



Aug. 1, 2020

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

Re: Comments on Oklahoma's Application for Section 1115
Waiver of IMD Rule

Dear Secretary Azar:

The Bazelon Center for Mental Health Law submits the following comments in response to Oklahoma's Section 1115 Institutions for Mental Disease Waiver for Serious Mental Illness and Substance Use Disorder application. The Bazelon Center is a national non-profit legal advocacy organization that promotes full inclusion and equal treatment of people with mental disabilities in all aspects of life, including health care, housing, community living, employment, and other areas. We are deeply concerned, however, about Oklahoma's proposal to increase the use of IMDs to treat serious mental illness, especially as COVID-19 impacts the state. For the reasons below, we urge you to reject the waiver.

CMS Lacks Authority to Grant the Proposed Waiver

Section 1115 of the Social Security Act does not allow CMS to approve waivers of the IMD rule. Section 1115(a)(1) only permits waiver of specific provisions of the Medicaid statute; the IMD rule is not among them.¹ The agency's "expenditure authority" under Section 1115(a)(2) only applies to waivers of those listed provisions.² The statutory language clearly prohibits federal financial participation for services provided to individuals aged 21-64 in IMDs, and CMS therefore has no authority to grant Oklahoma's request.

Even if CMS could grant the waiver, Oklahoma's proposal fails to meet the requirements set by the agency's 2018 IMD rule guidance. That guidance provides that Section 1115 waivers of the rule will only be granted to cover stays averaging no more than 30 days. Oklahoma's application only promises to "aim for" keeping stays under 30 days, but reserves the right to extend them on

¹ Social Security Act, 42 U.S.C. § 1315 (a)(1).

² *See Id.* at (a)(1-2) (permitting the use of expenditure authority only for the "costs of *such project*" that is approved under the agency's Section 1115(a)(1) authority).

a case by case basis.³ It also requests Medicaid reimbursement for up to 60 days of treatment in IMDs until it can transition some facilities to Qualified Residential Treatment Programs.⁴ The state therefore does not make adequate assurances that it will follow CMS guidance, and approving the waiver application in its current form would undermine the agency’s guidelines.

Oklahoma’s Hypotheses Have Already Been Disproven

Waiver of the IMD rule should not be granted to test the hypotheses Oklahoma presents in its application, as they have already been disproven through a large demonstration project. The state contends that increased access to inpatient psychiatric treatment will decrease emergency room utilization, reduce preventable admissions to hospitals and residential settings, increase access to inpatient crisis stabilization, and improve continuity of community care following hospitalization.⁵ From 2012-2015, the federally mandated Medicaid Emergency Psychiatric Demonstration reimbursed eleven states and the District of Columbia for inpatient treatment in private IMDs. The program’s final evaluation found no decrease in emergency department admissions or lengths of stay, no decrease in general hospital admissions or lengths of stay, no significant improvement in access to inpatient care, and no improvement in follow-up care.⁶ The program also either increased or had no effect on total mental health spending in each demonstration jurisdiction.⁷ Granting Oklahoma’s waiver request would therefore fund expensive care that will not achieve the stated goals of the demonstration.

Increasing IMD Use Will Not Address the Root Issue

The inaccessibility of mental health care in Oklahoma is caused not by too few inpatient beds, but by a lack of community-based mental health services. The Medicaid Emergency Psychiatric Demonstration report found that a lack of community-based care consistently hindered good continuity of care and discharge planning, one of Oklahoma’s stated goals.⁸ The National Association of State Mental Health Program Directors emphasizes that the pressure to increase psychiatric inpatient capacity “often actually stems from an underfunded community mental health system.”⁹

Oklahoma’s application acknowledges the importance of community-based services, affirming the state’s commitment to “maintaining a robust continuum” of non-institutional care.¹⁰ But its

³ *Section 1115 Institutions for Mental Disease Waiver for Serious Mental Illness/Substance Use Disorder*, Okla. Health Care Auth. 14 (June 19, 2020) [hereinafter “Oklahoma Application”].

⁴ *Id.* at 6.

⁵ *Id.* at 17, 19.

