September 9, 2024

Chiquita Brooks-LaSure
Administrator
Centers for Medicare & Medicaid Services
U.S. Department of Health and Human Services
7500 Security Boulevard
Baltimore, MD 21244

Submitted via regulations.gov

RE: Comments on Proposed Medicaid and Medicare Program Rules Amending Definition of Custody for Purposes of Medicare Exclusion (CMS-1809-P)

Dear CMS Administrator Chiquita Brooks-LaSure,

The National Consumer Law Center (NCLC), on behalf of its low-income clients, submits the following comments in response to the proposed rule issued by the Center for Medicaid and Medicare Services (CMS), Department of Health and Human Services, regarding Medicaid and Medicare Programs at 89 Federal Register 59,186 (July 10, 2024). NCLC's comments are limited to the issue of amending the definition of custody for the purposes of Medicare exclusions applicable to individuals currently or formerly in the custody of penal authorities and the Medicare Special Enrollment Period for formerly incarcerated individuals. For the reasons detailed below, NCLC supports the proposed revisions to the definition of custody. More generally, NCLC commends CMS's work to remove barriers to healthcare and Medicare access for people leaving incarceration, and we encourage CMS to continue to find additional ways to expand the use of Medicare resources for carceral medical care.

The Proposed Rule Would Expand Medicare Coverage to Individuals on Parole, Probation, or Home Detention, Resulting in Improved Access to Healthcare for People Leaving Incarceration

The population of individuals incarcerated in jails and prisons across the United States is getting sicker and older. In 2021, the Department of Justice found that 40% of incarcerated people in state prisons and 33% of incarcerated people in federal prisons reported having a chronic health condition.[1] Medicare funds generally do not cover healthcare costs of people who are in the "custody" of a penal authority, leaving many

[1]U.S. Department of Justice, *Survey of Prison Inmates, 2016: Medical Problems Reported by Prisoners* (June 2021).

people with chronic or other health conditions who are in custody or returning to their communities vulnerable to substantial medical debts or forgoing needed medical care.

The proposed rule would increase access to Medicare for justice-impacted individuals by changing the definition of "custody."[2] Currently, the Medicare program considers people who are not in prison or jail but who are on parole, probation, or home detention to be in the "custody" of the carceral system and, therefore, ineligible to have their medical care covered by the Medicare program.[3] If finalized as proposed, the new rule would change the definition of "custody" for the Medicare program to no longer include people who are living in the community who are on parole, probation, or home detention. This would allow people in these situations to participate in Medicare when otherwise eligible, increasing their access to affordable medical care at what is often a particularly critical time of transition and building health and financial stability.[4]

The proposed rule would also revise eligibility factors for the special enrollment period for formerly incarcerated individuals to facilitate easier access to Medicare coverage upon release.[5] The special enrollment period allows people who are released from prison or jail to enroll in Medicare without facing any late enrollment penalties during the first 12 months of their release. The proposed rule again seeks to change the definition of "custody" for the purposes of the special enrollment period and would allow people who are on parole, probation, or home detention to qualify for the special enrollment period.

NCLC is in support of both of these changes, as they would expand access to Medicare for people who are leaving incarceration or working to successfully complete a term of probation, parole, or home detention. Expanding access to Medicare in these situations reduces the risk of people either forgoing medical care or incurring significant medical debts–either of which could impede successful reentry or completion of community supervision.

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[2]CMS, *CY 2025 Hospital Outpatient PPS Policy Changes and Payment Rates and Ambulatory Surgical Center Payment System Policy Changes and Payment Rates CMS-1809-P Display* 89 Fed. Reg. 2024-15087 (proposed July 10, 2024).
[3]42 C.F.R. § 411.4(b).
[4]CMS, *CY 2025 Hospital Outpatient PPS Policy Changes and Payment Rates and Ambulatory Surgical Center Payment System Policy Changes and Payment Rates CMS-1809-P Display* 80 Fed. Reg. 2024-15087 (proposed July 10, 2024).
[5]CMS, *CY 2025 Hospital Outpatient PPS Policy Changes and Payment Rates and Ambulatory Surgical Center Payment System Policy Changes and Payment Rates CMS-1809-P Display* 80 Fed. Reg. 2024-15087 (proposed July 10, 2024).

