April 17, 2024

Chiquita Brooks-LaSure, Administrator
The Centers for Medicare and Medicaid Services
7500 Security Boulevard
Baltimore, MD 21244

Dear Administrator Brooks-LaSure,

The National Association of State Directors of Developmental Disabilities Services (NASDDDS) and ADvancing States are pleased to offer comments on revisions to the 1915(c) Waiver Application and Technical guide proposed in the Federal Register Notice for 1915(c) Waiver Application PRA Renewal [Document Identifier: CMS-8003].

NASDDDS and ADvancing States support the new revisions made in response to our comments submitted in Fall 2023. We appreciate CMS' decision to repost the waiver application and technical guide for public comment in response to feedback from state partners and stakeholders, and believe this collaboration sets a strong foundation for continued partnership on implementation of the proposed Ensuring Access to Medicaid Services rule and other upcoming HCBS initiatives.

Remote/Telehealth Delivery of Waiver Services

Our associations are pleased to see additional language in the Telehealth/Remote Supports delivery of waiver services section referencing that "'Telehealth' refers to a general service modality, and states may use other terms to reflect the use of telehealth in their HCBS waivers." This additional language allowing states to continue to use other terms to reflect the use of telehealth aligns with the way states have used such terms in waiver submissions that have already been approved by CMS.

Education Core Service Definition

We are also pleased to see CMS retain the Core Service Definition for Education within the technical guide so states can continue to use this service to cover tuition for adult education classes offered by a college, community college, technical school or university (institution of postsecondary education) as defined in Sections 22 and 25 of the Individuals with Disabilities Education Act (IDEA), and other similar benefits, when they are not available under a program funded by IDEA or available for funding by the Office of Vocational Rehabilitation (OVR).

217 Eligibility Group

Our associations appreciate the revisions CMS made to Appendix A-7 of the Instructions and Technical Guide to clarify that the Medicaid eligibility determination requirements in accordance with 42 CFR § 431.10 apply to the home and community-based eligibility group described at 42 CFR § 435.217, since level of care (LOC) evaluation is a factor in determining Medicaid eligibility. We also appreciate that CMS provided clarification and examples of the administrative functions that non-governmental entities can provide to support the eligibility determination process.

We encourage CMS to make an additional minor revision, both for consistency with the LOC evaluation terminology in the Waiver Operational and Administrative Functions and Appendix B-6 sections of the Technical Guide and to further clarify the distinction between Medicaid eligibility and waiver LOC determination for the 42 CFR § 435.217 eligibility group:

CMS proposes to insert the following language throughout Appendix A-7:

> "*Thus, eligibility determinations for the group described in 42 CFR § 435.217 (which includes a level-of-care assessment, because meeting a 1915(c) level of care is a factor of determining Medicaid eligibility for the group) must comply with 42 CFR § 431.10*."

Specifically, we recommend CMS revise this paragraph to read (new proposed language bolded):

> "*Thus, **all components of the eligibility determination process** for the group described in 42 CFR § 435.217 (which includes a **level-of-care evaluation**, because meeting a 1915(c) level of care is a factor in determining Medicaid eligibility for the group) must comply with 42 CFR § 431.10*."

Personal Care Delivered by a Legally Responsible Individual

The practice of paying legally responsible individuals (LRI) to provide supports has expanded in recent years, both as a response to growing workforce shortages, and especially as an emergency response to the exigencies of the COVID-19 pandemic. States understand the potential of this practice to increase the supply of direct care workers and recognize that often LRI are best positioned to provide successful supports to an individual receiving HCBS. However, states also understand that the practice comes with complexities that, if not carefully managed, can lead to increased isolation, loss of autonomy, and even increased risk of abuse or other threats to the health and welfare of individuals receiving services.

