

April 15, 2020

The Honorable Mitch McConnell  
Majority Leader  
United States Senate  
U.S. Capitol Building, Room: S-230  
Washington, DC 20515

The Honorable Charles Schumer  
Minority Leader  
United States Senate  
Hart Senate Office Building, Room: 419  
Washington, DC 20510

The Honorable Nancy Pelosi  
Speaker  
United States House of Representatives  
U.S. Capitol Building, Room: H-232  
Washington, DC 20515

The Honorable Kevin McCarthy  
Minority Leader  
United States House of Representatives  
U.S. Capitol Building, Room: H-204  
Washington, DC 20515

Dear Majority Leader McConnell, Minority Leader Schumer, Speaker Pelosi, and Minority Leader McCarthy:

On behalf of the National Association of State Directors of Developmental Disabilities Services (NASDDDS) and ADvancing States, we are writing to request further support for state governments in the upcoming legislation regarding coronavirus disease 2019 (COVID-19). Our associations collectively represent the government agencies responsible for administering a wide range publicly funded health care and long-term services and supports for older adults and people with all types of disabilities, including intellectual and developmental disabilities, in every state and territory. To maintain the ongoing sustainability of the long-term services and supports delivery system, there are four main issues that should be addressed immediately. We have also included two recommendations for issues that should be addressed in order to support state agencies once the pandemic begins to subside.

Issues Requiring Immediate Attention:

- Further increase the Medicaid Federal Medical Assistance Percentage (FMAP) to a total of 12%;
- Allow states to provide Medicaid retainer payments to additional provider categories and for extended periods of time as warranted by the emergency;
- Provide additional supports to ensure that older adults and people with disabilities have access to food; and
- Delay the CURES Act Electronic Visit Verification penalties.

Issues that should be addressed prior to the end of the Public Health Emergency include:

- Delay the proposed Medicaid Financial Accountability Regulation (MFAR); and
- Provide additional resources for Adult Protective Services to respond to abuse, neglect, and exploitation.

Below, we provide further detail and explanation of each of these requests.

#### Further Increase in FMAP

We are appreciative that Congress acted swiftly to provide a 6.2% increase in state Medicaid matching rates across the country. However, given the extensive resources expended on COVID-related response and activities, coupled with the upcoming decline in state revenue due to increased unemployment and reduced income and expenditures from the population, we do not believe that this will be sufficient to maintain the Medicaid program. We therefore support the request from the National Governors Association<sup>1</sup> and the National Association of Medicaid Directors<sup>2</sup> for an additional increase in the FMAP rates, to a total of at least 12% above the standard state percentage.

#### Expand Ability of States to Provide Retainer Payments

Current CMS policy allows for “retainer payments” to be made for certain services when the participant is not able to attend. This policy pre-existed the COVID outbreak and was largely provided to ensure that individuals who entered a hospital or nursing home short-term stay were able to retain their Medicaid home and community-based services providers upon discharge. As such, Federal policy restricts these payments to providers of personal care and habilitative services and includes stringent time limitations on their use. The COVID social distancing and shelter-in-place orders have exposed the fragile nature of a wide range of Medicaid-enrolled providers, and the inability of states to pay retainer payments risks completely dismantling the already tenuous network of entities that provide services to beneficiaries. We request Congressional authority for states to make retainer payments to any Medicaid enrolled provider that, at state discretion, would risk insolvency due to COVID-related issues.

We recognize that there should be scrutiny attached to such payments, and would support inclusion of post-payment auditing requirements; prioritization of providers in immediate financial distress and those who receive a significantly higher portion of their revenue from Medicaid; requirements for providers to retain staff; as well as limitations on the aggregate payment to enrolled providers.

