ANCOR

February 12, 2021

The Honorable Nancy Pelosi
Speaker
United States House of Representatives
Washington, DC 20515

The Honorable Charles E. Schumer
Majority Leader
United States Senate
Washington, DC 20510

The Honorable Robert C. "Bobby" Scott
Chair, Committee on Education & Labor
United States House of Representatives
Washington, DC 20515

Dear Speaker Pelosi, Leader Schumer and Chairman Scott:

We write to bring a critical issue to your attention that will require immediate congressional action as lawmakers consider raising the federal minimum wage. ANCOR has a well-established record of advancing and supporting policies to establish a living wage for direct support professionals (DSPs) working for intellectual/developmental disability provider agencies. Therefore, as you consider options to increase the federal minimum wage, it is imperative that any initiative to raise the minimum wage be accompanied by commensurate increases in Medicaid funding to cover providers' additional labor costs.

ANCOR is a national, nonprofit trade association representing more than 1,600 private providers of long-term services and supports to people with intellectual and developmental disabilities (I/DD). Nationally, our members employ more than 1 million DSPs who together deliver critical services to many of the nearly 6 million people with I/DD in the US.

Currently, this essential workforce is severely underpaid due to inadequate Medicaid rates paid to providers but set by state payers. The result is a community service delivery system challenged by high DSP vacancy rates and an average turnover rate of 43%, with numerous states reporting turnover rates in excess of 50%. These challenges stand to be even more pronounced if Congress takes action to raise the federal minimum wage to $15 per hour *without a commensurate increase in reimbursement rates for Medicaid-funded Home and Community Based Services (HCBS).*

DSPs are paid a median hourly wage of $12, and we know that in many states, DSPs earn significantly less. Because our workforce is disproportionately composed of women, workers of color and immigrants, low wages disproportionately impact the very groups who need livable wages now more than ever. For these reasons, we applaud efforts by Congress to help support hourly wage earners.

However, if the federal minimum wage is increased and state Medicaid programs *are not* compelled to increase payments to providers accordingly, community-based providers like those represented by ANCOR will have no good options to comply with the new federal wage mandate. Because DSP wages and benefits are predominantly tied to reimbursement rates, a wage hike without commensurate resources will force providers to reduce direct support positions. This will result in significant program closures and a dramatic reduction in the number of people to whom services can be delivered. This not only puts people in jeopardy of being institutionalized in violation of the Americans with Disabilities Act, but the number of people on states' waiting lists for HCBS—already nearly 600,000—would balloon.

There are both legislative models and administrative precedent acknowledging the unique considerations that need to be made for these providers. Two prominent legislative models are the *Domestic Workers Bill of Rights* (H.R. 3760/

S. 2112, introduced during the 116th Congress) and the *Disability Community Act of 2016* (H.R. 5902, introduced during the 114th Congress). The *Domestic Workers Bill of Rights* would have enumerated rights and established protections and benefits to domestic workers—including DSPs—while simultaneously increasing the FMAP to fund these initiatives. The *Disability Community Act of 2016* was a bipartisan bill sponsored by Representatives Paul Tonko (D-NY) and Steve Stivers (R-OH) during the Obama administration that authorized an FMAP increase specifically to help providers comply with the U.S. Department of Labor's 2016 Overtime Rule.

Regulatory precedent can be found in the aforementioned Overtime Rule, language from which is excerpted below:

