December 5, 2023

Shalanda D. Young
Director
Office of Management and Budget

Re: OMB-2023-0020, Draft Memorandum titled "Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence"

Dear Director Young,

The National Health Law Program (NHeLP) is a public interest law firm that fights for equitable access to quality health care for people with low incomes and underserved populations and for health equity for all. For over fifty years, we have litigated to enforce health care and civil rights laws, advocated for better federal and state health laws and policies, and trained, supported, and partnered with health and civil rights advocates across the country. We believe that all people should have access to the health care they need, regardless of geography, race, ethnicity, language, income, disability, sex, gender identity, sexual orientation, immigration status, or other factors.

NHeLP welcomes the opportunity to use our experience regarding automated systems to comment on the Office of Management and Budget's (OMB) guidance on the federal use of artificial intelligence ("Proposed AI Memo").[1] NHeLP has a long history of fighting against faulty and harmful computer systems and processes that rely on automated decision making systems (ADS), including Artificial Intelligence (AI), such as assessment tools, eligibility systems, and prior authorization mechanisms that unlawfully deny people benefits to which they are entitled.[2] We have also partnered with Upturn and Legal Aid of Arkansas to form the Benefits Tech Advocacy Hub to give advocates tools to fight harmful benefits technology and force greater transparency so that harm to individuals can be

identified, prevented, or reduced earlier in the technology's lifecycle. NHeLP has also released our [Principles for Fairer, More Responsive Automated Decision-Making Systems](#), which reflect our years of work regarding ADS, including AI, and what features and protections are needed in responsible ADS. We have real-world experience fighting the harm caused by technology in public benefits, knowledge about the how and why such harms occur, and practical ideas about policies necessary to protect against such harms.

NHeLP's decades of experience fighting to protect the rights of low-income and underserved people impacted by AI gives us a different and needed perspective on policy efforts to protect against harmful AI. We understand what the systems look like on the ground and how they impact people's rights. We also consistently see proposals to mitigate the harms of AI that fail to recognize the impact on public benefits, for which it is well-recognized that people have a "brutal need."[3] Protections of notice, transparency, and explainability already exist, are constitutionally required, and must be fully recognized in any AI policies that impact public

---

[1] Request for Comments on Advancing Governance, Innovation and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum, 88 Fed. Reg. 75, 625 (Nov. 3, 2023) [hereinafter Proposed AI Memo].

[2] *See* Elizabeth Edwards*, Nat'l Health L. Prog., Preventing Harm from Automated Decision-Making Systems in Medicaid*, https://healthlaw.org/preventing-harm-from-automated-decision-making-systems-in-medicaid/. This advocacy includes the following cases: *A.M.C. v. Smith*, No. 3:20-cv-00240, 2023 WL 6881785 (M.D. Tenn. Oct. 18, 2023) (challenging Tennessee's termination of Medicaid coverage without proper notice and hearing, including when the automated eligibility system made errors, could not evaluate for all categories of eligibility, especially related to disability, and otherwise wrongfully terminated coverage); *Darjee v. Betlach*, No. CV 16-00489 (D. Ariz. March 11, 2019) (alleging immigration status-related errors in the eligibility system that led to individuals wrongfully being provided emergency only Medicaid coverage instead of full Medicaid benefits); *Hawkins v. Cohen*, 327 F.R.D. 64 (E.D.N.C. Aug. 9, 2018) (granting preliminary injunction to stop North Carolina's Medicaid eligibility computer system from improperly automatically terminating benefits); *L.S. v. Delia*, No. 5:11-CV-354, 2021 WL 12911052 (E.D.N.C. March 29, 2012) (finding due process and other violations over the use of an automated assessment tool to determine budgets for Medicaid home and community-based services and cut those budgets without appropriate notice, including information about the basis of the decision made by the tool); Brief for Nat'l Health L. Prog. as Amici Supporting Appellant, *J.R. v. Horizon N.J. Health*, A-002028-21, N.J. Super. Ct. App. Div. (2023) (discussing right to assessment tools determining nursing hours and harmful AI); Brief for Nat'l Health L. Prog, et. al. as Amici Supporting Plaintiff Appellees, *Wit v. United Behavioral Health Care*, 79 F.4th 1068 (9th Cir. 2023) (discussing the need for behavioral health services and the use of tools to authorize those services based on generally accepted standards of care as opposed to internal algorithms based on other factors, including financial).

