To: Wisconsin Department of Health Services, Division of Medicaid Services
From: Disability Rights Wisconsin (Contact: Michael Soukop, Supervising Attorney, mikes@drwi.org)
Date: October 31, 2024
Re: Serious Mental Illness and Serious Emotional Disturbance 1115 Waiver Request

Disability Rights Wisconsin appreciates the opportunity to comment on the Department of Health Service's (DHS) request to the Centers for Medicare & Medicaid Services (CMS) for a waiver to provide mental health coverage for members aged 21-64 in Institutions for Mental Disease (IMD). Disability Rights Wisconsin is the state's assigned Protection and Advocacy organization. DRW serves people across the spectrum of disabilities to protect against abuse, neglect, or wrongdoing, and to enforce the rights of people with disabilities. We understand DHS must file an application for this waiver pursuant to 2023 Wisconsin Act 177, DRW submits these comments in opposition to the waiver request.

Wisconsin's proposed IMD waiver threatens to reverse the gains Wisconsin has made to provide a robust system of community-based mental health services. Existing gaps, deficiencies, and weakness in Wisconsin's current mental health system of care will not be solved by an IMD waiver. DRW regularly receives calls from community mental health consumers of all ages who face barriers such as waitlists, inappropriate denials, and a severe shortage of qualified providers, particularly providers that employ evidence-based practices. According to one recent report, Wisconsin had a lower utilization rate of community-based services compared to the national average.[1] Following an extensive review of Wisconsin's current system, another recent report recommended strengthening crisis services, training and education for providers, increased availability of outpatient and preventive mental health services, and improved coordination between service systems.[2] Despite delay in implementing common-sense recommendations arising from DHS' own study and failure to fully fund community-based programs intended to avoid institutionalization, DHS now seeks to reverse course away from the progress Wisconsin has made due to the incentives created by the IMD exclusion. DHS's priority should be on strengthening and expanding community-based mental health services and addressing root causes that exacerbate the crises people with mental illness face, such as the shortage of safe, stable, accessible housing. The fact that additional progress is needed is a reason to continue the IMD exclusion, not seek its waiver.

The IMD exclusion ensures that states prioritize community-based services over institutional care. This was the express purpose behind the exclusion. When Congress enacted Medicaid, it explained, "[o]ften the care in [psychiatric hospitals] is purely custodial," and that Medicaid would instead provide for "alternative methods of care" requiring "maximum use be made of the existing resources in the community which offer ways of caring for the mentally ill who are not in hospitals."[3] Wisconsin's successful strides to move people from institutional to community-based services resulted from the IMD exclusion combined with efforts of people with lived experience and support from dedicated advocates. Until community-based services are fully funded and consistently available statewide, the gaps and deficiencies that remain in Wisconsin's mental health system are almost certain to result both increased IMD psychiatric hospital placements and longer lengths of stay. Because Medicaid waivers must be budget neutral, federal funding that could expand access to community-based programs may instead be used to fund extended IMD stays.

DRW frequently supports clients who are facing delays and other barriers when they seek to return to a home or community setting following placement at one of Wisconsin's existing Institutes of Mental Disease such as Winnebago Mental Health Institute, Mendota Mental Health Institute, or Trempealeau County Health Care Center. Most commonly, DRW's client is ready for discharge but remains in an IMD longer than necessary due to delay in identifying and arranging the robust supports and services our client needs. This is especially true for individuals who require a residential placement such as a small group home. The shortage of small residential facilities is so acute, our clients frequently face pressure to either accept any available open bed anywhere in the state, even if it is hours away from their home community or remain in the institution for an undefined period of time. **This "treatment by geography" approach compounds social isolation, unduly restricts individual liberty and reduces their ability to maintain relationships, work, engage and participate in their chosen community**. Without the community connections that strengthen coping strategies, people with mental health needs are at greater risk of cycling back to an institution. Resources would be better utilized to support community-based treatment efforts such as expansion of CSP to include the full spectrum of services called for by the evidenced-based, Wisconsin-developed Assertive Community Treatment Program and statewide access to the full array of CCS and CLTS services without a waiting list, and Individual Placement and Supports (IPS).

The IMD exclusion also supports the integration mandate under *Olmstead v. L.C.* Under *Olmstead*, the Supreme Court held:

- it is a violation of the Americans with Disabilities Act for a state to unjustifiably segregate persons with disabilities in institutions.[4]
- the institutional placement of people who can benefit from community settings constitutes discrimination.[5]
- use of institutional settings severely diminishes the ability of people with disabilities from participation in everyday life.[6]

In the absence of a fully supported community-based options, a waiver of the IMD exclusion will inevitably be used to pull more individuals into IMDs and for longer periods of time. This would violate the core tenets of the ADA, as held by the Supreme Court in *Olmstead*.

In addition to the points above, DRW strongly believes an IMD waiver will not address the goals stated in the application, including the overarching goal to increase access to health care services and improve health outcomes for individuals with SMI or SED[7] as well as more specific goals to:

- Reduce utilization and lengths of stay in emergency departments while awaiting mental health treatment in specialized settings;
- Reduce preventable re-admissions to acute care hospitals and residential settings;
- Improve availability of crisis stabilization services;
- Improve access to community-based services to address the chronic mental health care needs of beneficiaries; and
- Improve care coordination[8]

Between 2012 and 2015, twelve states received federal funding for services in IMD, with the hope it would reduce emergency department visits and lengths of stay.[9] Instead, there were no changes in the length of stay for people in emergency departments.[10] Studies of the impact noted problems with emergency department access, delays receiving evaluations, delays getting people to locations with open beds, and the complexity of individuals with co-occurring issues, like traumatic brain injury and intellectual disability.[11] An IMD waiver will not address these factors.

More IMD beds will also not address the other four goals, all of which involve strengthening community services, and none of which are prohibited currently. For example, the application mentions there is no specific assessment tool for IMDs, and other behavioral providers and Wisconsin could require the use of an evidence-based assessment tool for IMDs and other behavioral health providers, but an IMD waiver is not needed to implement that change.

The lack of financially supported community-based options can lead to demand for additional IMD beds. Unless and until there is improvement for community-based services, additional IMD beds will be filled, contrary to the stated goals of the waiver application.

DRW strongly urges Wisconsin not to pursue this Medicaid waiver. Thank you for your attention to these comments. Please reach out at any time with any questions or follow-up.

[1] Wisconsin 2022 Mental Health National Outcome Measures (NOMS): SAMHSA report *available at* https://www.samhsa.gov/data/sites/default/files/reports/rpt42788/Wisconsin.pdf at page 2.
[2] The Wisconsin Intellectual and Developmental Disabilities and Mental Health (IDD-MH) System Improvement Report DHS, "Wisconsin Intellectual and Developmental Disabilities and Mental Health (IDD-MH) System Improvement Report," see https://www.dhs.wisconsin.gov/dms/imsi-report.pdf, at page 3.
[3] 1965 U.S.C.C.A.N. 1987, 2085.
[4] *Olmstead v. L.C.*, 527 U.S. 581, 606 (1999).
[5] *Id.* at 600-01.
[6] *Id*.
[7] Application at 11.
[8] Application at 12-14.
[9] Patient Protection and Affordable Care Act, Pub. L. No. 111-148 § 2707, 124 Stat. 119, 326.
[10] Crystal Blyer, *et al*, Mathematica Policy Research, *Medicaid Emergency Psychiatric Services Demonstration Evaluation, Final Report* (Aug. 18, 2016), see https://innovation.cms.gov/Files/reports/mepd-finalrpt.pdf.
[11] *Id*.