JUDGE DAVID L. BAZELON CENTER FOR MENTAL HEALTH LAW

February 3, 2023

The Honorable Xavier Becerra
U.S. Department of Health and Human Services
200 Independence Avenue SW
Washington, DC 20201

The Honorable Chiquita Brooks-LaSure
Administrator
Centers for Medicare & Medicaid Services
U.S. Department of Health and Human Services
Baltimore, MD 21244-8016
Submitted electronically

Re: **Comments on New York State's Proposed Section 1115 Demonstration Amendment**

Dear Secretary Becerra and Administrator Brooks-LaSure:

The Bazelon Center for Mental Health Law submits the following comments in response to New York State's proposed Section 1115 demonstration amendment, which seeks authorization for federal Medicaid matching funds for reimbursement for services delivered to beneficiaries residing in Institutions for Mental Diseases (IMDs) with behavioral health diagnoses including serious mental illness (SMI), serious emotional disturbance (SED), and substance use disorder (SUD).[1]

The Bazelon Center is a national nonprofit 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, and employment, among others.

The past fifty years have seen a clear and deliberate public policy shift away from the historic overreliance on psychiatric institutions and toward increased investment in the cost-effective community mental health services that reduce the need for hospitalization. This has occurred for two reasons: (1) a recognition that many individuals 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 mandate and the Supreme Court's decision in

[1] New York State Dep't of Health, New York State Medicaid Redesign Team (MRT) Waiver (Dec. 21, 2022) [hereinafter NYS Waiver Proposal], https://www.medicaid.gov/medicaid/section-1115-demonstrations/downloads/ny-medicaid-rdsgn-team-pa-12212022.pdf.

Olmstead v. L.C. (Lois Curtis),[2] which requires 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 New York's waiver request would undermine these crucial goals, in addition to exceeding CMS's statutory authority. Although we appreciate some aspects of New York's proposed amendment, we are deeply concerned about the state's proposal to provide mental health services, including crisis stabilization services, to individuals in IMDs, followed by linkage to transitional housing and other services that the proposal indicates may be provided on the campuses of the state's psychiatric facilities. For the following reasons, we urge you to reject these aspects of the state's proposed amendment.

CMS Lacks Authority to Grant the Proposed Waiver

Section 1115 of the Social Security Acct 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.[3] The agency's "expenditure authority" under Section 1115(a)(2) only applies to waivers of those listed provisions.[4] The statutory language clearly prohibits federal financial participation for services provided to individuals aged 21-64 in IMDs,[5] and CMS therefore has no authority to grant New York's request.

New York's Hypotheses Have Already Been Tested and Disproven

Waivers of the IMD rule should not be granted to test the hypotheses New York presents in its proposal, as the proposed benefits of providing services in IMDs have already been tested and disproven through a large demonstration project. New York contends that increased access to inpatient psychiatric treatment will decrease emergency room utilization, increase access to inpatient crisis stabilization, and "produce higher rates of quality metrics for health monitoring and prevention" for individuals discharged from IMDs.[6] 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 significant

[2] *Olmstead v. L.C.*, 527 U.S. 581 (1999).
[3] Social Security Act, 42 U.S.C. § 1315(a)(1) (provisions for which compliance may be waived; list does not include requirements of section 1396d, in which IMD rule appears).
[4] *See id.* at (a)(1)-(2) (permitting use of expenditure authority only for the "costs of such project" that is approved under agency's Section 1115(a)(1) authority).
[5] *See id.* at § 1396d(a).
[6] NYS Waiver Proposal, *supra* note 1, at 39.

improvement in access to inpatient care, and no improvement in follow-up care.[7] The program also did not decrease general hospital admissions or lengths of stay, and either increased or had no effect on total mental health spending in each demonstration jurisdiction.[8] Granting New York'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 unmet need for mental health care in New York State 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 New York's stated goals.[9] The National Association of State Mental Health Program Directors has emphasized that the pressure to increase psychiatric inpatient capacity "often actually stems from an underfunded community mental health system."[10]

