NAELA
National Academy of Elder Law Attorneys

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January 8, 2024

Chiquita Brooks-LaSure
Administrator
Centers for Medicare & Medicaid Services
U.S. Department of Health and Human Services
Hubert H. Humphrey Building
200 Independence Avenue SW
Washington, DC 20201

via www.regulations.gov

Re: Proposed Changes to 42 CFR § 435.601(d) (CMS-9895-P)

Dear Ms. Brooks-LaSure:

As advocates for older adults, people with disabilities, and their families, the National Academy of Elder Law Attorneys (NAELA) appreciates the opportunity to comment on the above-referenced rule, specifically, the proposed changes to the Medicaid eligibility regulations at 42 CFR 435.601(d).

NAELA represents over 4,000 elder and special needs law attorneys and 31 chapters, with members in every state and even some abroad. We are the only professional, non-profit association of attorneys that conditions membership on a commitment to the Aspirational Standards for the Practice of Elder and Special Needs Law Attorneys. Extending beyond the benchmark set by the American Bar Association's Model Rules of Professional Conduct, these standards recognize the need for holistic, person-centered legal services to meet the needs of older adults, people with disabilities, and their caregivers. Supporting the dignity and independence of these vulnerable populations is at the center of what we do.

In general, NAELA conditionally supports the proposal to allow states to expand eligibility for one or more non-MAGI subpopulations in a targeted manner. However, in reference to the brief discussion in the proposed rule that the proposed subpopulation be "reasonable" and "not violate other Federal statutes," we ask CMS to provide additional guidance to states and stakeholders on the guardrails associated with this flexibility, so that it is clear that a state plan amendment (and underlying state action) will not result in contracting any non-MAGI subpopulations' Medicaid eligibility. Specifically, as explained further below, we ask that CMS codify under 435.601(d) the following conditions for this flexibility:

- Require that the state plan amendment may only be submitted and approved if it describes new *less restrictive* methodologies the state seeks to apply and the groups to which it seeks to apply such methodologies. The official transmittal form (Form CMS-179) and relevant attachments are not considered acceptable if they describe new *more restrictive* methodologies. In this way, the state must continue to uphold and adhere to methodologies (e.g., existing income and resource disregards) that apply to the eligibility group so that the subpopulations remaining in the eligibility group do not

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experience a negative change with respect to the terms upon which they are eligible for Medicaid based on financial methodologies.
- Commit CMS to periodically review the long-term impacts of this relatively narrow state plan amendment pathway and its effect on efforts at the state level to expand eligibility more broadly among a greater share of non-MAGI eligibility groups. NAELA strongly supports broad access to long-term services and supports to all those in need and policies to allow individuals seeking home- and community-based services to receive them.
- Clearly reinforce the application of federal nondiscrimination laws to this flexibility and provide clear, non-exhaustive examples in the final rule of what is permitted when targeting less restrictive methodologies to subpopulations in the eligibility group.

Background

CMS proposes to eliminate from the rule text what is known as the "comparability mandate." Since 1993, federal regulations have required that any less restrictive financial eligibility methodologies for non-MAGI populations be "comparable for all persons within each category of assistance…within an eligibility group. For example, if the agency chooses to apply less restrictive income or resource methodology to an eligibility group of aged individuals, it must apply that methodology to all aged individuals within the selected group." (42 CFR 435.601(d)(4)). This comparability mandate continues to apply to certain categories of Medicaid eligibility populations including individuals who are age 65 years old or older; have blindness or a disability; are being evaluated for coverage as medically needy; or request need for coverage of long-term services and supports (LTSS).

We understand that the comparability mandate has helped to curb potential state policies that might disadvantage one singular eligibility group (e.g., optional categorical needy group) within a larger category of assistance (e.g., aged, disabled). At the same time, the mandate serves as a federal regulatory barrier to state actions that would advance more generous income or resource disregards for a particular eligibility subpopulation. Examples include:

- If a state that covers an eligibility group of individuals 65 years old and older who have been in a medical institution for at least 30 consecutive days wants to adopt a resource disregard of $5,000 of otherwise countable resources, the state must apply the disregard to all 65 and older individuals who are seeking coverage under the group; the state could not target the disregard at only certain 65 and older individuals seeking eligibility in the group, for example individuals age 65 and older with a diagnosed cognitive impairment.
- If a state that covers an eligibility group servicing individuals with disabilities who have earned income wants to prevent the individuals from exhausting all their savings to retain their Medicaid eligibility when the individual stops working, the state could not target the resource disregard at only these individuals transitioning into a new eligibility group.

