Maryland
DEPARTMENT OF HEALTH

Wes Moore, Governor · Aruna Miller, Lt. Governor · Laura Herrera Scott, M.D., M.P.H., Secretary

November 9, 2023

The Honorable Pamela Beidle
Chair
Senate Finance Committee
3 East Miller Senate Office Bldg.
Annapolis, MD 21401-1991

The Honorable Joseline A. Peña-Melnyk
Chair
House Health and Government Operations Committee
241 House Office Bldg.
Annapolis, MD 21401-1991

RE: Report on Personal Care Aides Providing Home Care at Residential Services Agencies (as Required by House Bill (HB) 544/Senate Bill (SB) 600, Ch. 673/674 of the Acts of 2022) - MSAR # 14327

Dear Chairs Beidle and Peña-Melnyk:

In keeping with the requirements of HB 544/SB 600 (Ch. 673/674 of the Acts of 2022), the Maryland Department of Health (MDH) respectfully submits this report on personal care aides who provide home care services at residential service agencies. Specifically, the bills requires that on or before October 1 each year, each residential service agency receiving Medicaid reimbursement for the provision of home care or similar services by a personal care aide shall report to the MDH, on a form or in an electronic manner developed by MDH, the number of personal care aides classified by the residential service agency as employees and independent contractors.

Furthermore, on or before July 1 of each year, MDH shall use the information reported to create a report concerning:

1. Maryland Medicaid's reimbursement rates;
2. the cost of delivering services; and
3. aggregated employment classifications of individuals who provide personal care services.

Background

A residential service agency (RSA), as defined in the Code of Maryland Regulations (COMAR), is "an individual, partnership, firm, association, corporation, or other entity of any kind that is engaged in a nongovernmental business of employing or contracting with individuals to provide at least one home health care service for compensation to an unrelated sick or disabled individual in the residence of that individual; or an agency that employs or contracts with individuals directly for hire as home health care providers".[1] RSAs categorized as skilled nursing with aides agencies have three (3) levels: level one (1) includes registered nurse (RN) supervision of aides to provide personal care without medication management, level two (2) includes RN supervision of aides to provider personal care with medication

[1] COMAR 10.09.05.02(25)(a)(i)-(ii) https://dsd.maryland.gov/regulations/Pages/10.07.05.02.aspx

management, and level three (3) includes complex care provided by an RN, Licensed Practical Nurse (LPN), and supervision of aides. There are other types of RSAs that provide home care services, including durable medical equipment (DME); DME with Oxygen; therapy services, including speech therapy, occupational therapy, and physical therapy; medical social services; nutritional services; intravenous therapy; or ventilator services. Due to the broad range of services an RSA may provide, the agency would employ a diverse workforce including registered nurses, licensed practical nurses, certified nursing assistants, certified medicine technicians, direct service professionals (i.e., personal care aides), therapists, and administrative staff.

The Office of Health Care Quality (OHCQ) within MDH has several functions as it relates to licensure, certification, surveys, and provider education. It is the licensing body in Maryland and provides a new RSA with a license to operate upon the successful completion of licensure application. Additionally, OHCQ recommends certification of the RSA to the Centers for Medicare and Medicaid Services (CMS), authorizing an agency to participate in the Medicare and Medicaid programs. OHCQ conducts surveys for licensed RSAs to determine compliance with State and federal regulations, which set minimum standards for the delivery of care. Lastly, OHCQ provides education and technical assistance to applicants, licensees, and other stakeholders. As part of the licensure process, OHCQ collects an organizational chart for an RSA; however, it does not gather the classification status of the employees of the RSA.

