February 10, 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: Utah Long Term Services and Supports for Behaviorally Complex Individuals Amendment 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 comments on Utah's proposed amendment to the Utah Medicaid Reform 1115 Demonstration.[1] For the reasons stated below, we request that HHS reject Utah's proposed amendment.

## I. Application Deficiencies

Utah's application lacks sufficient detail to allow meaningful comment.[2] It is unclear exactly what Utah is proposing. The State writes that the goal of the amendment is to provide LTSS to individuals with "behaviorally complex conditions," but does not explain exactly what services the State is proposing to provide. The application states that the demonstration population would receive "rehabilitative services in a skilled nursing facility with professionals who are licensed to provide care to individuals with substance use disorder, severe mental

illness, or other behaviorally complex conditions."[3] It appears that Utah is seeking to create institutional long term services and supports (LTSS) placements for certain individuals with behavioral health conditions that nursing facilities are unable or unwilling to serve. Utah states that such a facility is necessary for "individuals discharged from the Utah State Hospital, or individuals discharged from a skilled nursing facility (SNF) who are later hospitalized but unable to return to a SNF due to significant behavioral issues."[4] But the States fails to answer a number of critical questions.

First, it is unclear exactly what kind of facility Utah is proposing to create. If the facility at issue is a skilled nursing facility, why is Utah seeking expenditure authority? Nursing facility services are already a mandatory Medicaid service.[5] Would such a facility even meet the definition of a nursing facility, which is statutorily defined as an institution that, among other things, is not "primarily for the care and treatment of mental diseases"?[6] Could such a nursing facility (or a section of a facility) ensure that individuals are screened appropriately as required by the Pre-Admission Screening and Resident Review requirements?[7]

[1] Utah Medicaid Reform 1115 Demonstration Long Term Services and Supports for Behaviorally Complex Individuals Amendment Request (Dec. 30, 2022), https://www.medicaid.gov/medicaid/section-1115-demonstrations/downloads/ut-medicaid-reform-demo-pa18.pdf [hereinafter "LTSS for Behaviorally Complex Individuals Amendment"].
[2] *See* 42 U.S.C. § 1315(d)(2)(A), (C); Utah Medicaid Reform 1115 Demonstration, STC III.7 (Dec. 16, 2020) (requiring Utah to include with any amendment a "detailed description of the amendment, including impact on beneficiaries, with sufficient supporting documentation.").
[3] LTSS for Behaviorally Complex Individuals Amendment at 1.
[4] *Id.*
[5] *See* 42 U.S.C. §§ 1396a(a)(10)(a), 1396d(a)(4)(a).
[6] *Id.* § 1396r(a).
[7] *Id.* § 1396r(b)(3)(F)(i) & (ii).

Second, will the proposed facility be an "institution for mental disease" (IMD)?[8] Because IMD determinations are made on a case by case basis, more information is necessary.[9] Will the skilled nursing facility for individuals with behaviorally complex conditions be part of a larger facility? If it is part of a larger facility, what is the overall patient population and will the majority of patients be there because they need mental health treatment? How will it be licensed? Will it be under the jurisdiction of the state mental health authority? The answer to these questions, and others, will be determinative of whether the facility is an IMD.[10] If indeed Utah seeks to create an IMD, the application should be denied, for the reasons discussed below.[11]

While HHS has granted Utah limited authority to obtain federal funding for short term, acute care in IMDs, it has not given Utah permission to obtain federal financial participation (FFP) for services provided in IMDs outside the parameters of the STCs contained in those approvals, nor would doing so be consistent with CMS' stated policies on IMDs, as described in the Dear State Medicaid Director letters on this topic.[12]

Without more information on this project, it is impossible to fully and meaningfully comment on Utah's amendment. Given the lack of sufficient detail, the application should not have been deemed complete. We ask CMS to require the State to submit an application that adheres to

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[8] *See* 42 C.F.R. § 435.1010 ("Institution for mental diseases means 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.).

[9] State Medicaid Manual § 4390.

[10] *Id.*

[11] *See* 42 U.S.C. § 1396d(a)(31)(B). A facility can be both a nursing facility and an IMD. When this is the case, federal financial participation is not available for the nursing facility. *See Conn. Dep't of Maint. v. Heckler*, 471 U.S. 524, 537 (1985).

[12] Utah Primary Care Network (now called Utah Medicaid Reform 1115 Demonstration) Amendment Approval (Dec. 16, 2020) (approving FFP for services in mental health and SUD in IMDs, but applying a number of restrictions, including length of stay requirements, reporting requirements, quality improvements, and monitoring.).

the federal requirements and to provide an additional comment period on the proposal. Nevertheless, we offer the comments below based on the limited information we are able to glean from the application.

## 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;
- 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.[13] 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.

