November 17, 2023

Xavier Becerra, Secretary
Department of Health and Human Services
200 Independence Avenue, S.W.
Washington, D.C. 20201

RE: California Advancing and Innovating Medi-Cal (CalAIM) Transitional Rent Services Amendment Demonstration

Dear Secretary Becerra:

The National Health Law Program (NHeLP) is pleased to support and provide comments on California's proposed Transitional Rent Services Amendment to its California Advancing and Innovating Medi-Cal (CalAIM) Demonstration. Cal. Dept. Health Care Servs., *Medicaid Section 1115 Demonstration Amendment Request: California Advancing & Innovating in MediCal (CalAIM) Transitional Rent Services Amendment* (2023), https://www.medicaid.gov/sites/default/files/2023-10/ca-calaim-pa-10202023.pdf (hereafter "*Proposal*"). NHeLP protects and advances health rights of low-income and underserved individuals and families. We advocate, educate and litigate at the federal and state levels to advance health and civil rights in the U.S. We appreciate the opportunity to comment.

Section 1115 Waiver Hypotheses and Evaluation Plan

For the Secretary to approve a project pursuant to § 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. *Beno v. Shalala*, 30 F.3d 1057, 1069 (9th Cir. 1994). 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. Congress has made clear that 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." 42 U.S.C. § 1396-1; 1396d(a) (defining "medical assistance" as provision of, or payment for, specified health care and services). Thus, the "central objective" of the Medicaid Act is "to provide medical assistance." *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-1396w-5. *See* Social Security Act, § 1115(a)(1)). 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. *Id.* § 1115(a)(2). 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).

Fourth, section 1115 allows approvals only "to the extent and for the period necessary" to carry out the experiment. *Id.* § 1115(a); *see also id.* §§ 1115(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).[1] Congress did not enact section 1115 to permit the Secretary to make long-term policy changes.

Overall, we have questions about whether this proposal constitutes a genuine experiment given DHCS is seeking to cover transitional rent for up to six months for eligible high-need Medi-Cal members (if the member's plan chooses to cover it). DHCS proposes the following five hypotheses for this proposal:

- Address unmet transitional housing needs;
- Reduce long-term homelessness;
- Increase utilization of preventive and routine care;
- Reduce utilization of potentially avoidable, high acuity health care services; and
- Improve physical and behavioral health outcomes.

Proposal, at 12-15.

In addition, we continue to be concerned about the extension of existing waivers of statewideness, and amount, duration, and scope and comparability. *See Proposal*, at 11-12. Housing costs and homelessness are statewide problems and therefore the solutions must be statewide. Medicaid beneficiaries should not be penalized with less or no access to housing support simply because of the managed care plan or county behavioral health plan they are enrolled in. We remain concerned about DHCS's continued decision to make benefits available on a plan "opt-in" approach. This approach adds to the statewide confusion and complexity about what benefits are available to whom and where. It is particularly concerning that DHCS is continuing to allow this level of variation for this crucially important benefit at the same time it is working through CalAIM to standardize benefits and enrollment in managed care.

[1] In 2017, a CMS Informational Bulletin announced the intent "[w]here possible, . . . [to] approve the extension of *routine, successful, non-complex*" Section 1115(a) waivers for a period up to 10 years. Ctr. for Medicaid & CHIP Servs., CMS, CMCS Informational Bulletin 3 (Nov. 6, 2017) (emphasis added). The Bulletin should be disregarded because it conflicts with, among other things, section 1115's limitation of approvals to experimental, pilot, or demonstration projects (not for "routine" projects) and only for the period necessary to carry out the experiment (not to maintain a successful experiment as an ongoing policy).

Last, as noted above, we have concerns about the use of so-called expenditure authority, even when we support the overall goals of the demonstration. In the event that HHS approves this demonstration, we encourage HHS to work with California to identify long-term resources to support essential housing. Demonstrations are not intended to last forever, and it would be appropriate for HHS to require California, as a condition of approval, to create a transition plan in the event that the States wants to continue funding this program on a permanent basis.