[3] *Goldberg v. Kelly,* 397 U.S. 254 (1970).

benefits.[4] We welcome executive action and OMB guidance on the federal use of AI, including mitigating harm. This Proposed AI Memo is an important step in protecting rights and equity, but clarification and more detail are needed to assure that individuals' rights are not violated.

I. The definition of AI and technical context need to be broader and consistent with the Executive Order.

Policies addressing AI fairness and accountability frequently use different definitions of what types of systems are included as AI, which is confusing and causes uneven developments in protective policies. Unfortunately, the definition of AI in the Proposed AI Memo is also inconsistent with the definition in the Executive Order that the Memo is intended to implement.[5] Continuity of the executive branch's definition of AI is necessary for clarity to federal agencies. The Executive Order definition of AI is broader than that used in the Memo and will therefore apply to more of the technology that agencies already use and will use in the future. The definition of AI in the Propose AI Memo is too narrow and will exclude many systems that impact people's rights, particularly in the context of public benefits. This includes systems that determine eligibility, automate notices, and decide levels of benefits. The guidance is meant to implement the Executive Order and therefore must reflect the Executive Order's definition.

Further, the technical context of the Proposed AI Memo definition is too limiting and would exclude current automated systems that are harmful and need to be addressed by this Proposed AI Memo. While the technical context rightly notes that the level of technical complexity and autonomous functioning are not relevant to the definition of AI, the exclusions in this section are overly narrow.[6] The final guidance should not exclude robotic process automation or systems that operate only by human-defined rules. We have seen automated systems that rely solely on human-defined rules be improperly programmed, use data incorrectly, and result in improper denials and reductions of public benefits.[7] By considering AI

---

[4] *Id.*; *see also* Jane Perkins, Nat'l Health L. Prog., *Demanding Ascertainable Standards*, National Health Law Program (June 11, 2021), https://healthlaw.org/resource/demanding-ascertainable-standards-medicaid-as-a-case-study/.

[5] *Compare* Exec. Order No. 14,110, 88 Fed. Reg. 75, 191 (Nov. 1, 2023) (defining AI in alignment with 15 U.S.C. § 9401(3)) *with* Proposed AI Memo, *supra* note 1, at 22-23 (defining AI by citing to § 238(g) of the John S. McCain National Defense Authorization Act for Fiscal Year 2019).

[6] Proposed AI Memo, *supra* note 1, at 23.

[7] *See, e.g., A.M.C. v. Smith,* 2023 WL 6881785; Benefits Tech Advocacy Hub, Case Study: Wisconsin Medicaid Home and Community Based Services Terminations, https://www.btah.org/case-study/wisconsin-medicaid-home-and-community-based-services-terminations.html (describing automated eligibility system that repeatedly wrongfully terminated eligible individuals due to a system that failed to properly implement the eligibility policies); *see*

NATIONAL
HEALTH
LAW PROGRAM

in a narrow context, ADS that regularly impact people's rights will continue to be used without the important oversight and mitigation strategies outlined in the Proposed AI Memo.

II.   Requirements for Chief AI Officers and responsible AI innovation provide an important blueprint for agency AI management but need clarification.

We commend the thought put into agency AI oversight through Chief AI Officers (CAIOs) and responsible innovation measures. The inclusion of agency CAIOs and their responsibilities signifies the importance of AI oversight and how specialized knowledge and leadership are a crucial part of enacting the rest of the Proposed AI Memo. While we appreciate that much attention is paid to the authority and responsibilities of the CAIO, an assessment of whether the CAIO has the capacity to take on the duties outlined is never mentioned.[8] Simply giving an employee with the necessary level of authority these additional responsibilities without assessing whether they have the time or resources to carry them out is setting up the responsibilities to get minimal attention and time. In reality this work will need significant attention. The capacity of the CAIO to perform the task must also be part of the evaluation of the appointment and what other steps an agency may need to take to effectuate the memorandum.

