New Jersey NAELA
National Academy of Elder Law Attorneys
New Jersey Chapter

April 11, 2022

The Honorable Chiquita Brooks-LaSure,
Administrator
Centers for Medicare & Medicaid Services
Department of Health and Human Services
Hubert H. Humphrey Building
200 Independence Avenue, S.W.
Washington, DC 20201

Re: New Jersey FamilyCare Comprehensive Demonstration 1115 Waiver Renewal Application

Dear Administrator Brooks-LaSure:

The New Jersey Chapter of the National Academy of Elder Law Attorneys appreciates the opportunity to comment on the New Jersey FamilyCare Comprehensive Demonstration 1115 Waiver Renewal Application.

We specifically endorse and adopt all the comments submitted herein of Justice in Aging, AARP, and Disability Rights New Jersey and thank New Jersey for the innovative waivers in housing and services that they have requested.

Our specific concerns with the waiver renewal to date have centered on Qualified Income Trusts (QITs). Attached you will find our letter to the State of New Jersey regarding our position on the continued implementation of QITs in the 2022 Renewal.

New Jersey passed The Independence and Dignity in Long Term Care Act, *N.J.S.A.* 30:4D-17.24(h), which states among its findings: "Older adults and those with physical disabilities or Alzheimer's disease and related disorders that require a nursing facility level of care should not be forced to choose between going into a nursing home or giving up the medical assistance that pays for their needed services and thereby be denied the right to choose where they receive those services; their eligibility for home and community-based long-term care services under Medicaid should be based upon the same income and asset standards as those used to determine eligibility for long-term care in an institutional setting."

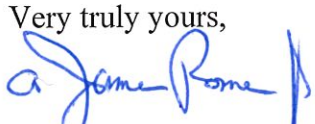
Since then, advocates in New Jersey, including NJ NAELA, have sought to create a system by which those who have incomes which would make them Medically Needy would not have to choose between Medicaid eligibility and HCBS.

The original 2012 New Jersey 1115 Demonstration Waiver created such a system, in a way that would have been a model for CMS' State Medicaid Director Letter #21-004, entitled *"State Flexibilities to Determine Financial Eligibility for Individuals in Need of Home and Community-Based Services"*. This letter endorses the use of hypothetical spend downs pursuant to 42 C.F.R. 435.217 in all states seeking 1115 waiver authorities for provision of HCBS and LTSS. Doing so created the opportunity for HCBS to be available to those whose income exceeded this income cap with a 3-month retroactive eligibility for any previously Medically Needy individual.

Inexplicably, that original waiver was amended to, as a part of the 1115 demonstration, eliminate this original 217-like spend down and instead require Qualified Income Trusts under 42 U.S.C. Sec. 1396p(d)(4)(b) for any individual whose income exceeded 300% of SSI. This removed all NF-level of care Medically Needy individuals from New Jersey's Medically Needy program. This change also removed the 3-month retroactive eligibility for any previously Medically Needy individual, and created potential ineligibility for the same population for any otherwise eligible individual who cannot locate a QIT trustee or a legal representative to establish such a trust.

Considering CMS' SMD letter #21-004, CMS should not approve the ongoing requirement of QITs in this Demonstration and should instead reinstate the hypothetical spend down model that was approved in the original 2012 1115 New Jersey Demonstration Waiver.

Very truly yours,



A. James Romer, Jr., President