



The National
CONSUMER VOICE
for Quality Long-Term Care

June 30, 2023

Centers for Medicare & Medicaid Services
Department of Health and Human Services
7500 Security Boulevard
Baltimore, MD 21244-1850
Submitted electronically, <https://www.regulations.gov>

RE: Medicaid Program; Ensuring Access to Medicaid Services CMS-2442-P

Dear CMS Administrator Brooks LaSure and CMS Colleagues:

The National Consumer Voice for Quality Long-Term Care (Consumer Voice) offers comments and suggestions supporting the proposed "Medicaid Program; Ensuring Access to Medicaid Services" rule. Consumer Voice is the leading national voice representing consumers in issues related to long-term care, helping to ensure that consumers are empowered to advocate for themselves. We are a primary source of information and tools for consumers, families, caregivers, advocates, and ombudsmen to help ensure quality care for the individual.

Consumer Voice strongly supports the goal of the Notice of Proposed Rulemaking (NPRM) to increase access to high-quality Medicaid-funded Home and Community Based Services (HCBS). We agree with CMS's multifaceted approach to achieve this goal, particularly the steps supporting the workforce, creating quality measures, increasing transparency and accountability in HCBS spending, and implementing a grievance program for recipients of Medicaid Fee for Service (FFS). Our comments below focus mainly on the HCBS provisions within the NPRM and are provided in the order by which they appear in the NPRM.

Medicaid Advisory Committee and Beneficiary Advisory Group, § 431.12

Consumer Voice supports the proposed requirements that each state create a Medicare Advisory Committee (MAC) that is, in part, composed of Medicaid recipients, their families, and caregivers, referred to as a Beneficiary Advisory Group (BAG). We

recommend that CMS explicitly state that the BAG should be composed of direct care workers. While the proposed language says caregivers, it is coupled with family, making the distinction unclear. State Medicaid agencies must hear from direct care workers on the frontline, and we urge CMS to make this explicit in the rule.

In addition, we recommend that CMS increase the minimum percentage of MAC members who are BAG members from 25% to 50% and ensure that the BAG is composed of recipients of HCBS. Raising the minimum percentage to 50% will ensure that the voice of the consumer is not stifled in the MAC. Additionally, HCBS services are a unique but critical Medicaid benefit, and its recipients should have a voice in the BAG.

Person-centered Planning Process § 441.301(c)(1)

Consumer Voice strongly supports the inclusion of person-centered planning requirements in the NPRM. However, we are concerned that the NPRM does not go far enough to ensure that states comply with the requirement that individuals lead the person-centered process. As proposed, CMS plans to gauge state performance in this area by measuring the frequency of when care plans are completed. Care plans must be updated annually, at an individual's request, or after an individual's needs change significantly. However, complying with these timeframes does not mean that the care plan was done through a person-centered process, but only that a care plan was done timely.

To ensure that care plans are person-centered, we urge CMS to require states to develop other methods to determine whether states are complying with this requirement. For instance, states could be required to survey a sample of HCBS recipients about whether they felt that their care plan was executed in accordance with person-centered principles. As proposed, CMS ensures timeliness, but does not ensure that the individual is the primary leader of the person-centered care planning process.

Grievance System § 441.301(c)(7)

Consumer Voice strongly supports the requirement that each state develop a grievance system. HCBS recipients enrolled in managed care are currently provided with a grievance system. FFS recipients must be afforded this same right.

State Assurances-Incident Report System § 441.302(a)(6)

Consumer Voice supports the requirement that all states have an operative incident report system. Recipients of HCBS are often isolated and in significant need of support, which places them at a heightened risk of abuse, neglect, or exploitation. HCBS providers must report critical incidents to the state to ensure an individual's safety.

We are concerned that the NRPM does not go far enough to protect HCBS recipients. As proposed, the regulation only gauges a state's performance by how efficiently they conduct investigations. The regulations should be more proactive. While the NPRM notes that states should use various data sources to identify critical incidents that might go unreported, we urge CMS to require that states have such a system in place. As proposed, the rule seems to suggest these practices rather than require them. CMS should require states to document how they are using other data sources, including collaboration with police or other law enforcement agencies, to ensure that critical incidents are being reported.

Additionally, CMS should require states to penalize HCBS providers that do not timely report critical incidents, by monetary penalties or suspension from the Medicaid program. As proposed, the NPRM does not provide for an enforcement mechanism against providers that do not report incidents.

Lastly, we recommend CMS require HCBS providers to timely report to law enforcement any reasonable suspicion of a crime committed against a recipient of HCBS. A similar requirement has been implemented in the nursing home setting. It is not enough that a provider notifies the state when an individual has been the victim of a crime. There will be critical incidents that require an immediate response from law enforcement, and a State Medicaid agency will not be equipped to respond quickly and effectively. Not all critical incidents will need to be reported to the police, but in instances where an HCBS recipient has been the victim of a crime, CMS should require states to notify law enforcement.

