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October 12, 2011

Richard McGreal, Associate Regional Administrator  
Department of Health & Human Services  
Centers for Medicare & Medicaid Services  
JFK Building, Government Center  
Room 2275  
Boston, Massachusetts 02203

**Re: *CMS August 9, 2011 Letter Regarding  
Institution for Mental Disease Exclusion***

Dear Mr. McGreal:

Stefanie Nadeau and I very much appreciated the opportunity to speak with you yesterday to clarify your August 9, 2011, letter which asked Maine to identify all Private Non Medical Institutions (PNMI) facilities that meet the Federal regulatory definition of an Institution for Mental Disease (IMD) within 60 days. Thank you for clarifying that CMS wants a list of those PNMI's that meet the 42 U.S.C. § 1396d(a)(29) IMD exclusion criteria (individuals between the ages of 21 and 65 who reside in IMDs).

As we discussed yesterday, the issue regarding scattered sites remains unclear and we appreciate your offer to set up a call to provide further guidance. We look forward to that discussion.

Background: Maine's PNMI State Plan Program

Maine's state plan has authorized PNMI services for many years. The latest PNMI state plan was approved in 2004. See Maine state plan, TN No. 04-011, Attachment to 3.1-A, approved effective 9/1/04. (Attachment). The state plan approval expressly authorizes PNMI reimbursement for institutions providing substance abuse and mental health services. It authorizes:

1. Private non-medical institutions for substance abuse treatment, mental health services, child-care services, and services for people with mental retardation. Covered services include only detoxification, rehabilitation, extended care, extended shelter, halfway house, mental health and child-care services, provided to residents by qualified staff. . .

*Id.*

In light of the approved plan language, the Department has never considered PNMI's to be IMDs, or to be subject to the IMD exclusion. We do not consider PNMI residents to be "patients" of these homes. Like our plan language, the regulation authorizing PNMI contracts (42 C.F.R. §434.12) makes no reference to an IMD exclusion. This is unlike the definition of inpatient hospital services and Nursing Facility services, both of which expressly incorporate the IMD exclusion. See 42 C.F.R. § 440.10 ("Inpatient hospital services, other than in institutions for mental diseases."); § 440.155 ("Nursing facility services, other than in institutions for mental disease.") Also note the federal definition of IMDs which

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states expressly that ICF-MRs are not IMDs (42 C.F.R. § 435.1009, which states: “An institution for the mentally retarded is not an institution for mental disease.”)

Below you will find the summary our analysis of PNMI services that are subject to the IMD exclusion.

### The IMD Exclusion Criteria

In making a determination as to whether any of Maine’s PNMI’s could be considered IMDs, Maine utilized the guidelines established by CMS in its State Medicaid Manual, two emails from Robert Cruz to Patricia Dushuttle,<sup>1</sup> and information collected from an Assessment Worksheet developed by Maine staff and posed to Maine PNMI providers.

Maine conducted its review as a three-step analysis. The first issue to determine was whether a PNMI meets the federal regulatory definition of “institution”. “Institution” is defined in 42 CFR § 435.1009 as meaning an establishment of single or multiple facilities that furnishes food and shelter and some treatment to four or more persons unrelated to the proprietor.<sup>2</sup>

Maine then determined whether each “institution” might be an “IMD”. IMDs are defined in federal law as being institutions which have more than 16 beds, and which are primarily engaged in providing diagnosis and treatment or care of persons with mental diseases.<sup>3</sup> 42 CFR § 35.1010. Whether an institution is an institution for mental diseases is determined by its overall character as that of a facility established and maintained primarily for the care and treatment of individuals with mental diseases, whether or not it is licensed as such.

CMS guidelines suggest that certain criteria be utilized in making a determination whether an institution is an IMD: (1) is the facility licensed or accredited as a psychiatric facility; (2) is the facility under the jurisdiction of the State’s mental health authority; (3) does the facility specialize in providing psychiatric/psychological care and treatment; and (4) does the current need for institutionalization for more than 50% of the facility’s patients result from mental disease. CMS, State Medicaid Manual, § 4390.

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<sup>1</sup> Robert Cruz (CMS) emails to Patricia Dushuttle (Maine DHHS) dated September 20, 2011, 4:29 PM and September 26, 2011, 4:38 PM.