We are concerned that many of the activities called for, such as conducting risk assessments and overseeing agency lists of safety- or rights-impacting AI, are softened by language such as the terms "necessary."[9] It is unclear from the Proposed AI Memo what OMB considers necessary for the purpose of AI oversight and innovation. For clarity and continuity across the federal government, we encourage OMB to define these terms and provide clear parameters to agency officials. Any such parameters should be written to result in as much oversight of risk assessment as possible, especially in the context of rights-impacting AI. The CAIO role should not be as discretionary as it is described in the Proposed AI Memo and OMB should have more criteria it can use to review and counter decisions made by the CAIOs. For example, as discussed in Section III.a *infra* the waiver authority of the CAIO is too unfettered. The CAIOs play a critical role in identifying risks in automated systems and they must have sufficient authority, capacity, and accountability to perform their important functions, including

---

also Casey Ross & Bob Herman, *Denied by AI: How Medicare Advantage plans use algorithm to cut off care for seniors in need*, STAT NEWS (Mar. 13, 2023), https://www.statnews.com/2023/03/13/medicare-advantage-plans-denial-artificial-intelligence/.

[8] *See, e.g.,* Proposed AI Memo, at 4 (discussing an evaluation of authority of the designated CAIO); *id.* at 5-8 (discussing the necessary, skills, knowledge, training, expertise, responsibility, seniority, and reporting structure of the CAIO).

[9] *See, e.g.*, Proposed AI Memo at 4.

risk assessments. The more checks and balances there are on an automated system, both before and during use, the lower the risk will be of harming underserved individuals.

III. Clearer guidelines and authority are needed to adequately manage the risks of rights-impacting AI.

A critically important part of the Proposed AI Memo is that minimum practices to manage risks from rights- and safety-impacting AI must be implemented by August 1, 2024 or agencies must stop using non-compliant AI. We believe that the best response to AI that is biased, discriminatory, or at all inappropriately reduces access to public benefits like Medicaid is to not use it.[10] As discussed earlier, public benefits are only provided to those in our country who are most in need of the services provided and are often not in positions where an error or harm has a negligible impact on their lives.[11]

We also appreciate the requirement that agencies review each AI in development or use to determine if it is rights- or safety-impacting. In many of the areas that are identified as safety- and rights-impacting, the likelihood of bias is high given the pervasiveness of institutional bias in those areas, such as health care, housing, the criminal legal system, child welfare, employment, and policing. As recognized by numerous studies regarding bias in algorithmic decision-making, there are often issues with bias in the underlying data or research assumptions due to institutional biases.[12] Without thorough review, many AI uses would slip

---

[10] *See generally* Ryan Calo & Danielle Keats Citron, *The Automated Administrative State: A Crisis of Legitimacy,* 70 EMORY L. J. 4 (2021), https://scholarlycommons.law.emory.edu/cgi/viewcontent.cgi?article=1418&context=elj (identifying harmful impacts in public benefits and the need to ensure tools enhance rather than undermine agency authority).

[11] *See, e.g.,* Leighton Ku et al., Health Affairs, *Florida's Medicaid Unwinding Lacks Fundamental Safeguards and Can Harm Population Health* (Dec. 1, 2023), https://www.healthaffairs.org/content/forefront/florida-s-medicaid-unwinding-lacks-fundamental-safeguards-and-can-harm-population (finding that disproportionate harm from Medicaid unwinding problems in Florida will deepen racial inequities in health care access and likely have serious health consequences).

[12] *See, e.g.,* Ziad Obermeyer, *Dissecting Racial Bias in an Algorithm Used to Manage the Health of Populations*, 366 SCIENCE 447 (Oct. 25, 2019), https://science.sciencemag.org/content/366/6464/447; Hannah E Knight et al., *Challenging Racism in the Use of Health Data*, 3 THE LANCET E144 (Mar. 1, 2021), https://www.thelancet.com/journals/landig/article/PIIS2589-7500(21)00019-4/fulltext; Mikella Hurley & Julius Adebayo, *Credit Scoring in the Era of Big Data*, 18 YALE J. L. TECH. 148 (2016). Relatedly, in the additional minimum practices for Rights Impacting AI, the Proposed AI Memo says that systems "should ensure that data used…is adequately representative of the communities who will be affected by the AI, and has been review for improper bias." Proposed

through the cracks and cause preventable harm. We agree that individual agencies are typically the experts in their own work and thus it makes sense to have each agency define their own additional AI uses that are presumed to be safety- or rights-impacting. However, because defining additional AI uses means additional analysis or potentially limitations on using AI tools that have decreased human workload, and thus incentivizes not finding issues, there must be oversight of this authority as well.