New York's proposal acknowledges the importance of community-based services, affirming that a goal of its demonstration project is to improve "access to community-based treatment and support services."[11] But the state has significantly underinvested in community-based services that have been shown to be effective in helping people with mental health conditions avoid psychiatric emergency room visits and psychiatric hospital stays.[12] For example, assertive community treatment, a mobile multidisciplinary team approach that provides treatment, rehabilitation, and community integration services to individuals with serious mental health

[7] Crystal Blyler et al., Medicaid Emergency Psychiatric Services Demonstration Evaluation: Final Report 27, 54-55, 74 (Aug. 18, 2016) [hereinafter Blyler Report], file:///C:/Users/Guest1/Downloads/mepd%20finalrpt%20VOL%20I.pdf; *see also* U.S. Dep't of Health & Human Servs., Medicaid Emergency Psychiatric Demonstration: Response to 21st Century Cures Act Requirements: Report to Congress xii-xiv (Sep. 30, 2019), file:///C:/Users/Guest1/Downloads/mepd%20curesact%20rtc.pdf.

[8] Blyler Report, *supra* note 7, at 70.

[9] *Id*. at 77.

[10] Sherry Lerch & 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.

[11] NYS Proposal, *supra* note 1, at 1.

[12] *See*, *e.g.*, Bazelon Center for Mental Health Law, Diversion to What? Evidence-Based Mental Health Services That Prevent Needless Incarceration 2 (Sep. 2019) [hereinafter Diversion to What?], https://www.bazelon.org/wp-content/uploads/2019/09/Bazelon-Diversion-to-What-Essential-Services-Publication_September-2019.pdf.

conditions in community settings,[13] has been shown to reduce both days spent in inpatient hospitals and days spent in jail for clients.[14] In December 2022, over 800 people were on waiting lists for ACT services in New York State.[15] There is also a waiting list for New York City's "Intensive Mobile Treatment" teams, which, like the state's ACT program, provide community-based services through a multidisciplinary model.[16] Governor Hochul recently announced a plan to add 42 ACT teams throughout the state, with 22 new teams in New York City and 20 teams throughout the rest of the state.[17] New York can and should seek federal Medicaid reimbursement for ACT and other team-based, community-based approaches to make these proven services more widely available, and not for care in IMDs.

Similarly, supportive housing—affordable housing with supportive services in place for individuals who are homeless or at risk of homelessness, including those with serious mental health conditions[18]--has been shown to help clients experience significant reductions in shelter use, hospitalizations, duration of hospital stays, and incarceration.[19] Supportive housing is also cost effective: by one estimate, it costs about $26,000 annually to provide a supported housing apartment to a person with a serious mental health condition, compared to nearly twice that amount, $48,000, to house that person in New York's shelter system, and approximately $340,000 annually to incarcerate that person.[20] Notably, New York's Section 1115 proposal estimates that placing 450 individuals in IMDs will increase the annual average demonstration

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[13] *See* New York State Office of Mental Health, Assertive Community Treatment (ACT), https://omh.ny.gov/omhweb/act/ (last visited Feb. 1, 2023).

[14] Diversion to What?, *supra* note 12, at 3-4.

[15] *See*, *e.g.*, Maya Kaufman & Jacqueline Neber, More Than 1,000 New Yorkers Await a Spot in Programs for Serious Mental Illness, Crain's New York Business (Dec. 1, 2022), https://www.crainsnewyork.com/health-pulse/more-1000-new-yorkers-await-spot-programs-serious-mental-illness.

[16] *See*, *e.g.*, Andy Newman, 35 Years of Efforts to Address Mental Illness on New York Streets, N.Y. Times (Dec. 2, 2022), https://www.nytimes.com/2022/12/02/nyregion/mental-illness-homeless-streets.html. See generally New York City Mayor's Office of Community Mental Health, Intensive Mobile Treatment (IMT) Teams (Nov. 10, 2019), https://mentalhealth.cityofnewyork.us/program/intensive-mobile-treatment-imt.

