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March 22, 2024

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: Montana Healing and Ending Addiction through  
Recovery and Treatment (HEART) 1115 Demonstration  
Waiver Amendment Application**

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 comment on Montana's proposed amendment to its section 1115 demonstration, "Healing and Ending Addiction through Recovery and Treatment."<sup>1</sup>

We urge the Centers for Medicare and Medicaid Services (CMS) to reject Montana's request to obtain federal financial participation (FFP) for child-serving institutions for mental disease (IMDs) that are also qualified residential treatment programs (QRTPs).

Montana has previously submitted a request for FFP for mental health services provided in IMDs, which CMS declined to approve.<sup>2</sup> NHeLP submitted comments objecting to Montana's initial request for FFP for IMDs for adults with serious mental illness.<sup>3</sup> Our previous objections to the use of section 1115 demonstrations to obtain FFP for IMD stays apply equally to the present request. Namely, both Montana's initial application and

the present amendment ask that the Secretary waive compliance with provisions that the Secretary does not have authority to waive; fail to proposed a genuine experiment; and undermine community integration for people with disabilities.<sup>4</sup> For the sake of brevity, we have attached our November 17, 2021 comments and incorporate them by reference.<sup>5</sup>

We have an additional two objections to the present request. First, the Secretary lacks the authority to create new exceptions to the IMD exclusion for child-serving settings outside of the formal rulemaking process. Second, Montana’s request to eliminate *any* average length of stay or maximum length of stay requirements for the next two years is unreasonable and risks subjecting youth to the serious harm of long-term institutionalization.

### **A. Congress Has Limited the Secretary’s Authority to Create New Carve Outs for Youth in IMDs**

The Secretary does not have authority to approve FFP for individuals under age 21 in Q RTPs. Congress has already prescribed the settings that are carved out of the IMD exclusion for youth and articulated the process by which the Secretary can add additional settings. Pursuant to 42 U.S.C. § 1396d(a)(16), states are authorized to obtain FFP for inpatient psychiatric hospital services for individuals under 21 (often referred to as the “psych under 21” or “psych 21” benefit), as defined in 42 U.S.C. § 1396d(h). In turn, 42 U.S.C. § 1396d(h) defines these services as “inpatient services which are provided in an institution (or distinct part thereof) which is a psychiatric hospital...or in another inpatient setting *that the Secretary has specified in regulations*” (emphasis added). Thus, while there

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<sup>1</sup> Montana Healing and Ending Addiction through Recovery and Treatment Demonstration (Heart) 1115 Demonstration Amendment Application (Feb. 15, 2024), <https://www.medicaid.gov/sites/default/files/2024-02/mt-heart-demonstration-pa.pdf> [hereinafter “Montana Heart Amendment Application”].

<sup>2</sup> Letter from Chiquita Brooks-LaSure, Administrator, Centers for Medicare and Medicaid Services., to Michael Randol, Montana State Medicaid Director (July 1, 2022), <https://www.medicaid.gov/sites/default/files/2022-07/mt-heart-demo-ca.pdf> (explaining that “CMS is not approving coverage for SMI or SED services provided in an IMD, given the termination of Montana State Hospital’s participation in CMS’s programs on April 12, 2022.”).

<sup>3</sup> Attachment A, Comments on Montana Healing and Ending Addiction through Recovery and Treatment (HEART) 1115 Demonstration Application (Nov. 17, 2021), <https://healthlaw.org/resource/nhelp-comments-on-montana-1115-waiver-request-imd-exclusion/>.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*



are some statutory exceptions to the IMD exclusion for youth, Congress has expressly stated that if the Secretary wishes to carve out any additional youth-serving inpatient settings from the IMD exclusion, he must do so via the formal regulatory process.<sup>6</sup>

Through regulation, the Secretary has specified only one additional inpatient setting for children that is carved out of the IMD exclusion: psychiatric residential treatment facilities (PRTFs).<sup>7</sup> The Secretary could, but has not, proposed regulations to authorize QRTPs as an additional setting for the psych 21 benefit. If the Secretary wishes to authorize additional settings under the psych 21 benefit, the statute requires the Secretary to do so via the formal rulemaking process.

