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June 8,2020
Seema Verma, MPH, Administrator
Centers for Medicare & Medicaid Services
Department of Health and Human Services
P.O. Box 8010
Baltimore, MD 21244-1850.

**Attention:** CMS-1733-P; Medicare Program; FY 2021Hospice Wage Index and Payment Rate Update

Dear Administrator Verma,

The Hospice and Palliative Care Association of New York State represents the majority of hospice providers in the state providing technical assistance, education and advocacy to hospice and palliative care providers as well as assistance to consumers on end of life care issues. We thank you for this opportunity to comment on the 2021 Hospice Wage Index Proposed Rule (CMS-17330-P)

**Payment rate:** We first thank CMS for the increase in the payment rates. This will be helpful for hospices to provide the services to consumers and to their communities in the wake of the pandemic. The proposed hospice payment update percentage for FY 2021 would be 2.6 percent.

**Election Statement**: C. Election Statement Content Modifications and Addendum to Provide Greater Coverage Transparency and Safeguard Patient Rights

These have been unprecedented times in our country and in the world. All of us have been focused in the past many months on COVID. We request that CMS extend the timeline until 1 full federal fiscal year after the PHE is stopped. As a precedent, CMS has previously delayed the implementation of OASIS-E in home health beyond the PHE period. We request that same consideration for hospice with the implementation of the election statement and addendum, that it be delayed at least one full calendar year after the end of the COVID-19 PHE. Our rationale is bulleted below.

- Although many areas of the country were not as severely impacted, CMS must look at and set the implementation timeline based on the most highly impacted areas to include at least-Metro NY City, Washington state, Southern Florida, Detroit and California. It would be unreasonable to expect that these hospices can comply in the prior timeline. As a result of COVID 19, they have seen record numbers of admissions to hospice, 100% more deaths per day than was normal prior to COVID, converted to 'pause' orders and stay at home for non-essential workers completely challenging the ability of society to continue to function effectively, coping with unimagined fear and anxiety within their staff and community, spent inordinate amounts of time and energy to fight and obtain enough PPE when FEMA was not including hospice as an essential provider while still caring for positive or presumed positive patients, receiving the NY State Department of Health notification on what to do when you do not have a facemask, grief from the loss of their coworkers as a result of COVID, 20 to 40% of their staff out sick from COVID or awaiting test results for weeks to see if they can

return to work, negotiating to get bodies removed from their hospice facilities and patients homes when the funeral parlors were so overwhelmed by the sheer number of bodies that they did not come for days, and providing counseling for complicated grief for families of hospice patients and of people in their community that lost a loved one and could not be with them/ could not grieve for them as they normally do/ could not have a funeral or a wake. They, as all health care providers in the hard hit areas, are exhausted each day, experiencing staggering cumulative loss and grief. It truly is a war and they are living in a warzone each day. With all of these things happening, how could a hospice comply with the addendums and the new consent forms. CMS just published the first set of sample forms on APRIL 10, 2020 while we were in the throes of the pandemic. Every day live has ceased as we know it, the creation, legal review and printing of new election forms is not even possible when print shops who do the NCR forms are not considered essential employees in the state of NY and are not working. We are not even sure when they could even start printing these forms considering the backlog of documents that they will need to have done.

- The experts are predicting a second wave of COVID for the fall. According to the AMA's article on May 8,2020 by Len Strazewski, indicate that the 2nd wave will come in the fall and it will be as bad as this spring. He quotes Dr. Marc Lipstitch, epidemiology professor at the Harvard TH Chan School of Public Health and the director of the Center for Communicable Disease Dynamics, state "that despite hopes that summer will bring continued relief from the spread of the virus, "fall will be very much like the spring," and the usual pattern of coronaviruses is likely continuing with new transmission peaking in November and cases peaking in December. If the fall is anything like the spring in NY, the hospice programs will be taxed, as well as the health care system, to provide care much less be in the early stages of a new paperwork process. "We will have a harder time controlling coronavirus in the fall ... and we will all be very tired of social distancing and other tactics. The hard thing will be to keep enough of it to protect our ICUs and keep the number of cases from flaring up," he said." https://www.ama-assn.org/delivering-care/public-health/harvard-epidemiologist-beware-covid-19-s-second-wave-fall

- Our computer vendors have not created and released a mechanism for us to complete this requirement by using our EMR. We are dependent on our Electronic Medical Records to be able to record and prepare the addendum and thus comply with this requirement and then be able to print out the addendum within the required time lines. In several surveys of our members, not one of the EMR's used in NY state have released the program updates to allow the capture of the items required in the addendum as we write this document. As a result of our work caring for patients with COVID, even if the EMR's released the programs today to the hospices, we will be challenged to implement, given what we have to do each day in the pandemic, to comply by October 1, 2020.
- While we are grateful for the publication of new model election statement and addendum forms, making them available in the midst of a PHE gives us little time for implementation. We are living in an unprecedented time of the COVID-19 virus. As you know, NY has been harder hit than any other state and their hospices are no exception. As a result of the war we have been fighting against the virus, we would ask CMS to reevaluate the timing of the election statement and addendum.