[17] *See* New York State, Governor Hochul Announces Comprehensive Plan to Fix New York State's Continuum of Mental Health Care (Jan. 10, 2023) [hereinafter Hochul Announcement], https://www.governor.ny.gov/news/governor-hochul-announces-comprehensive-plan-fix-new-york-states-continuum-mental-health-care.

[18] *See* New York City Human Resources Administration, Supportive Housing, https://www.nyc.gov/site/hra/help/supportive-housing.page (last visited Feb. 1, 2023).

[19] Diversion to What?, *supra* note 12, at 5-6.

[20] *See*, *e.g.*, Fortune Soc'y, Solving New York's Mental Health Crisis, https://fortunesociety.org/media_center/solving-new-yorks-mental-health-crisis/ (last visited Feb. 1, 2023).

cost by $22.69 million, or about $50,422 per person.[21] The federal government's investment in services for New Yorkers would have a significantly better return if directed to community-based supportive housing, instead of beds in institutional settings.

Advocates with lived experience and firsthand knowledge of the state's systems have stated that thousands of additional units of supportive housing are needed in New York City alone.[22] As one provider states, "There are people who are unsheltered right now that need significant help. Housing is health care."[23] Governor Hochul's recent announcement also includes a plan to create 1,500 supportive housing units.[24] Although a good start, this plan falls far short of the city's and state's needs. New York can and should seek federal Medicaid reimbursement for services that will help people secure and maintain supportive housing, including rental and move-in services but also case management, independent living skills training, medication management, employment support, and home health aide services[25]—but not for comparatively more expensive care in IMDs.[26]

New York's proposal to provide crisis stabilization services in its psychiatric centers also flies in the face of what people with mental health conditions want and need. The proposal states that individuals will be selected for participation in the IMD waiver program from the state's 23 psychiatric centers.[27] The average daily census at most of these facilities is well over 100

[21] NYS Proposal, *supra* note 1, at 38.
[22] *See*, *e.g.*, Courtney Gross, Losing Hope on the Streets: A Mental Health Crisis Grips the City, Spectrum News/NY 1 (Mar. 3, 2022), https://www.ny1.com/nyc/all-boroughs/homelessness/2022/03/03/losing-hope-on-the-streets--a-mental-health-crisis-grips-the-city.
[23] *Id.* (quoting Brenda Rosen, President & CEO, Breaking Ground).
[24] Hochul Announcement, *supra* note 17.
[25] Diversion to What, *supra* note 12, at 5.
[26] In particular, the federal government should not reimburse New York State for services provided to people who are placed in the state's psychiatric centers because of New York City's new policy increasing the use of emergency petitions and involuntary commitment to sweep the streets of people with mental health conditions. *See*, *e.g.*, City of New York, Transcript: Mayor Eric Adams Delivers Address on Mental Health Crisis in New York City and Holds Q-and-A (Nov. 29, 2022) [hereinafter Mayor Adams Transcript], https://www.nyc.gov/office-of-the-mayor/news/871-22/transcript-mayor-eric-adams-delivers-address-mental-health-crisis-new-york-city-holds; Disability Advocates Decry Mayor's Plan to Increase Coercive Treatment for Individuals with Mental Illnesses, Call for Comprehensive Program of Voluntary Engagement, Housing, and Community Supports (Nov. 29, 2022) ("[W]e must triple our investments in the new approaches that are in the process of being rolled out by the City and State, most notably specialized "housing first" programs designed to house and support people in the greatest need . . . [and] a continuum of proven voluntary services to provide sustained follow-up and support"), file:///C:/Users/Guest1/Downloads/Statement%20re%20Mayor's%20MH%20Plan%20Final.pdf.
[27] NYS Proposal, *supra* note 1, at 6.