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."[14] Thus, the "central objective" of the Medicaid Act is "to provide medical assistance," that is to provide health coverage.[15]

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[13] *Beno v. Shalala*, 30 F.3d 1057, 1069 (9th Cir. 1994).
[14] 42 U.S.C. § 1396-1; *id.* § 1396d(a) (defining "medical assistance" as provision of, or payment for, specified health care and services).
[15] *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).

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.[16] 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.[17] 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 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.[18] 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.[19]

Fourth, section 1115 allows approvals only "to the extent and for the period . . . necessary" to carry out the experiment.[20] The Secretary cannot use section 1115 to permit states to make long-term policy changes.

As explained below, Utah's proposed amendment exceeds these limitations.

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[16] *See* 42 U.S.C. § 1315(a)(1).
[17] *Id.* § 1315(a)(2).
[18] *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.").
[19] *See West Virginia v. EPA*, 142 S. Ct. 2587 (2022).
[20] 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)).

## III. Request for Long Term Services and Supports for Individuals with Behaviorally Complex Conditions

### A. The Secretary Does Not Have Authority to Waive Compliance with Provisions Outside of Section 1396a

Utah seeks funding for a new "LTSS provider."[21] Specifically, Utah seeks "expenditure authority" to "provide LTSS for individuals with BC [behaviorally complex] conditions through institutional services," as well as a waiver of section 1396a(a)(10)(B) to vary the amount, duration and scope of services provided individuals in the group, and section 1396a(a)(23)(A) to restrict freedom of choice to a single provider. As noted above, it is unclear exactly what services Utah seeks permission to fund and in what setting. However, to the extent that Utah seeks a waiver of provisions outside of section 1396a, the request should be rejected. 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.

### B. Utah Has Not Proposed a Genuine Experiment

Utah is not proposing a genuine experiment. The hypothesis posed is that the "demonstration facilitates timely transition of members with BC conditions to receive LTSS through institutional and home and community-based services. . . ."[22] The "evaluation approach" sheds no further light on what Utah seeks to test. The only anticipated measure is the number of individuals served under the demonstration, and Utah only states that an "[i]independent evaluator will design quantitative and qualitative measures to include quasi-experimental comparisons."[23] Furthermore, although the hypothesis mentions home and community-based services (HCBS),

[21] LTSS for Behaviorally Complex Individuals Amendment at 1.
[22] *Id.* at 2.
[23] *Id.*

there is no explanation to the relationship of HCBS to this proposal. In summary, the proposal states:

1) Utah hopes to move people into a new facility;
2) Utah will measure the number of people served in that facility; and
3) At a future date, Utah will use an independent evaluator who will design unspecified qualitative and quantitative measures.

This does not describe what will be tested and how, and as a result, is not sufficient to meet the experimental requirement of section 1115.

### C. The Proposed Amendment Undermines Community-Integration for People with Disabilities

Placing individuals with "behaviorally complex conditions" in a nursing facility does not promote integration. It is misleading to frame this request as proposal to "offer treatment alternatives which promote integration."[24]

In passing the Americans with Disabilities Act, Congress found that "historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem."[25] In *L.C. v. Olmstead*, the Supreme Court held that this kind of unjustified segregation is a form of discrimination:

> Recognition that unjustified institutional isolation of persons with disabilities is a form of discrimination reflects two evident judgments. First, institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life. . .. Second, confinement in an institution severely diminished the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment."[26]

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[24] *Id.* at 1.
[25] 42 U.S.C. § 12101.
[26] 527 U.S. 581, 600-601 (1999).

Nursing facilities are segregated institutions.[27] While a nursing facility may (or may not) be a lower level of care than a state psychiatric hospital such as Utah State Hospital, a lower level of care is *not* necessarily a less segregated setting. Thus, it is inaccurate to claim that the proposed amendment will increase community integration.

Utah also contends that the proposed amendment will help individuals "transition to home and community-based placements where individuals may otherwise be placed in inpatient psychiatric settings due to a lack of less-restrictive options."[28] There is no information in the proposed amendment related to access to or investments in home and community-based services (HCBS), and no reason to think placing individuals in nursing facilities will help people access HCBS.

## IV. Conclusion

For the above legal and policy reasons, we ask the Secretary to reject Utah's proposed amendment. If you have questions about these comments, please contact Jennifer Lav (lav@healthlaw.org).

Sincerely,

Jennifer Lav
Senior Attorney

[27] *See, e.g., Fisher v. Okla. Health Care Auth.*, 335 F.3d 1175, 1181-82 (10th Cir. 2003) (recognizing an *Olmstead* claim based on risk of institutionalization in nursing facilities); *Radaszewski ex rel. Radaszewski v. Maram*, 383 F.3d 599, 601-02 (7th Cir. 2004) (recognizing nursing facilities as institutional settings); *Brown v. District of Columbia*, 928 F.3d 1070, 1073 (D.C. Cir. 2019) (same).

[28] LTSS for Behaviorally Complex Individuals Amendment at 1.