While we support AI use-case review and agency-specific lists, these two parts of the Proposed AI Memo would benefit from further detail. All agency activities related to mitigating the risks of rights-impacting AI as outlined in the Proposed AI Memo should have detailed oversight and accountability mechanisms. OMB should include a process for review of agency rights-impacting use cases and agency-specific lists. OMB and public comment feedback should be required on what additional use-cases the agency may have failed to include. There should also be consequences for when agencies are non-compliant with the agency review and list requirements that will be sufficiently significant to act as a deterrent. OMB must also include a mechanism to stop agencies from using non-compliant AI.

a. **Needed protections are undermined by agency authority to determine that AI is not rights-impacting and allow waivers of minimum requirements.**

The proposed policy to allow CAIOs to determine that AI presumed to be rights-impacting is not rights-impacting in practice creates a dangerous exception that could undermine all the critical protections in the Proposed AI Memo. If this portion of the guidance remains in the final document, further oversight of the CAIO waivers by OMB will be necessary to ensure that agencies are not using this loophole inappropriately. The Proposed AI Memo on risk assessments lacks clarity and any limits on when risks or harms are too high. There should be clearer indicators of what type of harms should be heavily weighed or presumed impossible to mitigate through the benefits. OMB should provide templates for the risk assessments and maintain authority to override or maintain final approval of the assessments. Overall, more detail on such a review process is needed in the final guidance.

Similarly, allowing agencies to waive mitigation requirements and extend the deadline for compliance with the minimum requirements could allow agencies to evade compliance. In the context of waivers, the Proposed AI Memo fails to define or provide detail on what is

---

AI Memo, *supra* note 1, at 19. Given the evidence of the role of data in algorithmic bias, this evaluation of the data needs to be a requirement rather than simply a "should." Meredith Whittaker et al., AI Now, *Disability Bias & AI Report* 8-12 (Nov. 20, 2019), https://ainowinstitute.org/publication/disabilitybiasai-2019 (discussing bias in AI and data issues regarding disability); Rajiv Movva et al., *Coarse Race Data Conceals Disparities in Clinical Risk Score Model Performance* (Apr. 2023), https://arxiv.org/abs/2304.09270.

considered an unacceptable impediment. In the context of extensions, the Proposed AI Memo fails to provide detail on when an agency may find it cannot feasibly meet minimum requirements by August 1, 2024. Guidance for both must be included in such a way that maintains the highest level of mitigation requirements possible, or OMB risks agencies falling short of the goals of AI governance. Further, the ability to override or maintain final approval of such waivers and extensions is necessary. Waivers should also be time limited and require regular review to ensure they remain justified. There is also no clear guidance that would prohibit an agency from using a harmful AI. Without sufficient detail guiding agency authority and oversight by OMB, there is too much discretion instilled in the CAIO position that would allow agencies to evade the important protections in the Proposed AI Memo.

b. **Agencies are not provided a roadmap for oversight of AI used by state and local governments in federally funded programs.**

Many of the presumed rights-impacting AI uses occur at the state and local level rather than within the federal government, but federal agency oversight of such programs tied to funding should require the relevant agencies to apply the obligations of the Proposed AI Memo to the AI that they have a role in approving. In Medicaid, the primary context within which NHeLP works on AI, there is federal approval of the systems themselves or use of AI systems for eligibility, service approvals and denials, and other services-related systems.[13] ADS used in Medicaid frequently reduce or deny people benefits in ways that deny them Constitutional Due Process.[14]

Despite the breadth of state and local rights-impacting AI under the purview of federal agencies, such use-cases are not mentioned in the Proposed AI Memo. The final guidance must remedy this and provide a blueprint for federal agencies to work with the programs they oversee. This should include following the final AI Memo as a condition of federal funding as well as a process and timeline for federal agencies to develop their own specific guidance and best practices. Should OMB determine that it would exceed its authority to require state