The Maryland Medicaid Administration Office of Health Care Financing (MMA) within the MDH manages the Medicaid program, a public health insurance program offering free or low-cost health insurance for eligible low-income adults, children, pregnant women, elderly adults, and individuals with disabilities. Medicaid enrolls certified providers through its enrollment process to provide services to Medicaid participants, sets rates for Medicaid services, writes regulatory and subregulatory guidance for the provision of Medicaid services, and pays Medicaid claims for services rendered. The Medicaid program does not employ staff to provide Medicaid services directly to its participants or serve as a joint employer as defined by or under the U.S. Department of Labor's Fair Labor Standards Act (FLSA); instead, it contracts with providers, using a Medicaid Provider Agreement, which sets forth the requirements and expectations of its enrolled providers. As such, Medicaid does not collect employment classification data from its enrolled providers as it does not serve as an employer and is not severally and jointly liable with an employer for its employees' wages.

As of May 1, 2023, there are 1,725 licensed RSAs in the state of Maryland with 825, or 48 percent, of those RSAs enrolled with MMA. In other words, approximately half of the RSAs providing services to constituents in Maryland are Medicaid-enrolled providers and receive funding from MMA. The remaining RSAs receive funding from other sources such as private insurance companies, Medicare, or directly from the individual receiving services.

Medicaid Reimbursement Rates

A Joint Chairmen's Report (JCR) on Medicaid Provider Rate Setting[2] was drafted in December 2022 and provided to the respective committees. As noted on page two of the JCR, pursuant to SB 481 (Chapter 464 of the Acts of 2002), MDH established an annual process to set the fee-for-service (FFS) reimbursement rates for Maryland Medicaid and the Maryland Children's Health Insurance Program

[2] https://health.maryland.gov/mmcp/Documents/JCRs/2022/2022%20JCR_p115-116_MDH_Rate%20Structure.pdf

(CHIP) (together referred to as Maryland Medicaid). The law also directs MDH to submit an annual report to the Governor and various state House and Senate committees, including a comparison of Maryland Medicaid's FFS reimbursement rates with those of other states and a description of other measures of access and cost for Maryland's Medicaid program.

Certain home and community-based services (HCBS) are part of MMA's FFS reimbursement model. Providers have received several rate increases for certain home and community-based services since FY 2019. Within MDH, MMA's Office of Long Term Services and Supports (OLTSS), the Developmental Disabilities Administration (DDA), and the Behavioral Health Administration (BHA) operate and oversee programs that provide HCBS. Each administration applied rate increase percentages to its respective programs, as required through legislation and funding authority. Percentage increases are noted below by provider type and funding authority.

Long Term Services and Supports (LTSS) Providers

LTSS provider rate increases are supported by funding through the State budget; HB295 *Maryland Minimum Wage Act of 2014* (Ch. 262 of the 2014 Acts); HB 166/SB 280 *Labor and Employment – Payment of Wages – Minimum Wage (Fight for Fifteen)* Chs 10 and 11 of 2019 Acts)[3]; the Governor's Supplemental Budget; American Rescue Plan Act (ARPA); and HB 549/SB 555 *The Fair Wage Act of 2023*.

- FY 2019: 3% rate increase effective July 1, 2018
- FY 2020: 4% rate increase effective January 1, 2021 (HB 166/SB 280)[4]
- FY 2022: 5.2% rate increase effective November 1, 2021 (ARPA)[5]
- FY 2023: Effective July 1, 2022: Temporary, one time emergency 4% rate increase for FY 2023 only (ARPA); 4% rate increase (HB 166/SB 280); 4% rate increase allocated in Governor Hogan's Supplemental Budget No. 4 in amendment to the budget for FY 2023
- FY 2024: 4% rate increase effective July 1, 2023 (HB166/SB280)
- FY 2024: 8% rate increase effective January 1, 2024 (HB 549/SB 555)[6]

Developmental Disabilities Administration (DDA) Providers

DDA provider rate increases are supported by funding through HB295 *Maryland Minimum Wage Act of 2014* (Ch. 262 of the 2014 Acts); HB166/SB280 *Labor and Employment – Payment of Wages – Minimum Wage (Fight for Fifteen)* Chs 10 and 11 of 2019 Acts)[7]; the Governor's Supplemental Budget; the 10% enhanced FMAP funding available for reinvestment as a result of the American Rescue Plan Act (ARPA)[8]; and HB 549/SB 555 *The Fair Wage Act of 2023*.