CMS Should Explore Additional Opportunities To Use Medicare Funds to Cover Medical Care for Incarcerated Individuals, Which Would Improve Quality and Access to Care, Reduce Carceral Medical Debts, and Reduce Recidivism.

While the proposed rule would help remove barriers for people upon reentry and in community supervision, the rule does not change the fact that Medicare will not generally cover healthcare costs for people while they are incarcerated in prison or jail, and CMS should look at ways to expand the use of Medicare funds to support access to affordable healthcare in prisons and jails. Medicare does not provide coverage for a person's healthcare while they are incarcerated based on the presumption that the correctional facility is financially responsible for providing care.[6] However, NCLC has found that correctional facilities routinely charge incarcerated individuals for some, if not all, of their care, leading to financial barriers to care for incarcerated people, medical costs indirectly imposed on low-income family members, and in some cases, significant medical debts.[7] NCLC explored the issue of the impact of carceral healthcare costs on justice-impacted individuals in our recent report: *Medical Debt Behind Bars: The Punishing Impact of Copays, Fees, and Other Carceral Medical Debt*.[8]

If individuals are financially responsible for their medical care during incarceration and they are otherwise eligible for Medicare, Medicare funds should be used to help cover that care. In fact, under the current Medicare regulations, state prisons and jails are allowed to seek Medicare reimbursement for medical care, but only if the state or local correctional facility can first satisfy a number of complex requirements.[9] To seek reimbursement from Medicare, the state prison or local jail must demonstrate, among other things, that the incarcerated person with Medicare coverage is required by law to repay the cost of the care and that the state or local government actively pursues collection of carceral medical fees and debts.[10] Limited research is available analyzing how state and local correctional facilities seek Medicare reimbursement where eligible. In light of evidence that low-income people are frequently assessed unaffordable co-pays and other medical fees to access care in prison and often forgo necessary care as a result, these criteria may be too stringent to properly distinguish between prisons

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[6] 42 CFR 411.4(b); Centers for Medicare & Medicaid Services, *Medicare Learning Network, Patients in Custody Under a Penal Authority*, MLN908084 (Mar. 2024); Centers for Medicare & Medicaid Services, *Medicare Claims Processing Manual*, Chapter 1, Section 10.4: *Claims Submitted for Items or Services Furnished to Medicare Beneficiaries in State or Local Custody Under a Penal Authority* (Feb. 15, 2024).

[7] Anna Anderson, National Consumer Law Center, *Medical Debt Behind Bars: The Punishing Impact of Copays, Fees, and Other Carceral Medical Debt* (September 2024).

[8] Anna Anderson, National Consumer Law Center, *Medical Debt Behind Bars: The Punishing Impact of Copays, Fees, and Other Carceral Medical Debt* (September 2024).

[9] 42 CFR 411.4(b); Centers for Medicare & Medicaid Services, *Medicare Learning Network, Patients in Custody Under a Penal Authority*, MLN908084 (Mar. 2024).

[10] 42 CFR 411.4(b); Centers for Medicare & Medicaid Services, *Medicare Learning Network, Patients in Custody Under a Penal Authority*, MLN908084 (Mar. 2024).

that place the cost of medical care on incarcerated people and those that do not. CMS should therefore look at ways to make it easier for low-income people who are incarcerated to access healthcare and avoid medical debt through the Medicare program.

Enacting reforms to expand Medicare coverage of carceral medical care would help reduce costs for justice-impacted individuals and their families, improve quality and access to care, and reduce recidivism.

Thank you for the opportunity to comment on this important topic. For more information about these comments or to discuss this issue, please contact Anna Anderson at aanderson@nclc.org.

Respectfully submitted,

National Consumer Law Center (on behalf of its low-income clients)