individuals, and in some cases over 200 or 300 individuals.[28] In most cases, these facilities are not appropriate places to provide stabilization services. New York's system should be oriented toward smaller, more humane settings such as respite apartments,[29] apartments for short term stays staffed by mental health personnel including people with lived experience working as peers,[30] and walk-in or drop-off crisis centers scattered throughout neighborhoods in urban areas.[31] Short term detox facilities should be available as well, followed by offers of treatment for substance use disorders.[32] When stabilization is not possible in a person's own home, it should take place in as home-like a setting as possible—not in large congregate settings like New York's psychiatric centers.[33] Further, it seems likely that what the state may intend to be short-term IMD stays[34] will become longer-term stays, due to insufficient housing and community-based services.[35]

The proposal also relies on outdated models for service delivery that do not reflect accepted practices for meeting the needs of people with serious mental health issues. The proposal

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[28] *See*, *e.g.*, New York State Office of Mental Health, June 2022 Monthly Report 2 (presenting monthly average daily census for New York's state inpatient facilities for April, May, and June 2022) [hereinafter OMH Census Report], https://omh.ny.gov/omhweb/transformation/docs/2022/omh-report-jun-2022.pdf (last visited Feb. 1, 2023).

[29] *See*, *e.g.*, Daniel Fisher et al., Peer-Run Respites: An Effective Crisis Alternative, https://www.nasmhpd.org/sites/default/files/Peer%20Run%20Respite%20slides.revised.pdf (last visited Feb. 1, 2023).

[30] *See*, *e.g.*, Nat'l All. on Mental Illness, Crisis Services (March 2015), https://www.nami.org/NAMI/media/NAMIMedia/Images/FactSheets/Crisis-Service-FS.pdf ("Crisis respite centers and apartments provide 24-hour observation and support by crisis workers or trained volunteers until a person is stabilized and connected with other supports"); Diversion to What?, *supra* note 12, at 7-8 (describing "community crisis apartments where individuals can stay for a short period as an alternative to hospitalization, incarceration, or stays in costly and hospital-like crisis facilities" that provide support from clinicians and peers).

[31] *See*, *e.g.*, Kevin Martone et al., Olmstead at 20: Using the Vision of Olmstead to Decriminalize Mental Illness 3 (Sept. 2019), https://www.tacinc.org/resource/olmstead-at-20/.

[32] A widely respected example of such a center is the Houston Recovery Center. *See* Houston Recovery Ctr., Sobering Center, https://houstonrecoverycenter.org/sobering-center/ (last visited Feb. 1, 2023).

[33] *See* OMH Census Report, *supra* note 28, at 2.

[34] *See* NYS Proposal, *supra* note 1, at 18 ("The intention is to increase the proportion of patients effectively discharged from these facilities within 60 days.").

[35] *See*, *e.g.*, New York Ass'n of Psych. Rehab. Servs., Testimony Regarding NYS Proposal IMD Exclusion Transformation Demonstration Program 3 (Nov. 4, 2022) ("The proposal does not reference how quicker and more successful care transitions from hospital to community will be achieved. Moreover, it anticipates sufficient capacity in the identified respite, step-down, short-term crisis residential and intensive community support services and crisis stabilization centers as well as state of the art peer engagement and support services like the new INSET Model. We all know that this is not so. . . . How will [the New York State Office of Mental Health] be able to find housing for the identified group here within 30 days while others wait for years?") (on file with the Bazelon Center).

focuses on how IMD patients will learn and practice community living skills in the inpatient settings of the psychiatric centers. But there is a shared understanding among practitioners working with these populations that generalization of skills for use in everyday life is most likely to occur when the individual is provided with opportunities for practicing the skills in their own homes and communities—"the final common pathway" for utilization of skills learned during training.[36] The approach described in New York's proposal relies on inappropriate and patronizing assumptions about whether people with mental health conditions must be subjectively "ready" for transition to the community before such transition can take place.[37]

