January 28, 2023

The Honorable Xavier Becerra, Secretary
U.S. Department of Health and Human Services
Hubert H. Humphrey Building
200 Independence Ave., S.W.
Washington, D.C. 20201

Re: New Mexico Turquoise Care Renewal Request

Dear Secretary Becerra:

The National Health Law Program (NHeLP) is a public interest law firm working to advance access to quality health care and protect the legal rights of low-income and underserved people. We appreciate the opportunity to provide these limited comments on some of the new long-term services and supports (LTSS) provisions of New Mexico's request to renew Turquoise Care (formerly Centennial Care 2.0).[1] In offering comments only on the some of the LTSS provisions, we do not suggest that the other components of New Mexico's project satisfy the criteria in section 1115. Rather, our comments are intended to draw HHS's attention to a few particularly problematic components of the application. We also write to remind HHS of the limits of its authority under section 1115 and to urge the agency to adhere to those limits when evaluating every state application.

As described below, the Turquoise Care application raises serious legal concerns. The application does not include a sufficient level of detail to allow for meaningful comment on some of the LTSS provisions. While the application is unclear on many points regarding those provisions, it is clear that the State is seeking permission to implement a number of policies –

funding so called community-based services within institutional settings, paying for room and board, and otherwise promoting and developing segregated settings – that conflict with the its obligations under the Medicaid Act, as well as the Americans with Disabilities Act, Section 504 of the Rehabilitation Act, and Section 1557 of the Affordable Care Act.[2] In addition, the proposed LTSS components below do not meet the section 1115 requirements, as they are not a genuine experiment that will promote the objectives of the Medicaid Act and would require the Secretary to waive provisions that he does not have the authority to waive. As a result, NHeLP recommends that HHS reject those proposed components.

## I. Application Deficiencies

The Turquoise Care application's description of the LTSS Transformation to expand access to assisted living services and promote person-centered LTSS experiences is not clear and lacks sufficient detail to allow meaningful comment.[3] In particular, it is confusing whether the assisted living facility (ALF) and nursing facility (NF) pilot would be creating smaller assisted living settings within institutional settings and also separately implementing person-centered concepts in care delivery in ALF and NFs. Or, is New Mexico planning to create smaller ALF settings within NFs and implement person-centered care in those ALF settings? Or implementing person-centered care in both the ALF setting and the NF within which the ALF sits? Then, in the proposed phase 2, it is very unclear as to what "enhance physical spaces" refers to and whether that means enhance the ALF spaces only or also the NFs. Does the State intend to transform existing NFs to ALFs in whole or in part, and what "enhancements" would be deemed necessary? Whether the State is planning to fund the creation of AFs, or AFs in NFs, and/or to improve NFs is significant – the different plans would prompt a different analysis and comments.

In addition, the application describes the plan as creating "smaller, more community-based concepts" but does not explain whether these placements would be receiving community-based funding such that they must meet the home and community-based services rules. The State is obligated to have any section 1115 project used for community-based services follow these rules, which include only using Medicaid HCBS funds in settings that meet the definition

[1] New Mexico Human Servs. Dep't, *Turquoise Care Section 1115 Medicaid Demonstration Waiver Renewal Request (formerly Centennial Care 2.0)* (Dec. 9, 2022), https://www.medicaid.gov/medicaid/section-1115-demonstrations/downloads/nm-centennial-care-pa5.pdf [hereinafter "Application"].
[2] 42 U.S.C. § 12132; 29 U.S.C. § 794a; 42 U.S.C. §18116(a).
[3] *See* Application at 49-52; 42 U.S.C. § 1315(d)(2)(A), (C); 42 C.F.R. § 431.408(a).

of community.[4] A community-based setting must be integrated in and support full access of individuals receiving Medicaid HCBS to the greater community, including opportunities to engage in community life and receive services in the community, to the same degree as individuals not receiving Medicaid HCBS.[5] What the application describes as an ALF setting within an NF institution would be a presumptively institutional setting under the HCBS rule.[6] CMS has previously asked states to carefully consider creating new presumptively institutional settings to be funded by HCBS. It is important to know whether such settings are funded as HCBS and whether the settings could meet the HCBS criteria under heightened scrutiny. But that information is not provided, and the confusing, limited information available, as described below, indicates that the State is creating segregated rather than truly community-based settings. Although a state does not have to include heightened scrutiny information in a section 1115 application generally, the information about the planned settings and their characteristics is needed to understand what New Mexico is planning and to provide meaningful comment. Overall, there is insufficient information to understand the State's proposal or the experiment it is seeking to conduct. The application does not include any hypotheses related to the person-centered or NFs project or any criteria for determining the success or failure of the experiment.

