housing subsidies once placed in a nursing facility, or may lose his or her existing housing. Once admitted, individuals face many types of pressure from for-profit facilities to stay. While the provisional admission provision is supposed to address very short-term admissions, the experience with admissions from acute care hospitals—also intended to be short-term—demonstrates that such stays may be routinely characterized as short-term but become long-term due to a lack of alternatives.

Indeed, the statute does not authorize the categorical determinations for provisional admissions permitted by the current regulations, and accordingly the regulations should be modified to preclude such categorical determinations in these circumstances.

“Specialized Services.” We agree with the concerns raised by the Center for Public Representation about the proposed changes to the definition of specialized services for individuals with intellectual and developmental disabilities. For people with mental illness, however, we believe the proposal would be an improvement over the widespread practice of providing only inpatient care as specialized services; as CMS notes, specialized services should emphasize developing long-term skills to foster independence rather than focusing on managing crises.

“Nursing facility level of services.” As noted above, the low bar in many states’ standards for needing a nursing facility level of care results in widespread needless admission to nursing facilities and undermines the goals of PASRR. CMS should set minimum standards that clarify that a psychiatric or intellectual disability ordinarily is not sufficient by itself to justify the need for the level of service provided in a nursing facility. Doing so would go a long way toward ensuring that states’ PASRR processes function in the way that Congress intended. Additionally, we support the proposed language requiring that for a person to be determined to need a nursing facility level of service, placement in a “HCBS program cannot be achieved either because the individual’s total needs exceed or cannot currently be accommodated by the state’s HCBS programs, or the individual does not want community placement.” CMS should require that
evaluators be familiar with the full range of services available in the community, however, including community-based mental health services (which may not be labelled “HCBS services”).

**Coordination with Olmstead planning and implementation**: CMS should require or at least encourage states to ensure that Level II PASRR determinations that an individual can live in the community should be furnished to state officials in charge of Olmstead planning and implementation efforts. Currently, in many or most states, such determinations go into a file and are never seen or used by the systems working to facilitate compliance with the Americans with Disabilities Act’s integration mandate and the Supreme Court’s Olmstead decision, which are closely aligned with Congress’s goals for the PASRR program.

Very truly yours,

Jennifer Mathis  
Director of Policy and Legal Advocacy