> "The Department and the U.S. Department of Health and Human Services (''HHS'') have engaged in appropriate interagency discussions regarding the interaction between the Overtime Final Rule and HHS' policy and regulatory priorities. During these communications HHS expressed particular concerns about the Final Rule's impact on residential homes and facilities for individuals with intellectual or developmental disabilities with 15 or fewer beds. HHS also voiced concern that the December 1, 2016 effective date could affect the federal government's efforts to encourage the use of such community-based providers and stated that providing this subset of Medicaid funded providers additional time to implement these requirements could help mitigate potential budgeting and implementation concerns for these providers. HHS conveyed that the Final Rule coincides with implementation of certain provisions of its rule affecting states' provision of Medicaid home and community-based services (''HCBS''). See 79 FR 2948 (Jan. 16, 2014). Among its provisions, this HHS rule requires that all settings for HCBS be integrated in and support the beneficiary's full access to the greater community and requires States and the provider infrastructure on which these services rely to implement necessary enhancements to their Medicaid home and community-based systems to comply with these new requirements. States have until March 17, 2019 to implement approved transition plans under which providers must be in full compliance with the rule, and HHS expressed concern that the timing of the Overtime Final Rule could undermine compliance efforts of HCBS providers. The Department is committed to working with HHS to ensure that implementation of the Overtime Final Rule does not compromise its agency priorities or regulations.
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> "Based on these discussions with HHS, the Department has determined that DOL enforcement of the new salary threshold in the Overtime Final Rule in the period immediately following the December 1, 2016 effective date could have an impact on the use of these types of community-based facilities. Providing this subset of providers of Medicaid funded services additional time to transition and seek technical assistance from the Department without being subject to DOL enforcement of the new salary threshold may mitigate some potential budgeting and implementation concerns. Providers in this subset of Medicaid funded residential homes and facilities face a unique combination of challenges in balancing the goal of shifting care of individuals with intellectual or developmental disabilities to small community-based settings and meeting the timeline for implementing the HHS rule impacting HCBS providers, with the fact that these facilities are small, dependent on Medicaid funding in state budgets, and serve vulnerable populations. The non-enforcement policy will allow the Department to devote its time and resources to providing assistance to these providers of services at small community-based facilities, and will allow these employers time, if needed, to work with their state legislatures and HHS on implementation of the Overtime Final Rule. Accordingly, after carefully considering appropriate interagency discussions with HHS, the Department has decided to enact a time-limited nonenforcement policy for providers of Medicaid-funded services for individuals with intellectual or developmental disabilities in residential homes and facilities with 15 or fewer beds. This non-enforcement period will last from December 1, 2016 (the effective date of the Overtime Final Rule) until March 17, 2019. During this period of non-enforcement, the Department will not enforce the updated salary threshold of $913 per week for the subset of employers covered by this non-enforcement policy. However, the Department will continue to enforce all other provisions of the Overtime Final Rule as to this subset of employers, including in instances involving employees who meet the salary basis and duties tests but who earn less than the previous salary threshold of $455 per week. The nonenforcement policy does not apply to providers of Medicaid- funded services for individuals with intellectual or developmental disabilities in residential care facilities with 16 or more beds.

The impossible choices that will confront providers if forced into this scenario could not come at a worse time. Community providers deliver valuable services that enable people with I/DD to remain in the community, rather than being forced to live in high-cost, state-run institutions that isolate people with disabilities. This includes everything from supporting people to complete activities of daily living to ensuring people with disabilities have opportunities and supports to find and maintain employment. However, layered atop the delivery of these essential services is a range of threats wrought by the pandemic. On the frontlines working against those threats are DSPs, who are ensuring people with I/DD are isolated from COVID-19 but not from their communities.

Furthermore, the challenges wrought by the pandemic have put providers in a precarious financial situation. A survey of nearly 700 providers fielded by ANCOR at the beginning of the pandemic found that skyrocketing costs and plummeting revenues are already forcing the discontinuation of services—some of which have been made permanent.

Altogether, the pandemic is amplifying a crisis our workforce has long faced, and an increase of the federal minimum wage that is not accompanied by commensurate increases in Medicaid reimbursement rates will shatter an already-cracked system. The result will not only mean fewer options and resources for people with I/DD to live and work in the community, but it will also wreak havoc on more than 1 million workers who fit the exact profile of the workers who should benefit from a minimum wage increase.

Congress must immediately attend to the crisis facing providers of Medicaid-funded disability services. In the process, ANCOR stands at the ready, eager to engage with you to develop a policy solution that works for the million-plus DSPs in America. If you have questions or would like to discuss the challenges outlined in this letter in further detail, please contact Sarah Meek, ANCOR's Senior Director for Legislative Affairs, at smeek@ancor.org.

Sincerely,

Barbara Merrill

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Chief Executive Officer

Shannon McCracken

Shannon McCracken
Vice President, Government Relations

Cc: Senator Patty Murray, Chair, Senate HELP Committee
Senator Bernie Sanders, Chair, Senate Budget Committee
Senator Ron Wyden, Chair, Senate Finance Committee
Representative John Yarmuth, Chair, House Budget Committee
Representative Frank Pallone, Chairman, House Energy & Commerce Committee