



May 26, 2018

The Honorable Alex Azar, Secretary  
U.S. Department of Health and Human Services  
200 Independence Avenue, SW  
Washington, DC 20201

Dear Secretary Azar:

The Bazelon Center for Mental Health Law submits these comments in response to New Hampshire's Substance Use Disorder Treatment and Recovery Access Section 1115 Application. The Bazelon Center is a national non-profit legal advocacy organization that promotes equal opportunity for individuals with mental disabilities in all aspects of life, including health care, community living, housing, education, employment, voting, and other areas. Our comments focus on New Hampshire's requested waiver of the Institutions for Mental Disease (IMD) rule, specifically as it related to individuals with co-occurring mental illness and substance use disorder (SUD) presenting at hospital emergency rooms.

The Bazelon Center, along with the Disability Rights Center of New Hampshire (DRC) and other partners and the Department of Justice (DOJ), have a settlement with the state addressing the needs of adults with serious mental illness.<sup>1</sup> The case, as summarized by DOJ, was brought "because adequate and effective community-based alternatives are not available in sufficient supply in the State's system, people with mental illness are often given no choice but to enter an institution to receive needed mental health services from the State, many are forced to be readmitted multiple times, and many remain institutionalized for unnecessarily prolonged periods."<sup>2</sup> DOJ found:

"Individuals with mental illness who experience a crisis in New Hampshire often spend days in local hospital emergency rooms that are ill-equipped to address their needs, before ultimately being transported to the State's psychiatric facility, sometimes by the police. This needlessly traumatic process, rife with delayed treatment and undue restrictions, is costly and not therapeutic, especially when compared to proven and effective community alternatives."<sup>3</sup>

---

<sup>1</sup> Amanda D. v. Hassan, Settlement Agreement (Feb. 12, 2014), <http://www.bazelon.org/wp-content/uploads/2017/03/Amanda-D-NH-Settlement-Agreement-Signed-by-Court.pdf>.

<sup>2</sup> Amanda D. v. Hassan, U.S. Proposed Compl.-in-Intervention 3 (Mar. 27, 2012), <http://www.bazelon.org/wp-content/uploads/2017/03/Amanda-D-US-DOJ-Complaint-in-Intervention.pdf>.

<sup>3</sup> *Id.* at 3.

Under the terms of the ongoing settlement, New Hampshire agreed to expand those evidence-based community alternatives, including developing more assertive community treatment (ACT) teams (which must have substance use disorder specialists) and “develop[ing] a crisis system that: [ . . . ] provides interventions to avoid unnecessary hospitalization, incarceration, and/or Designated Receiving Facility, Acute Psychiatric Residential Treatment Program, **emergency room**, or nursing home admission.”<sup>4</sup> Implementation of the settlement agreement is ongoing, and compliance by the state has yet to be demonstrated. Indeed, the state has not met some of the benchmarks in the agreement concerning the development of community-based services that would reduce emergency room visits and hospital admissions.

In 2016, DRC wrote to the governor’s office, detailing steps that would reduce emergency department boarding without creating new institutional beds.<sup>5</sup> For example, the state should be determining whether the individuals presenting in ERs are already clients of the regional assertive community treatment (ACT) teams and if so, whether they could be diverted back into community-based crisis support from the ACT team. For individuals who are not clients of an ACT team, the state should ensure that they are connected to that service if appropriate. The state should also ensure that there are sufficient ACT teams, and that teams are fully staffed and operating with fidelity. These steps would ensure “a significant number of clients with more intense behavioral health needs will have ready access to the kind of community-based crisis supports required to prevent an unnecessary emergency room admission.”<sup>6</sup>

New Hampshire admits in the 1115 application that emergency department boarding continues,<sup>7</sup> but provides no discussion or details on what steps they are taking to provide the evidence-based community services required by the settlement agreement that would reduce admissions. Instead, New Hampshire is now asking CMS to expand funding for institutional services—the exact opposite of the goals and terms of the settlement agreement. New Hampshire entered the settlement agreement to reduce the state’s dependence on institutional services for people with serious mental illness, including those with co-occurring SUD, but this requested waiver is at odds with that goal. New Hampshire should focus on ensuring that people with serious mental illness and co-occurring SUD have access to quality, evidence based community services, including community-based crisis services as required in the settlement agreement rather than expanding costly institutional services.

For these reasons, we urge CMS to deny New Hampshire’s waiver request as it applies to people

---

<sup>4</sup> Settlement Agreement, *supra* note 1, at 6 (emphasis added).

<sup>5</sup> Disability Rights Center NH, Letter to Commissioner Meyers and Policy Director Kennedy (Mar. 9, 2016), <http://www.bazon.org/wp-content/uploads/2018/05/Emergency-Room-Boarding-Letter-to-Commissioner-3-9-2016.pdf>.

<sup>6</sup> *Id.* at 2.

<sup>7</sup> State of New Hampshire, Dep’t. of Health and Hum. Serv., Sub. Use Disorder Treatment and Recovery Access Section 1115 Application 7 (Apr. 9, 2018) (“Despite New Hampshire’s commitment to strengthening community supports for those with mental illness in hopes of mitigating psychiatric crises exacerbated by substance use disorder that requires hospitalization, the state observes an increasing number of individuals who present in hospital emergency rooms”), <https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/nh/nh-sud-treatment-recovery-access-pa.pdf>.

with co-occurring mental illness and SUD. At a minimum, CMS should require New Hampshire to demonstrate how it has complied with the settlement agreement and what steps have been taken to implement the measures proposed by Disability Rights Center NH to address emergency department boarding.

Respectfully submitted,

A handwritten signature in black ink that reads "Jennifer Mathis". The signature is written in a cursive style with a large initial "J" and "M".

Jennifer Mathis  
Director of Policy and Legal Advocacy  
[jenniferm@bazelon.org](mailto:jenniferm@bazelon.org)

Bethany Lilly  
Deputy Director of Policy and Legal Advocacy  
[bethanyl@bazelon.org](mailto:bethanyl@bazelon.org)