August 5, 2021

Daniel Tsai
Director
Center for Medicaid and CHIP Services
Centers for Medicare and Medicaid Services
7500 Security Boulevard
Baltimore, MD 21244

VIA EMAIL

Dear Mr. Tsai:

Organizations that advocate for consumers who rely on home and community-based services (HCBS) in New York State write to express concerns about New York's proposal on how to use the enhanced FMAP provided to states as part of the American Rescue Plan Act (ARPA). While New York's application includes proposals from several state agencies, our comments focus on proposals made by the Department of Health (DOH). DOH failed to get robust feedback from stakeholders, with only a couple of hastily scheduled, unpublicized briefings, leaving many stakeholders out of the process. Further, these proposals do not meet the intention of the Federal government, to expand, enhance, or strengthen HCBS. With the potential for a great amount of funding flowing to New York State from this enhanced FMAP, we greatly appreciate your attention to the issues with New York's proposal as outlined below.

1. **More than half of the funding is routed to Medicaid managed care organizations, with insufficient accountability** to ensure the funds will be used for improved workforce capacity and other stated purposes. We oppose diluting the impact of the funding by using it to increase capitation rates, since capitation rates fund every expense of managed care, including services other than HCBS, such as administrative overhead, profits, marketing, and other expenses. State proposals with this flaw include:
    - I.A. *Transform the Long-Term Care Workforce and Achieve Value-Based Payment (VBP) Readiness* ($623 million)
    - II.A. *Support Program Growth in Personal Care Services and CDPAP to Ensure Capacity* ($15 million)
    - II.C. *Invest in Expansion of CFCO* ($46.90 million)

- II.J. *Expand and Implement HCBS and Community Oriented Recovery and Empowerment (CORE) Services* ($12.50 million)

There are more direct and impactful ways of funding efforts to expand workforce capacity. For example, a fund could be established for licensed home care agencies and Consumer Directed Personal Assistance Program (CDPAP) fiscal intermediaries to draw down direct funding to pay increased wages. Workforce capacity is a huge barrier to accessing home care in New York State, which the pandemic has only worsened. New York is the epicenter of a worst-in-the-nation home care crisis due to very low wages, with the vast majority of home care workers earning minimum wage. As of this summer, people can earn $2.50 an hour above minimum wage working at fast food restaurants, only deepening the crisis. Merely increasing the capitated rate for Managed Long Term Care (MLTC) plans is insufficient to address this crisis. Advocates have been pushing for wages to be increased to 150% of minimum wage as part of this proposal.

2. **We oppose funding natural projected growth in demand for HCBS.** Part II.A. *Support Program Growth in Personal Care Services and CDPAP to Ensure Capacity* ($415 million) acknowledges that its second largest allocation may not comply with the requirements for the enhanced FMAP because it does not enhance, expand, or strengthen HCBS services, but merely funds those services already covered by New York's Medicaid program. We object to allowing New York State to use the enhanced FMAP for this purpose. This significant amount of funding could instead be used for many other initiatives that could truly accomplish the legislative intent of ARPA. Also, allowing this expenditure makes it possible for New York State to spend the enhanced FMAP quickly—by March 2022—reducing the period in which the ARPA Maintenance of Effort (MOE) requirement applies. This artificially-shortened MOE period is harmful to consumers, as the State is preparing to implement restrictions on both functional and financial eligibility criteria for personal care and CDPAP services that were enacted in 2020, but which may not be implemented until the MOE period expires.