⁶ Crystal Blyler et al., *Medicaid Emergency Psychiatric Services Demonstration Evaluation: Final Report*, *Mathematica Pol’y Rsch.* 27, 54-55, 74 (Aug. 18, 2016).

⁷ *Id.* at 70.

⁸ *Id.* at 77.

⁹ Sherry Lerch and Kevin Martone, *The Role of Permanent Supportive Housing in Determining Psychiatric Inpatient Bed Capacity*, *Nat’l Ass’n of State Mental Health Program Dirs.* 4 (Aug. 2017), https://www.nasmhpd.org/sites/default/files/TAC.Paper_4.Housing_in_Determining_Inpatient_BedCapacity_Final.pdf.

¹⁰ Oklahoma Application, *supra* note 3, at 3.

current mental health care system overemphasizes institutionalization. The state spends just 47% of all Medicaid Long-Term Services and Supports (LTSS) funding on community-based services, ten percentage points below the national average.¹¹ In 2016, \$72.6 million of Oklahoma's \$104 million behavioral health LTSS spending funded treatment in institutions.¹² The Oklahoma Department of Mental Health and Substance Abuse, the primary provider of community services for low-income people with mental health disabilities, lost \$52.6 million in state funding from 2014 to 2018.¹³ Granting the waiver application will only compound these inequities.

What integrated mental health treatment that is available is out of reach for too many Oklahomans. The state's community mental health centers use a four-point triage scale to screen people who request care, and the thousands of people who score a 3 or 4 only receive treatment if there is money left over. The CEO of one of the largest centers in Oklahoma likens this to a diabetic being told "you're not sick enough yet, come in when you're close to a coma and we'll help you then."¹⁴ The state's application touts its Assertive Community Treatment Program, but the program only serves 17 of the state's 77 counties, and residents only qualify if they have already been hospitalized for more than 30 days in the past year or four times over the last two years.¹⁵

The state's focus on institutions has major consequences. Oklahoma's waiver application correctly notes that thousands of residents have unmet mental health care needs, and former state Mental Health Commissioner Terri White blames gaps in community services for job loss, family strife, and worsening symptoms that eventually require more intense and expensive intervention.¹⁶ Further expanding institutional services rather than addressing these gaps in community services will continue the current situation and will not solve the problems that are causing hospital admissions and delaying discharges. CMS should not approve the requested IMD waiver.

¹¹ Steve Eiken et al., *Medicaid Expenditures for Long-Term Services and Supports in FY 2016*, Medicaid Innovation Accelerator Program (May 2018) at 7, <https://www.medicaid.gov/sites/default/files/2019-12/Ltssexpenditures2016.pdf>.

¹² *Id.* at Table 74.

¹³ Darla Slipke, *Oklahoma's Suicide Rate Ranks Among the Worst in the Nation*, *The Daily Oklahoman* (May 2, 2018, 5:00 AM), <https://oklahoman.com/article/5593159/oklahomas-suicide-rate-ranks-among-the-worst-in-the-nation>.

¹⁴ Jaclyn Cosgrove, *Epidemic Ignored*, *The Daily Oklahoman* (Nov. 13, 2016), <https://oklahoman.com/special/article/5474415/epidemic-ignored-oklahoma-treats-its-mental-health-system-without-care>.

¹⁵ *Program of Assertive Community Treatment (PACT)*, Okla. Dept. of Mental Health and Substance Abuse Servs. (last updated Nov. 7, 2019), [https://www.ok.gov/odmhsas/Mental_Health/Program_of_Assertive_Community_Treatment_\(PACT\).html](https://www.ok.gov/odmhsas/Mental_Health/Program_of_Assertive_Community_Treatment_(PACT).html).

¹⁶ Clifton Adcock, *Oklahoma's Mental Health System: Get Sicker First*, *Okla. Watch* (June 19, 2015), <https://oklahomawatch.org/2015/06/19/mental-health-system-get-sicker-first/>.

COVID-19 is Surging in Oklahoma, and Individuals in Congregate Settings Like IMDs are at Increased Risk

The COVID-19 pandemic is on the upswing in Oklahoma, and individuals in IMDs are at risk of contracting the virus and suffering severe complications. As we write these comments, the state's seven-day average case count has increased 64% over the last two weeks.¹⁷ Record hospitalizations are being reported, and public health officials have been warning for weeks that “we are beginning to encroach on capacity significantly.”¹⁸ COVID-19 deaths just passed 500 in the state, and the 7-day average death toll is at the highest level since April.¹⁹ These consistent upward trajectories make it likely that the virus will remain a significant danger on the state's requested effective date of October 1st.