### **B. A Two-Year Length of Stay is Unreasonable and Will Unnecessarily Segregate Children in Institutional Settings**

Montana requests FFP for children in QRTPs staying up to *two years*, which is a drastic increase from the 30-day average length of stay (ALOS) requirement that CMS has applied to every adult mental health IMD approval in recent history.<sup>8</sup> This would be a substantial departure from CMS guardrails that currently exist for adults receiving mental health services in IMDs, as well as from the 2018 CMS guidance on QRTPs.<sup>9</sup>

Exemptions to the ALOS or maximum length of stay requirements are bad policy, and set dangerous precedent. This is particularly true for children, where two years represents a large portion of their lives. Children do best in family-like settings, and the harm from ongoing institutionalization of children has been well-documented.<sup>10</sup> If children must be

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<sup>6</sup> 42 U.S.C. §§ 1396d(a)(16); 1396d(h).

<sup>7</sup> 42 C.F.R. § 441.151.

<sup>8</sup> Montana Heart Amendment Application, *supra* note 1, at 8.

<sup>9</sup> See CMS, *Qualified Residential Treatment Programs and Serious Mental Illness (SMI) and Serious Emotional Disturbance (SED) Demonstration Opportunity Technical Assistance Questions and Answers* 4 (Sept. 20, 2019), <https://www.medicaid.gov/federal-policy-guidance/downloads/faq092019.pdf> (“States interested in including QRTPs in their section 1115(a) demonstrations will need to determine how best to include stays in QRTPs, recognizing that overall the state will be expected to achieve a statewide average of 30 days as part of these demonstrations.”).

<sup>10</sup> American Academy of Pediatrics et al., *The Path to Well-being for Children and Youth in Foster Care Relies on Quality Family-Based Care* (Jan. 18, 2022), <https://familyfirstact.org/sites/default/files/QRTP%20and%20IMD%20One%20Pager.pdf>; Think of Us, *Away From Home Youth Experiences of Institutional Placements in Foster Care* (July 2021), <https://assets.website->

placed in inpatient or residential settings, their length of stay should be measured in days and weeks, not in years. We are unaware of any literature that supports two-year length of stays for inpatient or residential treatment for children. Unnecessary institutionalization also violates the rights of disabled children to live and receive services in their communities.<sup>11</sup>

Furthermore, the guidance Montana cites to justify this request states:

As a condition of approval for the exemption [of the average length of stay], states will be required to provide CMS with a plan, including key milestones and timeframes, for transitioning children out of QRTPs that are IMDs. This transition plan will take into account the up-to-two-year period during which children residing in QRTPs are exempt from the typical length of stay parameters; those parameters will apply to children residing in QRTPs at the expiration of this up-to-two-year period.”<sup>12</sup>

Montana has not submitted any such transition plan, nor has it even generally described how it intends to transition children out of QRTPs that are IMDs. Without such comprehensive descriptions, the public is unable to meaningfully comment on Montana’s proposal.<sup>13</sup>

### **C. Conclusion**

For the above legal and policy reasons, we ask the Secretary to reject Montana’s request to waive the IMD exclusion for children in QRTPs. We appreciate your consideration of our

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[files.com/60a6942819ce8053cefd0947/60f6b1eba474362514093f96\\_Away%20From%20Home%20-%20Report.pdf](https://www.files.com/60a6942819ce8053cefd0947/60f6b1eba474362514093f96_Away%20From%20Home%20-%20Report.pdf).

<sup>11</sup> 29 U.S.C. § 794(a).

<sup>12</sup> CMS, Qualified Residential Treatment Program (QRTP) Reimbursement: Family First Prevention Services Act (FFPSA) Requirements, Q & A, Oct. 19, 2021, <https://www.medicaid.gov/federal-policy-guidance/downloads/faq101921.pdf>. The guidance allows for the demonstration to waive the ALOS requirements for a limited period of time, up to two years, not to simply allow all children to stay up to two years.

<sup>13</sup> 42 C.F.R. 431.408(a)(1)(i).



comments. If you have questions about these comments, please contact Jennifer Lav ([lav@healthlaw.org](mailto:lav@healthlaw.org)).

Sincerely,

A handwritten signature in black ink, appearing to read "Jennifer Lav".

Jennifer Lav  
Senior Attorney