#### Provide Additional Support for Nutrition Services to Older Adults and People with Disabilities

We recognize and appreciate that Congress has provided substantial funding for Older Americans Act (OAA) meal programs. Despite this increased funding, we continue to have concerns about the ability of states to feed all of the HCBS participants who are sheltering in place across the country. We believe that there are two solutions to this challenge. First, we recommend additional funding for OAA Title III home-delivered meals programs. Second, we recommend allowing states to provide three meals a day through their Medicaid HCBS programs for the duration of the pandemic. Currently, CMS policy is that nutrition supports

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<sup>1</sup> <https://www.nga.org/letters-nga/health-human-services-committee/governors-request-for-third-congressional-supplemental-bill/>

<sup>2</sup> <https://medicaiddirectors.org/wp-content/uploads/2020/04/NAMD-Medicaid-Requests-for-COVID-19-Legislation.pdf>



cannot constitute a full nutritional regimen. This prevents states from ensuring that all of the needs of HCBS participants are met during this timeline.

#### Delay the Cures Act Penalties for States Without Electronic Visit Verification

Because of these unexpected strains on the program administration, staff are unable to spend time operationalizing new federal requirements and will therefore be unable to meet the deadlines originally anticipated in federal and state planning. As you know, the 21<sup>st</sup> Century Cures Act requires states to implement EVV for personal care services (PCS) requiring an in-home visit no later than January 1, 2020 and for home healthcare services no later than January 1, 2023. The original deadline for EVV PCS was 2019; however, Congress passed a one-year reprieve in response to delays in federal guidance that limited state ability to meet this timeline. The 2020 deadline included a 1-year reprieve for states unable to implement in time. This reprieve was given to every state except Tennessee, which effectively made January 1, 2021 the effective date of the penalties. Over the past several years, states have worked diligently to implement EVV despite unclear requirements and shifting federal guidance. Due to these challenges, much work remains before the systems become operational. However, at this juncture, state policy and program staff must spend their time addressing the immediate crisis and EVV cannot be a priority. We therefore request that Congress delay the effective date of the Cures Act EVV penalties by no less than one year, making the effective implementation deadline no earlier than January 1, 2022.

#### Delay the Medicaid Financial Accountability Rule

In November 2019, CMS published CMS-2393-P, a proposed rule known as MFAR, that would place substantial burden on Medicaid agencies, state agencies that administer portions of the Medicaid program, and enrolled providers.<sup>3</sup> While we support the need for fiscal and program integrity in Medicaid, we are concerned about the implications of many of the provisions in this proposed rule, and their potential unintended consequences. We are further concerned that implementation would divert resources needed for combatting the COVID pandemic and assuring the health and safety of Medicaid participants. We do recognize that it is a proposed rule and is not yet final, but the specter of these changes creates uncertainty and requires states to do preparatory work in the event of finalization. We therefore request a two-year moratorium on finalization of MFAR.

#### Additional Resources for Adult Protective Services (APS)

Presently, states are anecdotally reporting a decline in APS reports and cases. Unfortunately, this decline is not likely due to an actual decrease in instances and is instead most likely attributable to some combination of APS workers being unable to perform in-home checks; participants sheltering-in-place with their abuser and therefore unable to seek outside assistance; and individuals not attending programs outside the home where HCBS workers could identify signs of abuse, neglect, or exploitation. Because of these dynamics, coupled with the likely adverse outcomes associated with the COVID shelter-in-place mandates leading to

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<sup>3</sup> <https://www.federalregister.gov/documents/2019/11/18/2019-24763/medicaid-program-medicare-fiscal-accountability-regulation>



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increased stress and reduced ability for victims to avoid their abusers, we anticipate that there will be a surge in reports once social distancing measures are relaxed. We request that Congress allocate additional APS resources so that states can address the forthcoming increase in reports of abuse, neglect, and exploitation in older adults and adults with disabilities.

We appreciate the ongoing bipartisan efforts to address COVID-19. We and our members remain committed to assuring that the health and welfare of the individuals we serve are maintained. If you have any questions regarding this letter, please feel free to contact Damon Terzaghi at [dterzaghi@advancingstates.org](mailto:dterzaghi@advancingstates.org) or Dan Berland at [dberland@nasddds.org](mailto:dberland@nasddds.org).

Sincerely,

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Cc: Members of the U.S. Senate  
Members of the U.S. House of Representatives