IMDs have been among the most dangerous places in the U.S. during the pandemic. COVID-19 outbreaks have occurred at psychiatric hospitals in Connecticut, Kentucky, Louisiana, Maryland, Michigan, New Jersey, Washington, and Wisconsin, to name a few. Patients in these facilities typically live in close quarters with sealed windows and narrow hallways, rendering physical distancing impossible and exacerbating the spread of the virus.²⁰ People with serious mental illness have more medical issues than the general population, and are thus at elevated risk. As cases, hospitalizations, and deaths all increase, Oklahoma asks for support to put more people in harm's way.

The federal government has recognized the danger this request proposes. The Substance Abuse and Mental Health Services Administration “preferentially recommend[s] outpatient treatment during the COVID-19 crisis as telehealth technology and social distancing can be more effectively implemented”²¹ Granting Oklahoma's waiver would ignore this recommendation and increase the number of vulnerable people in facilities ripe for an outbreak. The state justifies its application in part by pointing to 62,979 adult Medicaid beneficiaries who have serious mental illness and may benefit from inpatient care.²² Institutionalizing even a fraction of this population risks many lives to COVID-19.

The past fifty years have seen a clear and deliberate public policy shift away from the historic overreliance on psychiatric institutions and towards increased investment in the cost-effective

¹⁷ *Oklahoma Coronavirus Map and Case Count*, N.Y. Times (last updated July 29, 2020, 2:08 PM), <https://www.nytimes.com/interactive/2020/us/oklahoma-coronavirus-cases.html>.

¹⁸ Catherine Sweeney, *Surge in Coronavirus Hospitalizations Raises Concerns Among Health Officials*, StateImpact Oklahoma (July 14, 2020), <https://stateimpact.npr.org/oklahoma/2020/07/14/surge-in-coronavirus-hospitalizations-raises-concerns-among-health-officials/>.

¹⁹ *COVID-19 Cases*, Okla. State Dep't of Health (last updated July 29, 2020), <https://coronavirus.health.ok.gov/>.

²⁰ Kit Ramgopal, *Coronavirus in a Psychiatric Hospital: 'It's the Worst of All Worlds'*, NBC News (last updated Apr. 17, 2020, 4:38 PM), <https://www.nbcnews.com/health/mental-health/coronavirus-psychiatric-hospital-it-s-worst-all-worlds-n1184266>.

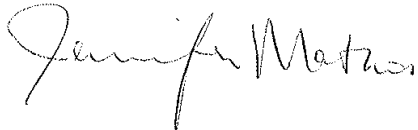
²¹ *COVID-19: Interim Considerations for State Psychiatric Hospitals*, SAMHSA (last updated May 8, 2020), <https://www.samhsa.gov/sites/default/files/covid19-interim-considerations-for-state-psychiatric-hospitals.pdf>.

²² Oklahoma Application, *supra* note 3, at 6. This number is sure to increase by next year, when the recently-passed State Question 802 requires the state to expand Medicaid under the Affordable Care Act.

community mental health services that reduce the need for hospitalization. This has occurred for two reasons: (1) a recognition that many individuals served in IMDs receive better care and achieve recovery in home and community-based settings, and (2) the need to comply with the Americans with Disabilities Act's integration and the Supreme Court's *Olmstead* decision, which require states to offer individuals with disabilities the opportunity to be served in the most integrated setting appropriate. The IMD rule has been an important driver of this positive shift. Granting Oklahoma's waiver request would undermine these crucial goals, in addition to exceeding CMS' statutory authority and risking catastrophic COVID-19 outbreaks.

We appreciate the opportunity to provide comments on Oklahoma's application. For the reasons listed, we urge CMS to reject the requested waiver with respect to psychiatric institutions.

Sincerely,

A handwritten signature in cursive script that reads "Jennifer Mathis".

Jennifer Mathis
Director of Policy and Legal Advocacy