

United States Senate

WASHINGTON, DC 20510-3203

August 4, 2020

The Honorable Seema Verma
Administrator
Centers for Medicare and Medicaid Services
U.S. Department of Health and Human Services
200 Independence Avenue SW
Washington, DC 20201

Dear Administrator Verma:

We are writing in regards to limits imposed on retention and advance payments as outlined in Frequently Asked Questions (FAQs) issued by the Centers for Medicare and Medicaid (CMS) on June 30, 2020.^[1] According to these FAQs, CMS is permitting states to authorize only up to three 30-day periods of retainer payments for individuals during the COVID-19 crisis using the Appendix K amendment to states' Home and Community Based Services (HCBS) 1915(c) waivers. While we appreciate that limits such as these are reasonable under certain circumstances, the ongoing COVID-19 pandemic has levied unprecedented strains on providers' HCBS programs. We urge you to reconsider this guidance and adopt an approach that will provide continued financial relief that ensures the availability of HCBS during and after the COVID-19 crisis for millions of individuals living with disabilities.

As you know, CMS has made retainer payments available to certain HCBS providers since a 2000 State Medicaid Director Letter, which authorized states to make such payments in order to provide parity with bed hold payments available to nursing homes.^[2] The guidance aimed to ensure that HCBS would continue to be available to eligible Medicaid beneficiaries with intellectual and developmental disabilities under 1915(c) waivers when circumstances prevented them from receiving these services during a period of time. In its 2000 guidance, CMS limited episodes of retainer payments to 30-day periods, but notably did not cap the number of periods available.

On June 30, 2020, CMS announced that it would limit states to three consecutive 30-day periods of retainer payments for individuals receiving HCBS during the period of the disaster using flexibilities under the Appendix K. We are deeply concerned that these limits could put HCBS service delivery networks at risk. Many HCBS service delivery providers are non-profits, small, and normally have limited cash on hand. An April 2020 report based on a survey conducted by the American Network of Community Options and Resources (ANCOR)^[3] found that half of the 689 agencies responding "would not be able to stay in business for more than 1 month given their financial resources" if their funding were curtailed.

The effects of the COVID-19 pandemic on HCBS service delivery providers has already been devastating. The same ANCOR survey reported that two thirds of providers have already cut back or eliminated some of their intellectual and developmental disability services. Moreover, many of the

^[1] <https://www.medicaid.gov/state-resource-center/downloads/covid-19-new-faqs.pdf>

^[2] <https://www.medicaid.gov/sites/default/files/Federal-Policy-Guidance/downloads/smd072500b.pdf>

^[3] https://www.ancor.org/sites/default/files/impact_of_covid-19_on_organizations_serving_individuals_with_idd.pdf

financial challenges experienced by these providers have not been fully addressed by other federal forms of fiscal relief, including the Paycheck Protection Program and the Provider Relief Fund, to date indicating that further federal action is needed to support these delivery networks and safeguard access to services during the emergency.^[4] States need both an infusion of dedicated HCBS funds and the flexibility to provide retainer payments in order to ensure agencies providing services remain stable and available to the beneficiaries who depend on these services and supports to remain in their homes.

Perhaps more devastating than the current effects of the pandemic on agencies is the damage retainer payment limitations will do to the long-term service delivery infrastructure of HCBS providers in states. If service providers are forced to close their doors permanently, there will be an even more fragile intellectual and developmental disability service delivery network left behind. Potentially millions of individuals will go without long-term services and supports until new service providers can be established and services restarted.

We understand that CMS's recent policy for retainer payments was based on time-limited natural disasters such as hurricanes. But the current disaster our country faces is different: the COVID-19 pandemic is ongoing and, in certain regions of the country, worsening, leading Secretary Azar to renew his declaration of a public health emergency just last week.^[5] Moreover, the pandemic has had disproportionate and devastating consequences for residents in institutional settings like nursing homes, magnifying the importance of HCBS as a critical tool in keeping patients safe during this crisis.^[6]

In light of the unique challenges of this crisis and long-term consequences that may loom ahead, a new policy on retainer payments should be adopted that fits the circumstances before us. We strongly urge CMS to revise its policy and allow states to provide retainer payments to HCBS providers throughout the public health emergency. This will allow states to make responsible decisions about providing retainer payments to service provider agencies and to retain their service delivery infrastructure.

This issue must be addressed swiftly. On July 21, the ability of New York to permit retainer payments ended.^[7] Other states will soon follow. We ask for a quick and positive response to our request. Without timely action by the Administration, the nation's HCBS providers are at risk of widespread closures that will leave millions of people with disabilities without access to critical care and support. Thank you for your attention to this urgent matter.

Sincerely,

/s/ Charles E. Schumer
United States Senator

/s/ Ron Wyden
United States Senator

/s/ Robert P. Casey, Jr.
United States Senator

/s/ Tammy Duckworth
United States Senator

/s/ Elizabeth Warren
United States Senator

/s/ Kirsten Gillibrand
United States Senator

/s/ Tina Smith
United States Senator

/s/ Catherine Cortez Masto
United States Senator

/s/ Jack Reed
United States Senator

^[4] <http://thearc.org/wp-content/uploads/2020/07/July-21-2020-Ltr-to-Leadership-.pdf>

^[5] <https://www.phe.gov/emergency/news/healthactions/phe/Pages/covid19-23June2020.aspx>

^[6] <https://www.aging.senate.gov/press-releases/casey-peters-wyden-release-new-report-detailing-trump-administrations-failure-to-protect-nursing-home-residents-and-workers-from-covid-19->

^[7] https://www.arceriecounty.org/assets/documents/NYDA_Letter_7_17_2020.pdf

/s/ Chris Van Hollen
United States Senator

/s/ Margaret Wood Hassan
United States Senator

/s/ Richard Blumenthal
United States Senator

/s/ Sheldon Whitehouse
United States Senator

/s/ Mazie K. Hirono
United States Senator

/s/ Michael F. Bennet
United States Senator

/s/ Jacky Rosen
United States Senator

/s/ Robert Menendez
United States Senator

/s/ Edward J. Markey
United States Senator