

July 3, 2023

Chiquita Brooks-LaSure
Administrator
The Centers for Medicare and Medicaid Services
7500 Security Boulevard
Baltimore, MD 21244

Subject: Ensuring Access to Medicaid Services (CMS-2442-P)

Dear Administrator Brooks-LaSure,

I am writing on behalf of The Arc of California. We appreciate the opportunity to provide comments on the proposed rule titled "Ensuring Access to Medicaid Services (Access Rule)," published in the Federal Register on May 3, 2023.

The Arc of California is among the largest and oldest advocacy organizations providing services, supports and advocacy with and for people with intellectual and developmental disabilities (IDD) and their families. The Arc of California has 22 chapters throughout the state that provide direct services and supports to thousands of individuals and families.

We support the goals underlying the proposed rule, including:

- Improving Medicaid Home and Community Based Services (HCBS) quality and access.
- Addressing the direct care workforce crisis.
- Addressing insufficient reimbursement rates for services.

The proposed rule includes a number of provisions to improve the transparency and consistency of Medicaid HCBS. This includes requiring states to:

- Establish a grievance system for beneficiaries with concerns about the person-centered planning process or compliance with the HCBS settings rule.
- Develop an electronic incident management system with a uniform minimum definition of critical incidents.
- Report on waiting lists, payment rates, and a standardized HCBS core measure set.

Advancing the goals of the Access Rule is critical to people with intellectual and developmental disabilities (IDD). To fully achieve these goals, Congress needs to act. We greatly appreciate this Administration for continuing to lead on these legislative issues, including its FY 2024 budget proposal to dedicate \$150 billion over ten years to Medicaid HCBS.

I. Current State of Medicaid HCBS for People with IDD in California

While California's Legislature and Governor have prioritized increased funding over the last few years for services and supports for the IDD community, there continues to be long waits for services and program closures across the state. Much of this is due to the lack of staffing, which is a direct result of provider service reimbursement rates as determined by the state. This

shortage of direct support professionals has a direct impact on the quality of life of Californians with IDD and their families.

II. Proposed Payment Adequacy Provisions at § 441.302(k)

We appreciate that CMS has sought to adopt a regulation for HCBS waivers to ensure sufficiency of payments that “meet the needs of beneficiaries and provide access to services in the amount, duration, and scope specified in the person-centered service plan.” However, the proposed rule captures an important although not complete element of Medicaid’s “equal access” provisions under Section 1902(a)(30)(A) of the Social Security Act, which uses the term “provider.”

Direct care workers are central to providing HCBS. We applaud their inclusion. Other important individuals and entities exist as well. This includes front-line supervisors, Qualified Developmental Disability Professionals, service coordinators, and non-profit organizations that help individuals and families navigate complex systems and benefits as well as deliver residential and employment services, education and advocacy, and consumer directed supports. As such, we believe the rule should match the broader term “provider” in the statute while highlighting the importance of the direct care workforce with the following recommendation.

RECOMMENDATION: *“payment rates are adequate to ensure a sufficient number of providers, including members of the direct care workforce, to meet the needs of beneficiaries and provide access to services in the amount, duration, and scope specified in the person-centered service plan.”*

III. HCBS Minimum Performance Standards at § 441.302(k)(3)(i)

We appreciate CMS’s efforts to try to address the direct care workforce crisis. The proposed rule would require that a state ensure that at least 80 percent of all payments with respect to homemaker, home health aide, and personal care services be spent on compensation for direct care workers. Based on our assessment, we believe that the proposed requirement, while well intentioned, would greatly reduce HCBS access and quality.

a. Lack of Investment in HCBS

While we appreciate CMS’s attempt to try to raise payment rates in other aspects of the rule, ultimately the federal government cannot force state legislatures to expand the amount of money it spends on an optional program. By adding an 80 percent pass-through requirement to already insufficient rates, we fear that many people will lose access to services, because providers will not be able to maintain the administrative, program support, and travel costs necessary to deliver HCBS. Alternatively, if states did feel forced by CMS to raise rates, the state can just reduce the number of slots available for a waiver program. This would result in forcing many people with disabilities into institutions or relying on unpaid family members to provide care.

As an example, the California Department of Developmental Services submitted a provider rate study addressing the sustainability, quality, and transparency of community-based services for individuals with developmental disabilities to the State Legislature in March 2019. When fully implemented in July 2024, service provider rates will be based on cost inputs (e.g., labor, real estate, travel) for each geographic area within the State of California. The percentages reflected in California’s rate study that are based on actual economic assumptions indicate a higher cost

for administrative functions such as recruiting, training, on-boarding, organizing, planning, reporting, and billing. Therefore, the 80% pass through requirement as proposed in this rule is a imprecise proposal that contradicts the state’s percentages developed through years of rigorous data study and stakeholder discussion.

b. Uncertainty Over the Application of the Minimum Performance Standard

We are unclear when certain services fall under the minimum performance standard and when they do not. For example, direct support professionals (DSPs) sometimes provide both habilitation and personal care assistance to the same individual. CMS should make clear in the final rule that the minimum performance standard does not apply in these situations. As CMS notes, services such as habilitation and adult day “may have facility or other indirect costs for which we do not have adequate information to determine a minimum percent of the payment that should be spent on compensation for the direct care workforce.”

c. Anticipated Impact of the Minimum Performance Standard

Based on our analysis, the minimum performance standard, as drafted, could foreseeably lead to the closure of many non-profit organizations providing HCBS. Such a situation could result in a catastrophic decline in access to HCBS. Given our assessment, and the lack of data and analysis provided in the preamble of the proposed rule, we believe that such a requirement requires additional examination to prevent unintentional harm.

There are many costs associated with the delivery of HCBS beyond compensation for direct care workers. For example, travel reimbursement to visit people with disabilities in their homes does not count towards the proposed standard. The proposed standard will create a major disincentive to provide services to individuals that require extensive travel to meet them in their homes.

Providing HCBS also comes with program support costs, including training, onboarding, and additional staff, such as front-line supervisors, schedulers, staff nurses, or workers who require special skills to support people with complex health conditions or behavioral health needs. Moreover, many front-line supervisors and other staff frequently step in to provide direct care but would not fall under the category of “direct care worker.” For people with IDD, these additional staff are critical to providing services. We are concerned that the minimum performance standard does not account for these critical workers and necessary support costs.

d. Conclusion

We urge CMS to remove the minimum performance standard provisions in the final rule.

We recommend that CMS undertake additional research, analysis and extensive engagement of stakeholders including people with disabilities, family members, advocacy organizations and nonprofit providers to determine better ways to ensure adequate rates, increased compensation, comprehensive performance standards, and financial accountability of providers.

Thank you for your consideration of our comments. If you have any questions, please contact Jordan Lindsey, Executive Director, at (916) 552-6619.

Sincerely,
Jordan Lindsey