Proposed Amendment on Transitional Rent

Housing supports, including services that help individuals find, move into and retain housing, are essential to the treatment and recovery of individuals living with serious behavioral health conditions.[2] For example, immediate access to housing and support from a mental health team has been shown to decrease inpatient days for homeless individuals with schizophrenia or bipolar disorder.[3] Housing assistance and supports are an important benefit as a part of the existing optional Community Supports available currently through MCPs under CalAIM. We understand housing supports are particularly critical for high-need members who are homeless and living with SMI/SED and/or SUD, especially those at risk of or transitioning out of institutional care or congregate settings, correctional facilities, or the child welfare system.

However, the federal request for coverage of up to 6 month transitional rent for this population is not particularly clear. We understand it will be offered by plans that elect to as part of their Community Supports benefit. DHCS states it is also separately requesting authority to provide transitional rent services for qualifying individuals enrolled in California's behavioral health delivery systems through the proposed California Behavioral Health Community-Based Organized Networks of Equitable Care and Treatment (BH-CONNECT) demonstration. Despite the clear efficacy of the goals of this proposal, there are still many unanswered questions, such as: What exactly is included in this "service", if anything, beyond the rent payment? How will this work if provided by potentially two different plans or delivery systems? How will it fit with other housing efforts underway, including existing CalAIM Community Supports, the

[2] *See, e.g., Ctr. Budget & Policy Priorities, Chart Book: Housing and Health Problems Are Intertwined. So Are Their Solutions* (2022), https://www.cbpp.org/research/health/housing-and-health-problems-are-intertwined-so-are-their-solutions.

[3] Loubière A. Tinland, et al, *Effectiveness of a Housing Support Team Intervention With a Recovery-Oriented Approach on Hospital and Emergency Department Use by Homeless People With Severe Mental Illness,* 29 EPIDEMIOLOGY & PSYCH. SCI. e169 (2020); https://doi.org/10.1017/S2045796020000785.

Behavioral Health Bridge Housing (BHBH) Program, the Mental Health Services Act (MHSA) funded housing such as Full Service Partnerships , the Housing and Homelessness Incentive Program (HHIP) that is available to MCPs, and the Homeless Housing Assistance and Prevention Grant Program (HHAP) for cities and counties?

While Medicaid will not pay for long-term housing, it can pay for a range of services and supports that help enrollees find or maintain stable housing so those support services are critical to addressing the needs of the unhoused Medi-Cal members with serious behavioral health conditions, leaving correctional facilities or transitioning from child welfare. This particular proposal should put more emphasis on pre-tenancy services (e.g., tenant screening and housing assessment, assisting with the housing application process and housing search, ensuring that housing units are safe and ready for move-in, assisting in arranging for and supporting move-in, including related transportation and moving expenses) and tenancy sustaining services (e.g., identifying and addressing behaviors that may jeopardize housing, education and training on the role, rights, and responsibilities of the tenant and landlord, individualized case management and care coordination).[4] We also request clarity on how DHCS will ensure that the necessary health or behavioral health supports will be provided to ensure these Medi-Cal recipients maintain successful housing, especially when ACT, FACT, CSC for FEP, IPS Supported Employment, CHW services, and clubhouse services are also only going to be available at county option, and it appears that some of these services are not required to be in place with the transitional rent services. Transitional rent services without these other supports will likely not be successful or achieve the intended outcomes. We also underscore the need for ongoing investment in permanent supportive housing to ultimately solve this ongoing overreliance on institutional care and homelessness. Permanent supportive housing is a proven solution to homelessness for the highest need populations by pairing housing with case management and supportive services.

Finally, the demonstration of offering transitional rent to select managed care plan members is laudable but the evaluation of the 5 hypotheses in Table 3 for this proposed demonstration could use additional detail (as stated above). *See Proposal,* at 14-15. The evaluation includes analyzing encounter data and quality measures, as well as surveying members to track changes and progress over time. *Id.* This analysis may not demonstrate how utilizing rent transition directly leads to the hypotheses or accounts for the better outcomes as opposed to other factors such as other services or supports

[4] Ctrs. Medicare & Medicaid Servs., *Opportunities in Medicaid and CHIP to Address Social Determinants of Health (SDOH)* (2021), https://www.medicaid.gov/federal-policy-guidance/downloads/sho21001.pdf.

or economic factors. We suggest that this proposal provide more details about the evaluation of providing transitional rent on the specific outcomes anticipated.

Conclusion

Thank you for considering our feedback. Please do not hesitate to contact me (lewis@healthlaw.org) should you have any questions.

Sincerely,

Kim Lewis
Managing Attorney,
National Health Law Program