By eliminating the comparability mandate, CMS would allow states to expand Medicaid eligibility in a targeted manner by targeting income and/or resource disregards at discrete subpopulations in the same eligibility group, provided the change does not discriminate based on race, gender, sexual orientation or disability. A state would file a state plan amendment to describe the new methodology and the groups to which the eligibility expansion applies.

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Specific NAELA Comments

While NAELA conditionally supports CMS's proposal, we recommend that CMS strengthen and clarify the conditions tied to this state flexibility so that states choosing this pathway can do so only by taking a "do no harm" approach. Specifically, we ask CMS to consider requiring a state to continue to uphold and adhere to methodologies (e.g., existing income and resource disregards) that apply to the eligibility group. In this way, Medicaid eligibility must expand in absolute terms, rather than in relative terms. We would oppose this proposal if it allowed (whether intentionally or not) a state to benefit one subpopulation under a more generous income or resource disregard, while some or all of the subpopulations remaining in the eligibility group experience a negative change with respect to the terms upon which they are eligible for Medicaid based on financial methodologies. Based on our interpretation of the preamble of the proposed rule, we understand that this flexibility is premised on CMS's expectation that the state plan amendment must "describ[e] any new less restrictive methodologies the State seeks to apply and the groups to which it seeks to apply such methodologies." Given this, we ask CMS to clarify in the final rule that CMS would disapprove a state plan amendment with more restrictive methodologies under which the state replaces a broad disregard applicable to the eligibility group with a discrete disregard for a subpopulation. Similarly, if a state chooses to implement multiple eligibility expansions over time for discrete subpopulations, we ask CMS to then prohibit a state from replacing a discrete existing expanded disregard policy for one subpopulation within the eligibility group with a discrete newly expanded disregard for a separate subpopulation within the applicability group.

The longer-term impacts of this policy change are another issue worthy of CMS's consideration. While we acknowledge, as CMS notes in the preamble, that it has only received inquiries from states seeking to expand eligibility, rather than contract it, close review of this state plan amendment language and implementation monitoring by CMS is warranted. We encourage CMS to commit to study any long-term effects on efforts at the state level to expand eligibility more broadly among a greater share of non-MAGI eligibility groups.

Finally, we ask CMS to provide additional guidance in the final rule regarding the proposed guardrails noted briefly in the proposed rule: that the subpopulation is "reasonable" and "does not violate other Federal statutes (for example, it does not discriminate based on race, gender, sexual orientation or disability)." We believe that our comments above will help inform the "reasonableness" assessment. In addition, the intersection of other federal laws like nondiscrimination standards and CMS program standards (and particularly program flexibilities) is often unclear. A concrete example developed in collaboration with the Office of Civil Rights or other relevant stakeholders—and informed by Section 504 of the Rehabilitation Act of 1973 and Section 1557 of the Affordable Care Act--would be helpful to incorporate in the final rule. We offer one example for consideration: if a state established a broader disregard to individuals aged 65 and older with a diagnosed cognitive impairment while establishing a narrower disregard to individuals with a disability than what these individuals encountered absent the change, it has violated the federal nondiscrimination laws.

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Conclusion

We thank CMS again for its commitment to policies that broaden income and resource disregards so that individuals do not need to impoverish themselves or their families in order to live with adequate health care and dignity. We thank CMS for its thoughtful consideration of the important issues discussed in the NPRM. We appreciate this and future opportunities to work with you. If you have any questions or would like to set up a discussion, please reach out to Thomas Harlow, NAELA's interim Chief Executive Officer, at tharlow@naela.org.

Sincerely,

Bridget O'Brien Swartz
President
National Academy of Elder Law Attorneys