



November 13, 2023

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

Dear Administrator Brooks-LaSure,

On behalf of the national associations that represent state and territorial Medicaid agencies and the state agencies that operate Medicaid home and community-based services (HCBS), we are pleased to offer comments on the [Federal Register Notice for 1915\(c\) Waiver Application PRA Renewal \(88 FR 62377\)](#).

The National Association of State Directors of Developmental Disabilities Services (NASDDDS) represents the nation's state agencies, and the District of Columbia and Puerto Rico, providing services to children and adults with intellectual and developmental disabilities (I/DD) and their families. NASDDDS promotes visionary leadership, systems innovation, and the development of national policies that support home and community-based services for individuals with disabilities and their families. The NASDDDS mission is to assist member state agencies in building effective, efficient person-centered systems of services and supports. NASDDDS members administer a significant portion of the Medicaid program, managing approximately one third of Medicaid Long Term Services and Supports (LTSS) spending and within that, three quarters of Medicaid HCBS spending.

The National Association of Medicaid Directors (NAMD) is a professional community of state leaders who provide health insurance to more than 93 million individuals and families through Medicaid and the Children's Health Insurance Program in each of the 50 states, the District of Columbia and the U.S. territories. NAMD elevates thought leadership on core and emerging policy matters, amplifies the experience and expertise of Medicaid and CHIP directors, supports state programs in continuous improvement and innovation, and optimizes federal-state partnerships to help millions live their healthiest lives.

ADvancing States is a nonpartisan association of state government agencies that represents the nation's 56 state and territorial agencies on aging and disabilities and long-term services and supports directors. We work to support visionary state leadership, the advancement of state systems innovation, and the development of national policies that support HCBS for older adults

and persons with disabilities. Our members administer services and supports for older adults and people with disabilities, including overseeing a wide range of Medicaid HCBS programs. Together with our members, we work to design, improve, and sustain state systems delivering LTSS for people who are older or have a disability and their caregivers.

## **Key Message**

NASDDDS, ADvancing States, and NAMD support the updates to the 1915(c) Waiver Application and Technical Guide that bring the guide into alignment with the final HCBS settings regulations, to ensure that every person receiving Medicaid-funded HCBS has full access to the benefits of community living. These regulations enhance the quality of HCBS and provide additional protection to individuals who receive services under Medicaid authorities. It is because of these important tenets that we provide this feedback to our federal partners. We were disappointed by the lack of engagement with our associations to develop the proposed changes and would emphasize the importance of soliciting input from states to determine where clarification is needed, as well as to understand the impact proposed changes will have on states' HCBS waiver programs. We hope CMS will carefully consider these comments. We look forward to future collaboration as CMS and states prepare for implementation of the [proposed Ensuring Access to Medicaid Services rule](#) and other upcoming regulatory changes.

**Note:** The comments contained herein are presented in order of appearance within the waiver application and/or technical guide, followed by general comments.

## **217 Eligibility Group**

In the 1915(c) waiver application, Appendix B-6(b): Evaluation/Reevaluation of Level of Care, CMS proposes to add clarifying language that the selection of "other" entity to perform evaluation and reevaluation is "only for a waiver that does NOT include the 42 CFR 435.217 special home and community-based services waiver eligibility group." CMS indicates that this will align with the requirement at 42 Code of Federal Regulations (CFR) §431.10.

While we understand that a state entity must make the final level of care determination, there are many state waivers with the 217 eligibility group option that have a contracted entity conduct the level of care assessment used to inform the state's determination. We request clarification that this practice will continue to be allowed as long as the state agency is responsible for making the final level of care determination.

## **Core Service Definition Changes**

### Education Core Service Definition

We are concerned about the deletion of the Education Core Service Definition from the technical guide. States have used 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). Educational services are enumerated as a coverable service at 42 CFR 440.180, so it is unclear why CMS would remove

this core service definition. Our associations recommend that, if CMS does not accept our recommendation to retain the core service definition, they affirm for states currently covering such service that the removal of the core service definition will not impact their ability to continue to offer the service as a part of their service continuum.

### Remote/Telehealth

Our associations are pleased to see additional guidance on Telehealth/Remote Supports included in the proposed changes to the technical guide and application. We recommend CMS adopt consistent language to describe delivery of services through telehealth. Our association members have noted that different terms are used, sometimes interchangeably and sometimes with distinct definitions, in guidance, webinars, and Requests for Additional Information (RAIs) responding to waiver amendment submissions.

Specifically, we recommend CMS clarify that the term “telehealth” refers to a general service modality, and that terms such as “virtual delivery”, “remote delivery” (as distinct from remote monitoring), and “digital delivery” carry the same meaning as telehealth. This will align with the way states have used such terms in waiver submissions approved by CMS. We recognize that “remote monitoring” has a more specific meaning, with a specific set of associated requirements.

In addition, we request that CMS clarify the treatment of telehealth as a delivery modality for extended state plan services. CMS recently provided guidance to a state that no additional language is needed in a waiver for extended state plan services, to allow extended state plan services to be delivered through telehealth, as delivery through telehealth is expressly permitted already for the delivery of state plan services. To alleviate any confusion, we encourage CMS to add language to the technical guide that makes this policy clear and explicit.

### **Electronic/Remote Monitoring HCBS**

In proposed section L of the technical guide, CMS indicates that “States have the option to include services in the HCBS waiver that include remote monitoring and remote monitoring equipment to enhance/increase individuals’ independence.” Our associations are pleased to see additional guidance on Electronic/Remote Monitoring Supports included in the proposed changes to the technical guide and application. We note that the proposed section includes requirements “[i]f the state includes electronic/remote monitoring inside of a waiver service.” We appreciate the evolution of this policy providing states greater flexibility to offer remote monitoring as a component of an existing service or as a standalone service. We request that CMS clarify the extent to which it will approve adding remote monitoring as a component of an existing waiver service.