HCBS Payment Adequacy § 441.302(k)

Consumer Voice supports the requirement that states demonstrate payment adequacy by documenting that 80% of all payments toward home health aide, personal care, and homemaker services be spent on direct care staff. Even before the COVID-19 pandemic, many individuals eligible for HCBS could not access services

because of workforce shortages.¹ These shortages were exacerbated by the COVID-19 pandemic² and are expected to worsen in the coming years.³

The most significant factor driving inadequate direct care staff is job quality. The median income for a home healthcare worker is \$19,100 annually.⁴ More than half of home health workers rely on public assistance. Home health workers are not paid enough for their critical work. Unsurprisingly, home healthcare agencies experience an annual turnover of 65%.⁵ As a result, individuals eligible for HCBS may have to go without services because there are no direct care workers to provide them.

Because poor job quality directly impacts individuals' access to HCBS, CMS must require states to use at least 80% of money spent on care to go to direct care workers. As CMS notes in its preamble to the proposed rule, "the vast majority of payment [for home care services] should be comprised of compensation for direct care workers" due to "low facility or other indirect costs."⁶ Additionally, 1902(a)(30)(A) of the Social Security Act requires Medicaid payment rates to be consistent with efficiency, economy, and quality of care, and that they ensure Medicaid enrollees have access to at least the same level of care as non-Medicaid enrollees. Additionally, section 2402(a) of the Affordable Care Act empowers HHS to ensure adequate numbers of direct care workers to provide HCBS. Requiring that direct care workers receive 80% of payments will create better jobs, reduce turnover, and increase individuals' access to HCBS.

¹ Disability and Care Needs Among Older Americans, Vicki Freedman and Brenda Spillman, *Millbank Quarterly*, 92(3) (2014), 509-541. Available at <https://pubmed.ncbi.nlm.nih.gov/25199898/>. See also Worker earnings, service quality, and firm profitability: Evidence from Nursing Homes and Minimum Wage Reforms, Krista Ruffini, Center for Equitable Growth, 2020. Available at <https://equitablegrowth.org/working-papers/worker-earnings-service-quality-and-firm-profitability-evidence-from-nursing-homes-and-minimum-wage-reforms/>

² *Direct Care Workforce Shortages Have Worsened in Many States During the Pandemic, Hampering Providers of Home and Community-Based Services*, Kaiser Family Foundation, August 10, 2021. Available at <https://www.kff.org/coronavirus-covid-19/press-release/direct-care-workforce-shortages-have-worsened-in-many-states-during-the-pandemic-hampering-providers-of-home-and-community-based-services/>.

³ *Direct Care Workers in the United States: Key Facts*, PHI, September 6, 2022. Available at: <https://www.phinational.org/resource/direct-care-workers-in-the-united-states-key-facts-3/>

⁴ Id.

⁵ Holly R. "A Huge Victory: Home Care Turnover Remains Stable at 65.2%", *Home Health Care News*, May 19, 2021. Available at <https://homehealthcarenews.com/2021/05/a-huge-victory-home-care-turnover-remains-stable-at-65-2/>

⁶ 88 FR 27889

Documentation of Access to Care and Service Payment Rates 42 C.F.R. § 447.203

Consumer Voice supports the proposed rule's requirement that a Medicaid State agency publish all Medicaid FFS payment rates on a website accessible to the public. The sufficiency of Medicaid rates is constantly debated. Transparency in rates is essential to determine whether rates are sufficient to ensure access to Medicaid programs for those that need it.

Consumer Voice also supports the creation of an interested parties advisory group (IPAG). Recipients of HCBS and direct care workers must have input into the adequacy of Medicaid payments. Too often, Medicaid payment rates do not reflect the community's needs but rather the state's budgetary concerns. An IPAG will help ensure rates are, in part, based on recipient and worker needs. However, to ensure the efficacy of IPAGs, we recommend CMS require states to consult with IPAGs before making any rate changes. Additionally, CMS should require states to justify any difference in a payment rate and recommended rate by the IPAG.

Create an HCBS Ombudsman Program

To assist proper implementation, Consumer Voice recommends that CMS establish and fully fund a national HCBS ombudsman program. The long-term care ombudsman program in skilled nursing facilities has proven to be one of the most effective tools to ensure nursing home residents' rights are protected. A similar program in the HCBS setting would help ensure that HCBS recipients are aware of their rights, can navigate the grievance system, and can report problems or concerns to an independent advocate.

We appreciate the opportunity to comment on this important NPRM. Consumer Voice strongly supports increasing access to high-quality HCBS services for older adults and people with disabilities, as well as the adoption of measures to improve job quality for direct care workers.

Sincerely,

A handwritten signature in black ink, appearing to read "Samuel Brooks", with a long horizontal flourish extending to the right.

Samuel Brooks, Direct of Public Policy