3. **We oppose distributing funds intended to expand HCBS services to nursing homes.** In Part I.C. *Expand Advanced Training Incentive (ATI) Program for HCBS Transitions from Nursing Homes* ($55.35 million), the State proposes to fund a program to train direct care nursing home staff to "identify changes in a recipient's physical, mental, or functional status that could suggest clinical improvement for nursing facility discharge to the community with appropriate HBCS support." The stated concept of this training program is wholly misguided. It presumes the only barrier to discharge to the community is that residents have not "clinically improved" sufficiently to be discharged to home. This is not the case, as many residents could live safely in the community with no clinical improvement whatsoever, if provided with supportive services and accessible and affordable housing. Moreover, direct care staff in nursing homes should already be trained to ask residents the question in the Multiple Data Set (MDS) survey, "Do you want to talk to someone about the possibility of leaving this facility and returning to live and receive services in the community?" (MDS Section Q). This assessment is given annually, quarterly and when there is a significant change.

4. **Use funding to expand Money Follows the Person (the *Open Doors* program in NYS).** Instead of funding nursing homes to do discharge planning that they are already required and funded to do, this funding should be used to expand this underfunded program that

directly assists nursing home residents seeking to be discharged. If a resident answers "yes" to the MDS Section Q question cited above about whether they are interested in returning to the community, the facility must make a referral to *Open Doors*. Yet the lack of funding for that program precludes it from providing assistance for every referral, which often involves complex and lengthy advocacy in order to secure housing and HCBS services.

5. **Implementation of CFCO services** (Section II.C. *Invest in Expansion of CFCO* – $46.90 million). For years, consumer advocates have urged the State to implement the Community First Choice Option (CFCO) benefit package, and protested prolonged delays in expanding this program to include managed care plans.[1] [2] Like funding natural projected growth in demand for HCBS discussed above, funding the long-awaited implementation of these long delayed services does not enhance, expand, or strengthen HCBS services.

6. **Increase access to private duty nursing services in managed care as well as fee-for-service** (Section II.M. *Enhanced Rates for Private Duty Nursing (PDN)* – $10 million). The State proposes to temporarily increase rates for the approximately 500 adult Medicaid recipients who access private duty nursing (PDN) services in the FFS program who are over 23 years old. The temporary increase would bring the rates up to the higher rates approved last year for children up to age 23. While this increase is necessary and we support it, it leaves out those adult Medicaid recipients in Medicaid managed care and MLTC plans who access PDN services. With over 250,000 adults enrolled in MLTC plans statewide, and millions more in mainstream Medicaid managed care plans for non-dual eligible, we expect there are more than 500 adults in these plans who need PDN services. A shortage of nurses has severely affected both MLTC and mainstream Medicaid managed care plan enrollees. Despite being authorized by their plans for PDN services—often only after pursuing extensive appeals— they are left without services when shifts are frequently not staffed. The same increased access for those in FFS must be made available to those in managed care plans.

Thank you for your attention to these critical concerns. We are available to discuss any of the above with your office.

Sincerely,

Lindsay Heckler
Supervising Attorney
Center for Elder Law and Justice

Bryan O'Malley
Executive Director
Consumer Directed Personal Assistance Association of New York State

---

[1] State Plan Amendment approval in 2015:
https://www.health.ny.gov/regulations/state_plans/status/non-inst/original/docs/os_2013-12-30_spa_13-35.pdf

[2] State directive issued in 2019:
https://www.health.ny.gov/health_care/medicaid/publications/docs/adm/19adm01.pdf

Kristin Brown
President and CEO
Empire Justice Center

Richard Mollot
Executive Director
Long Term Care Community Coalition

Lara Kassel
Coalition Coordinator
Medicaid Matters New York

Meghan Parker
Director of Advocacy
New York Association on Independent Living

Valerie Bogart
Director, Evelyn Frank Legal Resources Program
New York Legal Assistance Group

Brad Williams
Executive Director
New York State Independent Living Council, Inc.

Maria Alvarez
Executive Director
New York StateWide Senior Action Council

cc: Alissa Deboy, Director, Disabled and Elderly Health Programs Group
Melissa Harris, Deputy Director, Disabled and Elderly Health Programs Group
Jennifer Bowdoin, Director, Division of Community Systems Transformation
Martha Egan, Technical Director, Division of Community Systems Transformation