

**NATIONAL CENTER FOR LAW AND  
ECONOMIC JUSTICE**

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May 20, 2020

Administrator Seema Verma  
Centers for Medicare & Medicaid Services  
Department of Health and Human Services  
Attention: CMS-2418-P  
B.O. Box 8016  
Baltimore, MD 21244-8016

Re: Comments on Proposed Rule: Preadmission Screening and Resident Review  
CMS-2418-P

Dear Administrator Verma,

The National Center for Law and Economic Justice (“NCLEJ”) submits this comment in response to the Center for Medicaid Medicare Services’ (“CMS”) proposed Preadmission and Resident Review (PASRR) rules (hereinafter, the “proposed rule” or the “proposal,”) published in the Federal Register on February 20, 2020.<sup>1</sup>

NCLEJ advances economic justice by advocating for the fundamental rights for low-income families, individuals, and communities nationwide through impact litigation, policy advocacy, and support for grassroots organizing. Our work includes advocating for the rights of persons with disabilities in accessing critical health services. We also work to ensure that public benefits programs, such as Medicaid, operate efficiently and fairly to serve those who are eligible and in need of help.

As a result, NCLEJ strongly opposes the proposed rule because of its impact on low-income populations who are more likely to have fewer options with respect to their long-term care.<sup>2</sup> Specifically, the rule would likely result in more people with intellectual and developmental disabilities (IDD) and mental illness (MI) being admitted into nursing facilities, fewer people being discharged from these facilities, and fewer specialized services being provided to those who remain. The current health and wellbeing of our nation literally depends on our ability to maintain social distance. Therefore, the requirements that govern the congregate care settings that serve some of the populations most susceptible to COVID-19 should not be

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<sup>1</sup> 85 Fed. Reg. 9990-10027 (Feb. 20, 2020).

<sup>2</sup> See, e.g., Wilson, Chris, “These Graphs Show How COVID-19 Is Ravaging New York City's Low-Income Neighborhoods,” April 15, 2020, <https://time.com/5821212/coronavirus-low-income-communities/> (last visited May 20, 2020).

eased. In light of the rapid spread of COVID-19, particularly in nursing facilities<sup>3</sup>, we urge CMS to reconsider the proposed rules.

The Supreme Court in *Olmstead v. L. C. by Zimring* held that “unjustified isolation” constitutes “discrimination based on disability.” 527 U.S. 581, 597, 600 (1999) (quoting 42 U.S.C. § 12101 (a)(2)), and acknowledged the societal tendency ascribed in the Americans with Disabilities Act (ADA) to “isolate and segregate individuals with disabilities.” Relaxing standards for entry into nursing homes contravenes the goal of maintaining standards that allow people to receive care in “the most integrated setting” appropriate to their needs. *Id.* at 591-92 (quoting 28 C.F.R. § 41.51(d) (1998)).

Thus, while NCLEJ supports the goal of updating and clarifying the current PASRR regulations, the proposed rule does not reflect the purpose of the PASRR program and contradicts not only the requirements of the ADA and guidance published by CMS related to these laws, but also contemporary professional mental health and IDD standards that favor community-based services as a better option.

The proposed rule undermines community-based care in three ways: (1) reducing the utility of PASRR preadmission screenings and evaluations meant to prevent unnecessary admissions to facilities; (2) limiting the PASRR Level II evaluation with respect to placement in alternative home or community-based settings; and (3) diminishing available specialized services for persons with IDD and MI while residing in nursing facilities.

First, the proposed rule will reduce the use of PASRR assessments meant to prevent the unnecessary admission of persons with IDD or MI to nursing facilities. Currently, Level I screenings and Level II evaluations are specifically geared toward determining whether a person requires specific services only available at a nursing facility or if a person may be better served in an alternative integrated setting. If implemented, the proposed rule would instead allow states to skip Level I preadmission screenings altogether for individuals who are being considered for readmission to a facility, transfer to another facility, admission following discharge from a hospital, and provisional admission (which is admission to a facility specifically for respite, crisis, protective, or convalescent services). Once admitted, it becomes more unlikely that a person would be able to return to his or her community, even after a PASRR Level II evaluation is completed after admission. As a result, the proposed rule significantly increases the chances of long-term institutionalization.

Second, the proposed rule will significantly curtail the PASRR Level II evaluation’s consideration of alternative placements in home or community settings. Currently, the PASRR Level II evaluation emphasizes the need to offer community or integrated settings when the individual would benefit from receiving services in his or her own community. However, if implemented, the proposed rule would authorize admission of individuals who do not currently

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<sup>3</sup> Yourish, Karen, K.K. Rebecca Lai, Ivory, Danielle, and Smith, Mitch, “One-Third of All U.S. Coronavirus Deaths Are Nursing Home Residents or Workers,” May 11, 2020 <https://www.nytimes.com/interactive/2020/05/09/us/coronavirus-cases-nursing-homes-us.html> (last visited May 20, 2020).

have an available option in the community, even if the evaluation indicates that he or she would be better served in an integrated setting. The proposed rule also does not require states to provide information to individuals with IDD/MI or guardians about *Olmstead*'s requirements that a community placement must be assumed to be appropriate unless the person opposes such a placement.

Finally, the proposed rule will cut down on available services for persons with IDD/MI in facilities. If implemented, the rule will restrict the type of assessments used to determine whether specialized services are required by an individual, focusing almost exclusively on Activities of Daily Living (ADL) and Instrumental Activities of Daily Living (IADL) assessments instead of a broad range of social, vocational, educational, and communication areas, as required by the current regulations. As a result, states would be allowed to drastically limit the type of specialized services that they will provide to individuals in nursing facilities, and to eliminate any standard for determining what services should be provided. The proposed rule is particularly problematic for individuals with IDD, by significantly diluting the evaluation criteria for specialized services, and deleting the active treatment standard for providing these services, allegedly to avoid an institutional standard of care, even though they only apply to an institutional setting – nursing facilities.

In sum, NCLEJ strongly urges CMS to reconsider the proposed rule, substantially revise it to comply with the ADA and prior CMS Guidance in accordance with these protections, and republish for further public comment.

NCLEJ's comment includes citations to supporting research, including direct links to relevant studies and other data. We direct CMS to each of these cited studies and the links that we have provided, and we request that the full text of each of the documents, data, research, or studies cited, along with the text of this comment, be considered part of the formal administrative record on the proposed rule for the purposes of the Administrative Procedure Act.

NCLEJ appreciates the opportunity to comment on this proposed rule. If you have any questions regarding NCLEJ's comments, you may contact Staff Attorney Britney Wilson ([wilson@nclej.org](mailto:wilson@nclej.org)) and Equal Justice Works Fellow Jen Rasay ([rasay@nclej.org](mailto:rasay@nclej.org)). Thank you for your consideration.

National Center for Law and Economic Justice