### **Housing Supports**

Our associations are pleased to see the proposal to include a section titled “Assistance in Community Integration - Housing Supports” in the technical guide. We appreciate CMS’ commitment to supporting states to provide housing-related supports and services that promote health and community integration, and the agency’s recognition of the importance of addressing Social Determinants of Health (SDOH) for Medicaid beneficiaries as addressed in [SHO# 21-001 \(Opportunities in Medicaid and CHIP to Address Social Determinants of Health \(SDOH\)\)](#).

## Personal Care Delivered by a Legally Responsible Individuals

Family caregiving has been evolving as the foundation of LTSS in the U.S. for many years, stabilizing supports and providing essential care to family members. Driven in part by growing workforce shortages, and accelerated by the pandemic, some states have begun to adopt the practice of paying legally responsible individuals to provide supports, in limited circumstances. This policy yields great benefits; it increases the supply of potential support workers, and often a legally responsible individual is the person best positioned to provide successful supports to an individual receiving HCBS. However, without appropriate safeguards, the practice runs the risk of limiting an individual's autonomy and possibly contributing to further isolation.

We are concerned that CMS proposes to remove from the technical guide language expressing the expectation that states specifically ensure that service delivery by a legally responsible individual is "in the best interest of the participant." The removal of this language will undermine important safeguards states have put in place to ensure any such arrangement promotes individual choice and autonomy and in no way isolates the individual from the broader community. The language in the technical guide regarding safeguards to protect the individual's best interests supported states to ensure that care provided by legally responsible individuals did not usurp individual autonomy or place participants at a higher risk for abuse, neglect, and exploitation. Bulwarked by this expectation, states are able to support participants receiving paid supports from legally responsible individuals to communicate their choices and preferences for their caregiver. It also better positions the state to determine whether service delivery by a legally responsible individual is in the best interest of the person and does not hinder the person's ability to engage in meaningful community activities.

We urge CMS to replace, rather than remove, this important language with an affirmation that additional safeguards are important to ensure individual autonomy, choice, and program integrity. Specifically, we recommend the addition of language that references or echoes safeguard requirements in existing regulations, such as:

- Echoing requirements at 42 CFR §441.735: "The State must have policies describing the process for authorization; the extent of decision-making authorized; and safeguards to ensure that the representative uses substituted judgment on behalf of the individual."
  - *Note:* 42 CFR §441.735 applies to the 1915(i) authority. However, we believe it would be appropriate to add equivalent language to the 1915(c) waiver application. This would be consistent with CMS guidance to states to use the technical guide for 1915(i) programs in addition to 1915(c).
- Requiring states to describe strategies utilized to ensure that the provision of services by a legally responsible individual adheres to all regulatory provisions at 42 CFR §441.301(c)(1) and (c)(4). In particular, we suggest emphasizing the requirement at 42 CFR §441.301(c)(1)(vii): "The person-centered planning process: offers informed choices to the individual regarding the services and supports they receive and from whom."

## **General Comments**

### Strategy for Implementation

States are undergoing difficult transitions as they unwind their Appendix K flexibilities and import many of them into the broader waiver. Given this activity, it is particularly important that CMS establish very clear timelines for implementation of any waiver application and technical guide changes that are finalized. Specifically, we request clarification and guidance for states on the following:

- Will CMS expect any amendment submitted after January 1, 2024 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 gain public comments on any such new language.
- Will states currently implementing HCBS settings corrective action plans (CAPs) for their waiver program(s) need to include any specific reference to the CAP in their waiver application?

### Waiver Management System

Our associations have also received feedback from states regarding changes to the 1915(c) Waiver Management System (WMS) that supports waiver application management. This system is seen as cumbersome to navigate, and technical issues within the system have caused significant complications to the waiver submission, review, and approval processes. States have reported entering and saving information in the waiver application template in the WMS that is not later reflected within the system, resulting in unnecessary amendments due to system failure/crashes. States also report that increasing the character limits, especially in the performance measure areas, would assist with their data entry into the WMS. In addition, our members would greatly appreciate any changes to the portal to make it easier to enter and view/review information. Examples include the ability to add bullets, use italics, and add tables and charts.

### Accessibility of Waiver Application Template

To ensure individuals with disabilities and persons with limited English proficiency who need linguistic accommodations can access the technical guide or a state's waiver application, we are requesting via our comments that CMS create accessible Word versions of the waiver application template and technical guide that states can share with the public to track changes that are being proposed in amendments and renewals. Addressing this need also acknowledges differences in cultural norms and understanding of the materials.

We also request that updates to the templates use plain language to afford all stakeholders the ability to read and understand the materials effectively. Increasing health literacy is a key goal of the U.S. Department of Health and Human Services' (HHS) Healthy People 2030 and improving access to information and services that people need to make informed decisions about their health is an important part of achieving this goal. Further, increasing accessibility of waiver

documents would align with proposed transparency and accessibility requirements in the proposed Access rule and proposed Discrimination on the Basis of Disability in Health and Human Service Programs or Activities (Section 504) rule.

We appreciate the opportunity to provide comments on these proposed changes and look forward to continued partnership between CMS and state and territorial agencies in furtherance of our mutual goals to support and improve Medicaid HCBS programs.

Sincerely,



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