- CMS recognized the extraordinary needs and services during this time by making blanket 1135 waivers for all health care providers, including hospices. These waivers were put in place to put "to put patients over paperwork" and we thank CMS for their relaxation of requirements as we worked to care for patients and our communities in the pandemic. We had to focus on learning about the virus, educating our staff on how to be safe and to teach patients and families how to be safe, to secure unmet needs for PPE, to comfort patients and families and our staff who were frightened and scared, and to provide care to people who are dying. It was the right thing to do. Hospices have lost most of this calendar year in COVID processes and could not finish the work that they had started in complying with the addendum and consent requirements.
- The implementation of the election statement content modifications and addendum will require action by Medicare Administrative Contractors (MACs) and Beneficiary and Family Centered Care-Quality Improvement Organizations (BFCC-QIOs). In conversations with the National Hospice and Palliative Care Association, the MACs and BFCC-QIOs revealed that there has been no communication from CMS to the MACs related to the addendum as a condition of payment or the BFCC-QIOs related to a patient/representative's request for an appeal of the decision of the hospice agency on items not covered because the hospice has determined that the items, services and drugs are not related to the terminal illness. The MACs are currently preparing education for providers on the election statement changes and the addendum and expect to offer educational sessions this summer. Despite CMS's commitment in the FY 2020 Hospice Wage Index final rule to "collaborate with the MACs to establish clear guidelines on the use of the addendum as a condition for payment," no CMS guidance has been given to the MACs specifying their role related to the condition of payment.

<u>Comments on the Addendum and Election Statement Sample Forms</u>

As you move forward with the addendum and the new election statement requirements, as requested one full federal Fiscal Year after the PHE has subsided, we have suggestions for updates to the samples you provided:

<u>Election Statement</u>-

The font is too small to accommodate the seniors who will be reading and signing them.

In review of CFR 418.24 b, we find key items missing from this sample and have concerns that if the hospices use this sample, they will no longer be in compliance with the Medicare Requirements.

Specifically: Identification of the hospice must be included 418.24 b 1- your form should specify that the hospices must insert the name of the hospice, preferably at the top of the form.

Patient identification must also be part of the form- their Medicare number is required for identification. (name and MRN for example)

In the section called Effects of a Medicare Hospice Election, I understand is repeated several times. Please start with the line 'I understand' and bullet the 4 points to save space.

In the section called Effects of a Medicare Hospice Election, acknowledgement of coverage responsibility- 418.24 b 3 - specifically, the last line in this section "I also understand that services unrelated to my terminal illness and related conditions are exceptional and unusual and **hospice should cover all care related to my terminal illness and related conditions needed under the hospice**

**election**." We believe that this statement in highlights is misstated: 418/24 b 3 states:
"For Hospice elections beginning on or after October 1, 2020, this would include providing the individual with information indicating that services unrelated to the terminal illness and related conditions are exceptional and unusual and hospice should be providing virtually all care needed by the individual who has elected hospice. Virtually all care is not all care, we request that the word virtually be added to the statement."
Further, we suggest, based on the definition of hospice care in the hospice Conditions of Participation, that the words as delineated in a specific patient plan of care also be added to this statement. The citation is:

> "Hospice care means a comprehensive set of services described in Section 1861(dd) (1) of the Act, identified and coordinated by an interdisciplinary group (IDG) to provide for the physical, psychosocial, spiritual, and emotional needs of a terminally ill patient and/or family members, as delineated in a specific patient plan of care."
> "Section 40 - Benefit Coverage (Rev. 188, Issued: 05-01-14; Effective: 08-04-14; Implementation: 08-04-14) To be covered, hospice services must meet all of the following requirements: • They must be reasonable and necessary for the palliation and management of the terminal illness as well as related conditions; and • The individual must elect hospice care in accordance with sections 20.2 – 20.4 of this chapter; and • A plan of care must be established and periodically reviewed by the attending physician, the medical director, and the interdisciplinary group of the hospice program; and • That plan of care must be established before hospice care is provided; and • The services provided must be consistent with the plan of care; and • A certification that the individual is terminally ill must be completed as set forth in section 20.1 of this chapter."

Finally, in addition to 'virtually', we request inclusion of "reasonable and necessary for the palliation and management of the terminal illness as well as related conditions" and "as delineated in a specific patient plan of care" be included, then the statement would read: I also understand that services unrelated to my terminal illness and related conditions are exceptional and unusual and hospice should cover virtually all care related to my terminal illness and related conditions needed under the hospice election that are reasonable and necessary for the palliation and management of the terminal illness as well as related conditions and as consistent with and delineated in a specific patient plan of care.
Our rationale for including the reference to the plan of care and to reasonable and necessary for the palliation and management of the terminal illness and related conditions is necessary because patients and their families may request cure focused treatments and medications that would not fall under the Medicare hospice benefit. Examples are for chemotherapy for cancer patients not aimed at symptom management, certain types of medications that are not aimed at symptom management, etc. the intent of these new regulations are for transparency, we do not want to muddy the waters by having families believe that they can have anything and everything even if it is not in the agreed upon plan of care and not aimed at pain and symptom management.
Copayments: in this paragraph, add the words "if applicable" at the end of this sentence:

> I acknowledge that I have been provided with information about my financial responsibility for certain hospice services (drug copayment and inpatient respite care, if applicable).