Without more information on this project, it is impossible to fully and meaningfully comment on critical aspects of New Mexico's proposal. Given the lack of sufficient detail, the application should not have been deemed complete.[7] We ask CMS to require the State to submit an application that adheres to the federal requirements and to provide an additional comment period on the proposal.

## II. HHS Authority Under Section 1115

For the Secretary to approve a project pursuant to section 1115, the project must:

- be an "experimental, pilot, or demonstration" project;
- be likely to promote the objectives of the Medicaid Act;

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[4] *See, e.g.,* 42 C.F.R. §§ 441.301(c)(4); 441.302(5); Ctrs. for Medicare & Medicaid Servs., *Questions and Answers – 1915(i) State Plan Home and Community-Based Services, 5-Year Period for Waivers, Provider Payment Reassignment, Setting Requirements for Community First Choice, and 1915(c) Home and Community-Based Services Waivers – CMS 2249-F and 2296-F* 2 (Dec. 2019), https://www.medicaid.gov/sites/default/files/2019-12/final-q-and-a.pdf.

[5] *See, e.g.,* 42 C.F.R. §§ 441.301(c)(4); 441.302(5).

[6] 42 C.F.R. § 441.301(c)(5).

[7] *See* 42 C.F.R. § 431.412(c)(2).

- waive compliance only with requirements in 42 U.S.C. § 1396a; and
- be approved only to the extent and for the period necessary to carry out the experiment.

Discussing each of these limitations a bit further:

First, the state must propose to conduct an "experimental, pilot, or demonstration" project. This demands a "novel approach" to program administration.[8] To evaluate whether a proposed project is a valid experiment, the Secretary needs to know what will be tested and how, at the point in time when the project is being approved. This requires sufficient information in the Application to understand what is being proposed and to allow for meaningful comment.

Second, the project must promote the Medicaid Act's objectives. According to Congress, the purpose of Medicaid is to enable states "to furnish[] medical assistance" to individuals "whose income and resources are insufficient to meet the costs of necessary medical services" and to provide "rehabilitation and other services to help such families and individuals attain or retain capability for independence or self-care."[9] Thus, the "central objective" of the Medicaid Act is "to provide medical assistance;" in other words, to provide health coverage.[10]

Third, the Secretary can only waive provisions set forth in section 1396a of the Medicaid Act. The Secretary cannot waive requirements contained in sections 1396b through 1396w-6.[11] Once the Secretary has acted under section 1115(a)(1) to waive compliance with designated provisions in section 1396a, section 1115(a)(2) provides that the costs of "such project" are "regarded as expenditures under the State plan" and, thus, paid for under the same statutory formula that applies for a state's expenditures under its State plan.[12] Section 1115(a)(2) does not create an independent "expenditure authority" for the Secretary to allow a state to ignore provisions of the Medicaid Act outside of section 1396a or to rewrite the provisions in section 1396a or any other provision outside of section 1396a. To the contrary, it is a "clean-up" provision that merely provides the authorization necessary for federal reimbursement of

[8] *Beno v. Shalala*, 30 F.3d 1057, 1069 (9th Cir. 1994).
[9] 42 U.S.C. § 1396-1; *id*. § 1396d(a) (defining "medical assistance" as provision of, or payment for, specified health care and services).
[10] *Stewart v. Azar*, 366 F. Supp. 3d 125, 138 (D.D.C. 2019); *id.* at 144 (rejecting "promoting health" as an independent objective because the Medicaid Act is "designed … to address not health generally but the provision of care to needy populations" through a health insurance program).
[11] *See* 42 U.S.C. § 1315(a)(1).
[12] *Id.* § 1315(a)(2).