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[3] https://mgaleg.maryland.gov/2019RS/bills/sb/sb0280E.pdf

[4] On December 17, 2020, Governor Larry Hogan announced that Medicaid behavioral health and long term care provider rate increases pursuant to Maryland Senate Bill 280 (2019) will go into effect January 1, 2021, rather than July 1, 2021, https://health.maryland.gov/mmcp/Documents/MEDICAID%20PROVIDER%20RATE%20CHANGES%20FROM%20JANUARY%201%202021.pdf.

[5] For more information regarding MDH's ARPA spending plan, see the quarterly updates posted here, https://health.maryland.gov/mmcp/Pages/Public-Notices.aspx.

[6] https://mgaleg.maryland.gov/2023RS/Chapters_noln/CH_2_sb0555t.pdf

[7] https://mgaleg.maryland.gov/2019RS/bills/sb/sb0280E.pdf

[8] For more information regarding MDH's ARPA spending plan, see the quarterly updates posted here, https://health.maryland.gov/mmcp/Pages/Public-Notices.aspx.

- FY 2016: 3.5% rate increase effective July 1, 2015 (HB 295)
- FY 2017: 3.5% rate increase effective July 1, 2016 (HB 295)
- FY 2018: 3.5% rate increase effective July 1, 2017 (HB 295)
- FY 2019: 3.5% rate increase effective July 1, 2018 (HB 295)
- FY 2021: 4% rate increase effective January 1, 2021 (HB 166/SB 280)[9]; 5.5 % rate increase beginning April 1, 2021 except for targeted case management (ARPA)
- FY 2022: 4% rate increase effective July 1, 2021 (HB166/SB280); 5.5% increase for targeted case management providers effective November 1, 2021 (ARPA); one-time temporary emergency 10% increase for all providers with the exception of targeted case management providers from January 1, 2022 through March 31, 2022 (ARPA)
- FY 2023: 4% rate increase effective July 1, 2022 (HB166/SB280); additional 4% rate increase effective July 1, 2022 (Governor's Supplemental Budget); one-time temporary emergency 10% rate increase for targeted case management providers from October through December 2022 (ARPA)
- FY 2024: 4% rate increase effective July 1, 2023 (HB166/SB280)
- FY 2024: 8% rate increase effective January 1, 2024 (HB 549/SB 555)[10]

Behavioral Health Administration (BHA) Provider Rate Increases

BHA provider rate increases are supported by funding through HB1329/SB967—*Heroin & Opioid Prevention Effort (HOPE) & Treatment Act of 2017* (Chs. 571 and 572 of the Acts of 2017); HB166/SB280 *Labor and Employment – Payment of Wages – Minimum Wage (Fight for Fifteen)* Chs 10 and 11 of 2019 Acts); the Governor's Supplemental Budget; the 10% enhanced FMAP funding available for reinvestment as a result of ARPA; and HB 549/SB 555 *The Fair Wage Act of 2023*.

- FY 2019: 3.5% rate increase effective July 1, 2018 (HOPE Act)
- FY 2020: 3.5% rate increase effective July 1, 2019 (HOPE Act)
- FY 2021: 4% rate increase effective January 1, 2021 (HB 166/SB 280)[11]
- FY 2022: 3.5% rate increase effective July 1, 2021 (HB166/SB280); 5.4% rate increase effective November 1, 2021 (ARPA).
- FY 2023: 3.25% rate increase effective July 1, 2022 (HB166/SB280); 4% rate increase effective July 1, 2022, that was allocated in Governor Hogan's Supplemental Budget No. 4 in amendment to the budget for FY 2023; one-time temporary emergency 4% increase in rate from July 2022 through September 2022 for Brain Injury Waiver providers
- FY 2024: 3% rate increase effective July 1, 2023 (HB166/SB280)
- FY 2024: 8% rate increase effective January 1, 2024 (HB 549/SB 555)[12]

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[9] On December 17, 2020, Governor Larry Hogan announced that Medicaid behavioral health and long term care provider rate increases pursuant to Maryland Senate Bill 280 (2019) will go into effect January 1, 2021, rather than July 1, 2021, https://health.maryland.gov/mmcp/Documents/MEDICAID%20PROVIDER%20RATE%20CHANGES%20FROM%20JANUARY%201%202021.pdf.