Given the importance of this option as a tool to expand available supports and improve outcomes, we appreciate CMS' attention to this section of the technical guide in the proposed revisions. **We thank CMS for the decision to add the "best interest of the participant" language back into the proposed revisions as well as to expand upon it.** We especially appreciate the reminder that "When legally responsible individuals are used to deliver services, all required statutory and regulatory components of 1915(c) waivers must continue to be met, including, but not limited to, an individual's free choice of providers, adherence to person-centered service planning, health and welfare oversight, and ensuring community integration consistent with the home and community-based settings regulations." These statutory and regulatory provisions will support states to implement policies for paying LRI that address and affirm these important requirements. We also appreciate and strongly support the proposed addition of requirements for states to describe the "policies to determine that the provision of services by a legally responsible individual is in the best interest of the waiver participant;" and "the state processes to ensure that legally responsible individuals who have decision-making authority over the selection of waiver service providers use substituted judgement on behalf of the individual." These additional requirements

will assist states to ensure they are effectively targeting safeguards to prevent violations of state obligations to ensure the health and welfare, and enforce the rights, of waiver participants.

We note that CMS now proposes to add, at several points in the technical guide where paying LRI is discussed as a state option, a reminder that "States are required to ensure individuals have access to needed services, and when necessary, states should strongly consider the authorization of legally responsible individuals to meet the requirement of ensuring the delivery of needed services." Although this is an important reminder to states that paying LRI can play a role in meeting state obligations and can help to spur further consideration at the state level, **we recommend strengthening this language by adding similarly explicit reminders of the impact paying LRI can potentially have on the participant, to ensure the state considers the need to establish firm safeguards and mitigate risks, in addition to understanding the benefits of payment to LRI.** For example, CMS could highlight that, in the event that paying LRI leads to adverse outcomes (such as increased isolation, loss of autonomy, or difficulty providing sufficient quality oversight), states should reconsider their approach to allowing payment to LRI. This would support fully informed state level discussion focused on both the benefits and the potential pitfalls of various approaches to this issue.

Again, we appreciate the changes CMS has already made to the proposed revisions to this section. We believe they go a long way in improving support for states to consider adopting or expanding policies for paying LRI that address potential concerns.

Prevocational Services

Beginning with 2011 guidance, CMS has increasingly made explicit the role that prevocational services should play as a time-limited part of preparing an individual for employment. State approaches to supporting employment outcomes through HCBS have benefited from these policy clarifications. We are concerned that the following proposed revisions may be interpreted as a softening of the direct connection between prevocational services and employment:

> "*Individuals receiving prevocational services ~~must~~ **are expected to** have employment-related goals in their person-centered plan"*
>
> *"The general habilitation goals ~~must~~ **may** be designed to support employment goals."*

We suggest retaining the original language. If CMS intends a shift in expectations related to prevocational services, we suggest additional clarifying language. However, we urge CMS to maintain the expectation that prevocational services are time limited and designed to lead to employment.

General Comments

<u>Waiver Management System & Waiver Application Accessibility</u>

We appreciate CMS's response to our comments regarding navigability of the Waiver Management System (WMS) and accessibility of the waiver application template. In particular, we appreciate efforts to increase the character limits in WMS. We reiterate our prior comment suggesting that changes to the portal include the ability to make it easier to enter and view information, including the ability to add bullets, use italics and add tables and charts. We encourage CMS to continue efforts to make waiver application information, systems and processes accessible, efficient and reliable.

Implementation

We request CMS provide clear guidance to states regarding implementation of the updated waiver application template. For instance, will CMS expect any amendment submitted after the proposed revisions are effective to incorporate any changes necessary to be in accordance with the guide, or will these changes be expected to be added through renewals? These operational details will be essential for states to understand, as many are planning amendments right now and will need time to make any alterations and to obtain public comments on any new language.

We appreciate the opportunity to comment on these proposed changes and look forward to continued partnership with CMS. If you have any questions about the recommendations in this letter, please reach out to Dan Berland (dberland@nasddds.org) or Rachel Neely (rneely@advancingstates.org).

Sincerely,

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