expenditures for a project that has been approved under section 1115(a)(1). To be clear, as worded, section 1115 does not include an independent, freestanding expenditure authority.[13] As the Supreme Court's recent opinion involving the EPA illustrates, the words of statutes must control—and limit—the actions of the federal agency, in this case limiting HHS to using federal Medicaid funding only for experimental projects that are consistent with Medicaid's objectives and that waive only provisions set forth in section 1396a.[14]

Fourth, section 1115 allows approvals only "to the extent and for the period . . . necessary" to carry out the experiment.[15] The Secretary cannot use section 1115 to permit states to make long-term policy changes.

## III. The Secretary Does Not Have the Authority to Approve the ALF Room & Board Proposal

Section 1115 does not give the Secretary the authority to approve New Mexico's request to pay for room and board for ALF settings. As discussed above, the Secretary can only waive provisions set forth in section 1396a of the Medicaid Act and cannot waive requirements contained in sections 1396b through 1396w-6.[16] The prohibition on Medicaid funds being used for room and board is grounded in the limited inpatient services that provide room and board, which are listed in section 1396d as hospitals, nursing facilities, and ICF/I-DDs.[17] Therefore, the Secretary cannot authorize room and board payments under Medicaid for any setting outside those allowed under section 1396d.[18] The State does not request waiver authority, but instead purports to use expenditure authority for this project, which as discussed above, is not a separate authority; thus, the request is not approvable.[19]

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[13] *See*, *e.g.*, *Portland Adventist Med. Ctr. v. Thompson*, 399 F.3d 1091, 1097 (9th Cir. 2005) ("Section 1115 does not establish a new, independent funding source. It authorizes the Secretary to 'waive compliance with any of the requirements of' a series of provisions of the Social Security Act in approving demonstration projects.").
[14] *See West Virginia v. EPA*, 142 S. Ct. 2587 (2022).
[15] 42 U.S.C. § 1315(a); *see also id*. §§ 1315(e)(2), (f)(6) (limiting the extension of "state-wide, comprehensive demonstration projects" to one initial extension of up to 3 years (5 years, for a waiver involving Medicare-Medicaid eligible individuals) and one subsequent extension not to exceed to 3 years (5 years, for Medicare-Medicaid waivers)).
[16] *See* 42 U.S.C. § 1315(a)(1).
[17] 42 U.S.C. § 1396d(a)(1),(4), (14)-(16); 42 C.F.R. § 441.360(b); *see also Pennsylvania, Dep't of Pub. Welfare v. U.S. Dep't of Health & Human Servs*., 647 F.3d 506, 511-12 (3d Cir. 2011).
[18] *See* 42 U.S.C. § 1315(a)(1).
[19] *See* Application at 67.

## IV. The ALF Proposals Are Not Experimental

The request to pay for room and board also fails to propose an experiment. Assisted living facilities are currently part of the continuum of care. There is no experiment in promoting ALFs. While ALFs are chosen by many older adults and individuals with disabilities as an alternative to institutional living, the strong preference remains to stay at home with supports. All that the application describes is the problem that the lack of room and board payments leads to people choosing institutional settings. But a problem is not a hypothesis. To the extent that New Mexico is seeking to test whether the payments will reduce the use of institutional settings, that hypothesis is not reasonable. The State fails to provide any data to support the suggestion that people in New Mexico are choosing NFs because they cannot afford ALF or because they cannot afford other, more integrated community placements due to the cost of room and board.[20] For example, is the push to more segregated settings and higher levels of care at all related to a lack of sufficient services at home? Or is there a lack of affordable, accessible housing? The State seems to be jumping to a cause without any investigation and responding with funding settings that are questionably community-based.

Additionally, the proposal to make the settings more community-based and with person-centered planning is not an experiment given that ALFs that receive HCBS funding are already required to meet these requirements.[21] There are no clear criteria about what will indicate success or failure for this proposal. In efforts to move people from NF to lower levels of care, the experience of the individuals and their ability to make choices both about selecting the setting and choices within the setting are critical.[22] If the concept is to make NFs more community-based and include person-centered planning, it is not clear how this is a valid experiment when the settings are deemed institutions under Medicaid and simply will not be fully integrated settings due to their design, function, and overall nature.[23] For these LTSS projects, the State fails to propose any real hypotheses or measurement criteria.