Further, the proposal highlights how participants in the waiver program will be provided "step down," transitional residential housing, along a "continuum of care," after leaving the IMD.[38] Other communications from the state indicate that at least some of this transitional housing will be located on the campuses of the state's psychiatric centers.[39] The inclusion of "step-down" housing in the proposal appears to follow a "linear continuum of care" approach that has been debunked by research and experience, and rejected by mental health experts and service systems around the country. For example, Michael Hogan, former Commissioner of New York's Office of Mental Health, has acknowledged that "[m]any staff and advocates have come to believe" that the linear continuum model is "inherently problematic" because "moving is especially stressful for people with psychiatric disabilities and can contribute to problems and rehospitalization."[40]

Research studies, including those conducted in New York itself demonstrate better outcomes associated with a (permanent) "housing first" approach. The housing first model transitions

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[36] *See* Alex Kopelowicz et al., Recent Advances in Social Skills Training for Schizophrenia (Oct. 2006), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2632540/.

[37] NYS Proposal, *supra* note 1, at 10 ("Patients who are resistant to discharge may not feel confident in their ability to function in the community, which might contribute to anxiety. Therefore, robust community-living skills programming should be available on the inpatient setting and continued assistance with and training for living skills should be incorporated, as appropriate.").

[38] *Id.* at 11-12, 29.

[39] *See*, *e.g.*, New York State Contract Reporter, Community Residence-Single Room Occupancy (CR-SRO) for Adults with Serious Mental Illness (Feb. 1, 2023) (soliciting proposals from potential operators of 48-bed SRO on the grounds of the Creedmoor Psychiatric Center campus in Queens, New York) (on file with the Bazelon Center).

[40] *See* Trial Transcript, *DAI v. Paterson*, 653 F. Supp. 2d (E.D.N.Y. 2009), at 252 (citing P-590 (Comm'r Hogan Testimony, at 4). *See also* Patrick W. Corrigan & Stanley G. McCracken, Place First, Then Train: An Alternative to the Medical Model of Psychiatric Rehabilitation, Soc. Work, Vol. 50, No. 1 (Jan. 2005), 31, 32 ("Transitional programs in a continuum of care typically do not focus on independent work and living in the real world. Instead, they teach skills that are most relevant to living, working, and socializing in supervised settings. Each transition is a significant adjustment where individuals cut their ties from one group and replace these connections with people in a different environment. This kind of chronic dislocation would be upsetting and disorienting for anyone, let alone people with mental illness.").

people with mental health conditions directly to permanent supportive housing, rather than moving them along a "linear continuum."[41] Studies of this approach have consistently found it effective, cost-efficient, and associated with a decrease in visits to psychiatric hospitals and high measures of health and recovery.[42]

The state's proposal for "step-down" housing following an IMD stay represents a backward step for people with serious mental health conditions in New York. Further, locating them on the state hospital campuses is inconsistent with the spirit of Medicaid's home and community-based services (HCBS) "Settings Rule," which identifies those settings that have institutional qualities and may not qualify as a community-based setting for purposes of providing HCBS.[43] Among such settings are those "on the grounds of, or immediately adjacent to, a public institution."[44] The HCBS Settings Rule is a vital part of the broader effort to promote community integration for people with disabilities, like those in the proposal's IMD waiver population.[45] New York should not support the development of housing that so clearly flouts this principle, nor should the federal government reimburse services provided in such housing.[46]

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[41] *See*, *e.g.*, Leyla Gulcur, et al., Housing, hospitalization, and cost outcomes for homeless individuals with psychiatric disabilities participating in continuum of care and housing first programmes 13, 171-186, J. of Community & Applied Soc. Psychol. (2003) ("Participants randomly assigned to the experimental condition spent significantly less time homeless and in psychiatric hospitals, and incurred fewer costs than controls."); Sam Tsemberis & Ronda F. Eisenberg, Pathways to housing: supported housing for streetdwelling homeless individuals with psychiatric disabilities, 51, 487-493 Psych. Serv. (2000) (finding the risk of discontinuous housing was approximately four times greater in linear as compared with Pathways samples); Sam Tsemberis, et al., Housing first, Consumer choice, and harm reduction for homeless individuals with a dual diagnosis, Am. J. of Pub. Health, 94, 651-656 (2004) ("The Housing First program sustained an approximately 80% housing retention rate, a rate that presents a profound challenge to clinical assumptions held by many Continuum of Care supportive housing providers who regard the chronically homeless as "not housing ready."); Jennifer Perlman & John Parvensky, Denver Housing First Collaborative Cost Benefit Analysis and Program Outcomes Report, Denver: Colorado Coalition for the Homeless (2006) (finding Denver's program was cost-effective).

