

Congress of the United States
Washington, DC 20515

August 22, 2023

The Honorable Chiquita White Brooks-LaSure
Administrator
Centers for Medicare and Medicaid Services
U.S. Department of Health and Human Services
200 Independence Avenue, SW
Washington, D.C. 20201

Dear Administrator Brooks-LaSure:

We write to thank you for your work in supporting care for people with disabilities and low-income elderly adults. As we know from a recent Government Accountability Office report, people with disabilities with Medicaid coverage are disproportionately likely to have one or more additional health conditions and to have significantly higher health care costs compared to their peers in Medicaid who do not have a disability.¹ Among the most important and unique needs of these individuals are home and community-based services (HCBS) and other long-term services and supports (LTSS). These services help enable them to maintain integration within their communities and continue to live independently.

We appreciate many of the approaches and steps you have taken in the proposed rule, *Medicaid Program: Ensuring Access to Medicaid Services (CMS-2442-P)*. The measures you propose regarding HCBS waiting lists, payment rates, the reporting of critical incidents and strengthening person-centered service planning for persons with disabilities, including annual updates of service plans, are greatly needed and well developed.

However, we are concerned about the inclusion of a provision in the proposed rule that would require states to ensure that at least 80 percent of all Medicaid payments for HCBS services are spent on compensation to direct care workers. As your agency notes in the rulemaking, direct care workers, who would otherwise stand to benefit from the proposed rule, have historically earned lower wages relative to other professions that compete for these same workers, “contributing to a shortage of direct care workers and high rates of turnover in this workforce.”² As such, we’ve seen incredible progress this year as a diverse array of states like South Dakota,³

¹ <https://www.gao.gov/assets/gao-23-105457.pdf>.

² <https://www.federalregister.gov/documents/2023/05/03/2023-08959/medicaid-program-ensuring-access-to-medicaid-services>.

³ <https://listen.sdpb.org/politics/2022-12-07/nursing-homes-education-state-employees-applaud-noems-proposed-budget>.

Texas,⁴ and New York⁵ have worked to increase funding in their state budgets for LTSS workers. Despite this progress at the state level, the proposed rule's requirement to pass on 80 percent of reimbursement rates would simply be unattainable for many states, including those states that just made significant investments in their workforce. The increased demands that this requirement would put on state budgets would more than exceed the available resources to pay for this requirement.

The stated intent of the proposed 80 percent rule, as your agency notes, is to increase access to care for Medicaid beneficiaries through efforts to ensure that an adequately paid workforce can meet the needs of beneficiaries in the program. Though well-intentioned, the likely real-world effects of the agency's proposal will fall short of the proposed rule's goals. This is because states that have endeavored to have balanced budgets are simply not prepared to absorb the significant increases in costs that the proposed rule would inevitably impose. Instead of increasing access and wages, the proposed 80 percent pass-through requirement could result in significantly limiting access to care, and more consequentially, potentially forcing these providers to permanently close their doors. These new requirements could also threaten the overall quality of care individuals are receiving, forcing providers to divert limited quality improvement and oversight resources to comply with these new requirements.

Additionally, your agency touts the unprecedented nature of all these new requirements. However, CMS does not appear to have gathered and tested enough material data needed to justify why an 80 percent threshold would ensure that HBCBS providers could cover the fixed costs they incur to execute these programs as well as to comply with the resulting, unique requirements of each State and its Medicaid beneficiaries. We therefore request CMS share any relevant data or evidence used to reach this 80 percent threshold with Congress and impacted stakeholders. Given the far-reaching impacts this new policy could have, it is imperative for Congress and these stakeholders to be involved in any proposed policy changes and to know how CMS is reaching these conclusions.

There undoubtedly is national, bipartisan interest in supporting direct care workers who constitute this workforce. States are showing their willingness to increase state budget allocations to close cost-of-living gaps that disproportionately impact direct care workers. Furthermore, we believe that each state's respective needs for its workforce are unique and that a one-size-fits-all federal standard for payment rates would fly in the face of the unique efforts that each state is undertaking as they work to support providers. While well-intentioned, we believe this 80 percent threshold will ultimately lead to reduced access and lower quality. Therefore, we ask that you forego adopting this provision of the rule and preserve the flexibilities that states have long held in being able to set their own Medicaid reimbursement rates.

⁴ <https://skillednursingnews.com/202/05/texas-legislators-approve-900-million-for-medicaid-rate-jump-for-nursing-homes/>.

⁵ https://buffalonews.com/business/local/nursing-homes-hospitals-get-medicaid-rate-increase-in-state-budget-just-not-as-much-as/article_cca00ce2-e83f-11ed-bb87-17cf5ed33317.html.

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