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[20] *See, e.g., Brown v. D.C.*, 928 F.3d 1070 (D.C. Cir. 2019).
[21] *See generally* 42 C.F.R. § 441.301.
[22] *See, e.g.,* 42 C.F.R. § 441.302 (regarding person centered planning; also the role of informed choice in HCBS waivers).
[23] 42 C.F.R. § 441.301(c)(5).

## V. The ALF LTSS Proposals Fail to Promote Care in the Most Integrated Settings

New Mexico is not proposing to provide room and board payments for the full continuum of care settings to which paying room and board could support access. Instead, they are focusing on part of the continuum that is closer to institutionalization. Under the integration mandates of the ADA, Section 504, and Section 1557, the State is obligated to provide services to people with disabilities in the most integrated settings appropriate to the individual's needs.[24] Rather than looking to support more independent and integrated settings, they are only proposing to support settings that are often at best "institutional light," if not very institutional in nature. The proposal discusses people who need lower limits of NF LOC and seems to presume a need for a residential or some form of institutional setting. But this ignores that HCBS programs exist to provide *alternatives* in the community to NFs. Instead of considering whether they should evaluate whether this population needs residential care at all, the project presumes that some form of facility is still the most integrated for their needs.

Instead of investing in fully integrated settings and experimenting with supporting people in the most integrated settings appropriate to their needs as is required by the integration mandate, New Mexico is focused on supporting a choice that is often the lesser of two unwanted choices between ALFs and NFs, when what is more desired is sufficient supports to live independently or with family. While some assisted living facilities may meet the HCBS rule standards for community based settings, many do not because to the residents, the lived experience is similar to nursing facilities, with highly structured days, limited personal choice, control over access to premises and to the community, and limited community interaction, among other institutional features. It is not uncommon for assisted living facilities to be former NF buildings or part of or on the same grounds as NFs. While trying to move people out of NFs is a good goal, moving them to slightly less institutional settings is likely not meeting the legal obligation of providing services in the most integrated setting appropriate to this population's needs. Notably, although New Mexico is expanding access to supportive housing by providing pre-tenancy and tenancy support activities to members with SMI and others in this project, it is not asking to provide room and board payments in what are likely far more integrated settings.[25] CMS should not approve New Mexico's request because the States plans are not compliant with the integration mandate, both due to the state's obligations to people with disabilities and those similar requirements of CMS under Section 504 and Section 1557.

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[24] 42 U.S.C. § 12132; 29 U.S.C. § 794a; 42 U.S.C. §18116(a); 28 C.F.R. § 35.130(d); 45 C.F.R. § 84.4(b)(2); *Olmstead v. L.C. ex rel. Zimring,* 527 U.S. 581, 600 (1999).
[25] Application at 40.

## VI. Conclusion

NHeLP supports the use of section 1115 to implement time-limited, experimental projects that are likely to promote the objectives of the Medicaid Act. We strongly object to using this law to skirt essential provisions that Congress has placed in the Medicaid Act to protect Medicaid beneficiaries and ensure that the program operates in their best interests. As demonstrated above, the LTSS components of the Turquoise Care project are inconsistent with the standards of section 1115 and the Medicaid Act.

We have included numerous citations to supporting research, including direct links to the research. We direct CMS to each of the materials we have cited and made available through active links, and we request that the full text of each of the studies and articles cited, along with the full text of our comment, be considered part of the formal administrative record for purposes of the Administrative Procedure Act. If CMS is not planning to consider these materials as part of the record as we have requested here, we ask that you notify us and provide us an opportunity to submit copies of the studies and articles into the record.

Thank you for the opportunity to comment on the Turquoise project. If you have further questions, please contact me Elizabeth Edwards (edwards@healthlaw.org).

Sincerely,

Elizabeth Edwards
Senior Attorney