There is no need for initials and a date on the section to elect or not to elect to receive the "Patient Notification of Hospice Non-Covered Items, Services, and Drugs" These are dated and signed at the bottom.

Right to choose an attending physician: please add a line to this section that states that the attending physician must agree to fulfill that role. The rationale is that a patient can choose any physician, but unless that doctor is available and amenable to be their hospice attending physician, then it's not a valid choice. We have had cases where the chosen attending physician has refused, for examples when the physicians refuse, physicians are unavailable because they are sick or have moved out of the area.
Timeframes- we request that the timeframe for hospice to comply with this requirement be put onto the form so that the family has understands when to expect the reply from the hospice.

Election statement and addendum timeframes- Decisions about relatedness are completed by the physician after receiving and reviewing clinical information from the registered nurse's assessment of the patient. The hospice will not be able to provide both the signed election statement and the addendum at the same time, and we believe that there will be confusion about the requirement that they be provided together.

Attending Physician- section 20.2.1 Hospice Election states that the Attending Physician can also be a Nurse Practitioner or a Physician's Assistant. Please include that language in the Election Statement so that it is clear to the patient who has an NP or PA as their attending, that they may choose that provider.
The individual's designated attending physician (if any). Information identifying the attending physician recorded on the election statement should provide enough detail so that it is clear which physician, Nurse Practitioner (NP), or Physician Assistant (PA) was designated as the attending physician. This information should include, but is not limited to, the attending physician's full name, office address, NPI number, or any other detailed information to clearly identify the attending physician.
Attending Physician- the patient sometimes selects a physician who is unavailable or unwilling to assume that role. We request a line in this section that sates; 'if s/he is available and agrees to serve in this role, …"

Witness- we do not believe that the law requires that the form is witnessed. Also, we would consider adding under representative: what the relationship to the patient this representative has.
**Patient Notification of Hospice Non-Covered Items, Services, and Drugs (Addendum): We thank you for the example of the addendum and have recommendations for changes.**

Diagnoses related to Terminal Illness and Related Conditions, in the addendum CMS has noted "hospice is responsible to cover all items, services and drugs." We suggest that this better align with the current Medicare requirements as stated above. This line should read 'hospice is responsible to cover *virtually* all items, services and drugs as delineated in a specific patient plan of care.' Rationale was provided in this document in the election statement section.
Diagnosis: Six spaces would not be enough space to list all terminal and related conditions. (Our average for most patients is around nine.)
Signature Section: we find that it is much better to only have the two legal options as check boxes if the Beneficiary is unable to sign. These would be 1) Cognitive Impairment or 2) Physical Incapacity. Otherwise we get family members that want to sign forms on behalf of the patient so they don't need to know they are electing hospice care, or they are just tired, etc.
Witness- we do not believe that the law requires that the form is witnessed. Also, we would consider adding under representative: what the relationship to the patient this representative has.

Many questions still remain about the differences and similarities of the Advance Beneficiary Notice(ABN) and the Addendum. We would like CMS to provide clear guidance for the use of the ABN in the final rule.

**The Hospice Addendum as a Condition of Payment.** HPCANYS once again reiterates its strong disagreement with CMS's decision to proceed with implementing the Addendum and Election Statement changes as a condition of payment. Not only is the addendum redundant of existing obligations hospices have to inform patients about the services covered under the hospice benefit, but there is no basis for the addendum to be treated as a condition of payment for hospice services. The Social Security Act only authorizes CMS's conditioning of payment on a patient's having made "an election . . . to receive hospice care". The addendum, which is provided after the patient's election, cannot and should not legally alter the patient's election or, as is suggested, make it retroactively invalid for purposes of payment. The fact that CMS has chosen to title the document an "addendum" to the election does not overcome the plain language limitations on the requirements that can be considered conditions of coverage in Sections 1814(a)(7) and 1812(d)(1) of the Social Security Act and in 42 C.F.R. § 418.200. If CMS proceeds with its treatment of the addendum as a condition of payment, we are deeply concerned that even single human "errors" in the addendum or an unreturned addendum will give rise to non-payment of hospice services for what CMS implies could be the patient's entire election period. We fail to see how to see how any such errors are material to the payment for services hospices provide to clinically eligible patients who have unquestionably exercised their right to elect to receive hospice care.

Thank you for considering our comments.
Sincerely:

Carla Braveman

Carla Braveman, BSN, RN, M.Ed.,
CEO & President