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Andrew Slavitt
Centers for Medicare and Medicaid Services
Department of Health and Human Services
Attention: CMS-6074-NC
P.O. Box 8016
Baltimore, MD 21244-8016

Re: Request for Information: Inappropriate Steering of Individuals Eligible for or Receiving Medicare and Medicaid Benefits to Individual Market Plans

Dear Acting Administrator Slavitt:

The co-chairs of the Consortium for Citizens with Disabilities (CCD) Health Task Force appreciate the opportunity to comment on the *Request for Information: Inappropriate Steering of Individuals Eligible for or Receiving Medicare and Medicaid Benefits to Individual Market Plans* (the RFI). The CCD is a coalition of more than 100 national disability organizations working together to advocate for national public policy that ensures the self-determination, independence, empowerment, integration and inclusion of children and adults with disabilities in all aspects of society. The CCD Health Task Force is focused on health policy from a disability perspective.

The CCD Health Task Force believes the language of the RFI itself presents a biased view of long-standing third party payment arrangements geared toward individuals with low incomes that enable these individuals to choose the health insurance option that best meets their needs. These third party payment arrangements have been reviewed and approved by the federal government for decades. Yet, the RFI asserts that patient "steering" by providers toward Marketplace plans is occurring for their own benefit with no real evidence of this behavior detailed in the Request for Information. The RFI asserts that certain third party payment arrangements are potentially fraudulent and abusive, relying on "anecdotal evidence," thereby taking a legitimate policy issue and casting a pall on this practice without any recognition of how low income patients benefit under these arrangements.

We have serious concerns that this issue is portrayed in this light, with virtually no acknowledgement in the RFI that insurers appear to be doing everything *they* can to "steer" patients *out* of their Marketplace plans and onto the Medicare program as soon as an enrollee develops a disabling health condition, specifically End Stage Renal Disease (ESRD). This

constitutes discrimination based on disability status and violates several provisions in the Affordable Care Act designed to protect individuals with disabilities, as well as previous guidance issued by CMS. It is unfortunate that the RFI does not even address this aspect of the issue.

Discriminatory Treatment of Certain Individuals with Disabilities

The RFI May Allow Insurers to Exclude Individuals with Disabilities from Marketplace Coverage in Violation of ACA Protections

The Affordable Care Act (ACA) prohibits group and non-grandfathered individual plans from limiting, excluding, or denying coverage to individuals based on the existence of a health care condition. This prohibition against "pre-existing condition exclusions" is complimented by the guaranteed issue and guaranteed renewability provisions of the ACA. Together, these provisions prohibit discrimination in the individual health insurance market based on health status. Section 1557 of the Affordable Care Act also prohibits federal health care programs, activities, and contracts of insurance from discriminating against individuals.[1] Section 1557's regulations state:

> A covered entity shall not, in providing or administering health-related insurance or other health-related coverage, discriminate on the basis of race, color, national origin, sex, age, or disability.[2]

A "covered entity" includes a health insurer that provides health-related insurance coverage where any part of which receives Federal financial assistance.[3] Under the regulations, a health insurer may not "deny, cancel, limit…a health-related insurance plan or policy…or impose…other limitations or restrictions on coverage on the basis of…disability."[4]

In addition, CMS has established in numerous regulations that eligibility for Medicare coverage due to ESRD status does not require an individual to immediately enroll in Medicare. Individuals with ESRD who are able to pay their insurance premiums out-of-pocket are permitted to maintain their existing coverage, or even change their coverage, while remaining on the group or individual market.

Enrollees who develop ESRD and cannot afford to pay their private insurance premiums may seek to obtain charitable assistance to help them stay on their plan. As stated previously, the federal government has approved of this practice in many instances. In the ESRD community, the Office of Inspector General has explicitly approved such third party payments for low income individuals through a nonprofit organization known as the American Kidney Fund (AKF). Labeling the use of these charitable contributions as inappropriate "steering of patients" onto the Marketplace is inconsistent with the underlying rules of ACA insurance coverage and transition between the Marketplace and Medicare. CMS should not adopt a regulatory scheme that permits individuals with financial resources to maintain choice of insurance options when

[1] 42 U.S.C. § 18116.
[2] 45 C.F.R. § 92.207(a).
[3] *Id*. **§** 92.4. A "covered entity" also includes an entity established under Title I of the ACA that administers a health program or activity and HHS. *Id*.
[4] *Id*. § 92.207(b).

they develop ESRD, but denies low income individuals with ESRD the same insurance options because they require charitable assistance to cover the cost of insurance premiums and other cost-sharing.

In addition, we understand that certain behaviors by issuers with respect to the ESRD population are raising serious concerns in the ESRD community and disturbing questions about discriminatory treatment. Some issuers have been limiting coverage of dialysis treatments to no more than a few months, essentially forcing enrollees to disenroll from their Marketplace plans and join the Medicare program in order to continue to obtain dialysis coverage. Other issuers shift additional costs onto enrollees or even mislead patients that federal law requires individuals with ESRD to enroll in Medicare shortly after they are diagnosed with this condition. All of these tactics are designed by issuers to offload the costs of resource-intensive patients onto the Medicare program and can be described as impermissible "steering" of patients onto the Medicare program. We urge CMS to address this form of patient steering if a proposed rule on third party payments is issued in the future.

Individual Choice of Insurance Options Is Essential

Above all, CCD Health Task Force, while opposing genuine patient steering, supports beneficiary choice of insurance options regardless of the individual's health condition or financial status in order to best serve the interests of those with disabilities and chronic conditions, in this instance, individuals with ESRD and chronic kidney disease (CKD).

Individuals with ESRD may prefer private coverage over joining the Medicare program for many reasons. Such coverage may provide a more robust provider network and greater network continuity. Private health insurance plans on the Exchange often limit out-of-pocket expenses, while Medicare fee-for-service does not. The fact that half the states do not permit ESRD beneficiaries to purchase Medigap plans contributes to the financial burden for Medicare fee-for-service beneficiaries. Private insurance also often provides family coverage, something that would be lost if a father or mother were to join the Medicare program.

Any proposed regulations on the appropriateness of third party payments must ensure that individuals of all income levels have maximum choice in the selection of insurance plans or programs that meet their individual needs.

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CMS should clarify that third party payments for low income individuals with ESRD are, indeed, permissible as long as patients are not blatantly steered to Marketplace coverage, and CMS should also prohibit Marketplace plans from steering ESRD patients to the Medicare program to avoid the costs of ESRD care.

We greatly appreciate your attention to our concerns and your interest in our comments.

Sincerely,

The CCD Health Task Force Co-Chairs

Rachel Patterson
Christopher & Dana Reeve Foundation
rpatterson@christopherreeve.org

Peter Thomas
Brain Injury Association of America
Peter.Thomas@ppsv.com

Mary Andrus
Easterseals
mandrus@easterseals.com

Bethany Lilly
Bazelon Center for Mental Health Law
bethanyl@bazelon.org

Julie Ward
The Arc of the United States
Ward@thearc.org