<sup>2</sup> 42 CFR § 435.1009 defines “institution” as follows: “Institution means an establishment that furnishes (in single or multiple facilities) food, shelter, and some treatment or services to four or more persons unrelated to the proprietor.”

<sup>3</sup> 42 CFR §435.1010 defines “Institution for mental diseases” as “a hospital, nursing facility, or other institution of more than 16 beds that is primarily engaged in providing diagnosis, treatment or care of persons with mental diseases, including medical attention, nursing care and related services. Whether an institution is an institution for mental diseases is determined by its overall character as that of a facility established and maintained primarily for the care and treatment of individuals with mental diseases, whether or not it is licensed as such. An institution for the mentally retarded is not an institution for mental diseases.”

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The final determination is whether, if a facility is an IMD, it is subject to the Medicaid IMD exclusion<sup>4</sup> which essentially provides that federal financial participation is unavailable for IMDs serving populations between the ages of 21 and 65. 42 USC § 1396d(a)(14), (16) and (29).

#### Maine's Assessment Worksheet

In August, 2011, based on the CMS guidelines, and as directed by your August 9, 2011, letter, Maine developed a four page Assessment Worksheet to support determinations of whether a PNMI facility was an IMD. Maine then hired workers who called all Maine PNMI facilities – hundreds of them - and, based on the verbal responses of the PNMI facilities, filled out a separate Assessment Worksheet for each PNMI facility. In addition, my staff answered questions from providers regarding the assessment process. This was a difficult and time-consuming process to ensure compliance with the 60 day response deadline.

#### Maine PNMI's that fit the IMD Exclusion Criteria

Finally, Maine applied the CMS IMD/Institution criteria to data recovered by utilizing the recently developed Assessment Worksheet. Based on this analysis, we concluded that five PNMI facilities meet the federal definition of an IMD, and fall within the IMD exclusion. They are:

- Saint Francis Recovery Center Halfway House (Provider: Catholic Charities)<sup>5</sup>
- Saint Francis Recovery Center (Provider: Catholic Charities)
- 65 India Street (Provider: Milestone Foundation)
- Serenity House (Provider: Serenity House)
- 28 Portland Ave (Provider: Milestone Foundation)

Each of these five PNMI facilities are licensed for 16 beds or over, serve a population between the ages of 21 and 65, primarily house individuals receiving treatment for persons with mental disease, and more than 50% of the patients in the facilities entered the facilities because of a need stemming from mental disease.

Per our conversation on October 11, 2011, Maine will cease requesting Medicaid reimbursement for these facilities for services rendered November 1, 2011, or later.

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<sup>4</sup> 42 USC §1396d(29)(B) “medical payments” does not include:

(b) any such payments with respect to care or services for any individual who has not attained 65 years of age and who is a patient in an institution for mental disease.”

<sup>5</sup> Although Saint Francis has over 16 beds in one location, they are licensed to provide two separate services, and operate as separate programs.

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Maine's Remaining PNMI's

Based on the CMS guidance we have been given to this point, and based on the information received from the PNMI facilities by the use of the recently developed Assessment Worksheet, we believe that the remaining Maine PNMI's are not "institutions", or are not "IMDs" or do not fall under the IMD exclusion regulation.

Maine's Proposed Alternatives to PNMI's

I have been conferring extensively with my staff concerning ongoing CMS concerns about Maine's PNMI program. Our intention is to develop a state plan and/or waiver service that would, in part at least, meet the medical needs of this fragile population. I have recently hired a Director of Program and Regulatory Accountability, who will work closely with me and staff to prepare an alternative program. We will reach out to you as we develop this plan. Because we will need the approval of the Maine State Legislature for funding, our tentative plan is to be able to present CMS with state plan and waiver requests as soon as practicable.

We are and will continue to be responsive to your concerns, and we look forward to working with you as Maine works towards an appropriate alternative to the Maine PNMI program. Again, we very much appreciate our conversation yesterday, and the spirit of cooperative and collaboration as Maine finds a new way to provide necessary medical services to this very needy population.

Sincerely,



Mary C. Mayhew  
Commissioner

Attachment (Maine PNMI state plan)

cc: Bonnie Smith, Deputy Commissioner of Programs  
Stefanie Nadeau, Director, Office of MaineCare Services  
Patricia Dushuttle, Director, Policy, Office of MaineCare Services  
Pamela Easton, Director of Program and Regulatory Accountability