[42] *See*, *e.g.*, Gulcur et al., *supra* note 41 (finding individuals transitioning from psychiatric hospitals in the experimental group reduced their total time hospitalized by more than half in the first year of the study).

[43] Centers for Medicare & Medicaid Servs., Guidance on Settings That Have the Effect of Isolating Individuals Receiving HCBS From the Broader Community, https://www.medicaid.gov/medicaid/hcbs/downloads/settings-that-isolate.pdf (last visited Feb. 1, 2023).

[44] *Id.*

[45] *See* American Civil Liberties Union, The Home and Community Based Services Settings Rule 1 (Jan. 2018), https://www.aclu.org/sites/default/files/field_document/aclu_faq_-_hcbs_settings_rule-final-_1-10-18.pdf.

[46] We would have the same concern about other of the "enhanced services" the state intends to provide on its psychiatric center campuses. NYS Proposal, *supra* note 1, at 29 ("Select inpatient campuses will be transitioned to offer enhanced services. These services settings will include transitional housing,

With federal financial support through Medicaid, New York can meet the need for community-based services and solve the problems that are causing hospital admissions and delaying discharges. It will not do so by further expanding institutional services, through the federal investment that accompanies a waiver of the IMD rule.[47]

CMS Should Approve the "In-Reach" Component of New York's Proposal

New York is also requesting authorization of Medicaid coverage for a set of "in-reach" services up to 30 days prior to discharge from one of the state's inpatient psychiatric centers.[48] These services would include care management, discharge planning, clinical consultations, peer services, and medication management.[49] This set of services would not be provided to individuals for whom the state would claim federal financial support under the "IMD waiver" component of the state's proposal, described above. Although the proposal is not completely clear on this point, the "in-reach" services seem intended to support the transition of individuals who have resided in a psychiatric center for a longer period of time.

New York should hasten and improve the transitions of these individuals, virtually all of whom could be served in the community with supportive housing, ACT or other intensive and/or multidisciplinary service delivery supports, and other needed services such as mobile crisis services, peer support services, and supported employment,[50] with or without federal support.

To the extent that providing these "in-reach" services is more likely to expedite transitions and promote achievement of the state's goals to improve care coordination, improve the quality of care in the community following inpatient hospitalization, and to advance racial equity in its delivery of community-based services, we support this aspect of New York's proposal.

However, as a condition for CMS approval of this aspect of New York's proposal, New York should affirm that community-based providers will provide the "in-reach" services in the psychiatric centers. In this way, the same organization that is responsible for transition planning

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employment and education supports, as well as an integrative model of mental health and substance-use disorder services and primary care.").

[47] New York's proposal also notifies CMS and the public that the state is planning to submit an additional Section 1115 demonstration amendment later this year, to add its request for federal Medicaid reimbursement for services provided to children and youth in Qualified Residential Treatment Programs (QRTPs). NYS Proposal, *supra* note 1, at 4. The Bazelon Center opposes federal funding for services provided to children with serious emotional disturbance (SED) in QRTPs, and will file comments objecting to this proposal should it be made.

[48] *Id.* at 1, 13, 31, 38.

[49] *Id.* at 1.

[50] *See* Diversion to What?, *supra* note 12, at 7-12.

for an individual in the institution should be responsible for providing services to the individual in the community.

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We appreciate the opportunity to provide comments on New York's proposal. For the reasons listed above, we urge CMS to reject that portion of the proposal that seeks federal reimbursement through Medicaid for care provided in IMDs.

Sincerely,

/s/Lewis Bossing

Lewis Bossing
Senior Staff Attorney