---

[13] For example, the Centers for Medicare & Medicaid services certify Medicaid enterprise systems, including those used to determine eligibility. *See* Ctrs. for Medicare & Medicaid Servs., *Certification*, https://www.medicaid.gov/medicaid/data-systems/certification/index.html. CMS also approves the use of automated tool for services, including assessment tools used for determining services. *See* Elizabeth Edwards & Sarah Grusin, Nat'l Health L. Prog., *Opportunities for Public Comment on HCBS Assessment Tools* (Dec. 19, 2019), https://healthlaw.org/resource/opportunities-for-public-comment-on-hcbs-assessment-tools/.
[14] *See See* Miriam Delaney Heard et al., Nat'l Health L. Prog., *Medicaid Enrollees Challenge Florida's Failure to Provide Due Process During Unwinding* (Aug. 24, 2023), https://healthlaw.org/resource/medicaid-enrollees-challenge-floridas-failure-to-provide-due-process-during-unwinding/; Edwards, *supra* note 2; Perkins, *supra* note 3.

agencies to follow the guidance, the final AI Memo should still outline the responsibility of the federal agencies for their approval of any AI systems.

   c. **Rights-impacting AI notice minimum practices proposals lack necessary clarity and provide for dangerous loopholes that may lead to rights violations.**

The Proposed AI Memo's risk management of rights-impacting AI is an important step toward realizing equity in the use of technology, particularly the requirements for human intervention and oversight. However, the notice minimum practices create significant risk that entities will follow the minimum requirements and not recognize that requirements of "applicable laws" like the Constitution require far greater notice and transparency for certain rights-impacting AI, including for public benefits.[15] The Proposed AI Memo appropriately requires notice be given to negatively impacted individuals with instructions on how to contact the agency, but only encourages agencies to provide explanation for such decisions.[16] In the context of public benefits, agencies are constitutionally required to provide adequate explanation for an individual to understand the decision being made and what the agency relied upon to reach such a decision.[17] Worryingly, footnote 37 states that explanations of AI decisions "are often not technically feasible."[18] However, if AI is used where constitutional protections require explainability, then AI that cannot explain its decisions must not be allowed to be used.

The final OMB guidance should also be clear that AI systems must be able to meet the requirements of the guidance, including notice and transparency, and not assert "protections" of intellectual property. Any AI system used should be able to explain itself publicly, but it must be able to explain the basis of its decision regardless of intellectual property protections when public benefits are in question.[19] It should be clear in the final OMB guidance that "applicable law" will require greater transparency and ascertainability for certain rights-impacting AI.

The President's Executive Order and the Proposed AI Memo are inclusive of public benefits programs, such as Medicaid, as a context in which AI is rights-impacting.[20] To the largest extent possible, OMB should include more oversight of agency action, require federal agencies to apply the guidance to AI they oversee and fund, and ensure that the minimum risk

---

[15] Proposed AI Memo, *supra* note 1, at 20.
[16] *Id.*
[17] *Goldberg,* 397 U.S. at 270-71; *see also* Perkins, *supra* note 3*.*
[18] Proposed AI Memo, *supra* note 1, at 20 n. 37
[19] *See, e.g., Salazar v. Dist. of Columbia*, 596 F. Supp. 2d 67 (D.D.C. Feb. 6, 2009); *Ark. Dept. of Commerce, Div. of Workforce Servs. v. Legal Aid of Ark*., 645 S.W.3d 9 (S.C. Ark. 2022).
[20] Similarly, the Proposed AI Memo recognizes that rights-impacting AI includes civil rights, which include due process, and access to critical resources or services, including health care, such as Medicaid. Proposed AI Memo, *supra* note 1, at 24.

management strategies for rights-impacting AI meet minimum legal requirements, including those protecting constitutional rights and against discrimination. These measures are necessary to protect people and approach equity in AI.

We appreciate this opportunity to provide feedback on the Proposed AI Memo. If you have any questions, please reach out to Cassandra LaRose at larose@healthlaw.org and Elizabeth Edwards at edwards@healthlaw.org.

Sincerely,

Cassandra LaRose
Staff Attorney

Elizabeth Edwards
Senior Attorney