[10] https://mgaleg.maryland.gov/2023RS/Chapters_noln/CH_2_sb0555t.pdf

[11] On December 17, 2020, Governor Larry Hogan announced that Medicaid behavioral health and long term care provider rate increases pursuant to Maryland Senate Bill 280 (2019) will go into effect January 1, 2021, rather than July 1, 2021, https://health.maryland.gov/mmcp/Documents/MEDICAID%20PROVIDER%20RATE%20CHANGES%20FROM%20JANUARY%201%202021.pdf.

[12] https://mgaleg.maryland.gov/2023RS/Chapters_noln/CH_2_sb0555t.pdf

A Medicaid-enrolled RSA receiving the aforementioned rate increases for the provision of home and community-based services serves as the employer and determines how to apply those increases across its agency. MMA establishes rates for its covered services. As previously mentioned, MDH does not employ direct care staff or serve as a joint employer. MDH does not regulate how an RSA applies the rate increase nor does it collect data to determine how the RSA applied the rate increase.

Cost of Delivering Services

As noted above, most rate increases applied to home and community-based services are funded through legislation and the Governor's annual budget. The rate increases are not based on costs reported by RSAs. In order to base rates on the costs of delivering services, MDH would need to collect data related to facility characteristics, service utilization, and costs such as direct and indirect labor costs, equipment, supplies, and property. MDH does not currently collect any cost data from home and community-based providers. Providing this data is an administrative challenge and financial hardship for providers. In addition, to assure financial accountability and data integrity, it requires expertise from financial professionals such as certified public accountants or actuaries that small businesses do not have contractual agreements with nor do they have these requisite resources on staff.

MDH collects cost report data for certain providers such as nursing facilities through its contractor, Myers and Stauffer LC, a certified public accounting firm. Myers and Stauffer collects cost report data from each nursing facility in Maryland and applies a complex rate setting model to determine rates based on costs and then applies a budget adjustment factor to ensure that the rates paid remain within budgetary constraints of the allocated annual Medicaid budget. While collecting this data is an administrative burden for nursing facilities, these facilities operate sophisticated business models and are typically staffed with or are able to contract with financial professionals who are able to extract, interpret and analyze, and defend financial data as requested and needed.

If MDH were to collect cost reports for home and community-based providers, it would need to leverage a contractor to develop a cost report, train providers on how to engage in the cost reporting/rate-setting process, collect the data from providers, complete an analysis of those costs, engage the providers in its analyses (which will require providers to have financial professionals under contractual agreement or on staff) via a formal engagement process, and generate a rate model that supports a methodology that must be approved by CMS before adopting rates and incorporating those costs. A modification to the current contract would be required, if permissible, based on State procurement law and an agreement between the contractor and MDH to the terms of the modification. If a new contract is required, a request for proposals would need to be drafted and posted to the eMaryland Marketplace to obtain a contractor able to complete the required work.

Aggregated Employment Classification Data

As previously stated, MDH does not collect employment classification data. As such, this report does not contain information related to employees and contractors providing personal care services in RSAs.

If you need more information about this subject, please contact Megan Peters, Acting Director of Governmental Affairs, at Megan.Peters@maryland.gov or (410) 260-3190.

Sincerely,

Laura Herrera Scott, M.D., M.P.H.
Secretary

cc: Marie Grant, Assistant Secretary for Health Policy
Ryan Moran, Deputy Secretary, Health Care Financing and Medicaid
Megan Peters, Acting Director, Office of Governmental Affairs
Sarah Albert, Department of Legislative Services (5 copies), MSAR # 14327