NASDDDS NASUAD NAMD National Association of Medicaid Directors

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Cynthia Mann
CMS Deputy Administrator/Director
Center for Medicaid and CHIP Services)
Centers for Medicare & Medicaid Services
Department of Health and Human Services
200 Independence Avenue, SW
Washington, DC 20201

Dear Cindy,

Adoption of the new home and community-based services (HCBS) regulation is a watershed in the 30+ years of experience with the Medicaid HCBS waiver program. The new rule adopts as a core tenet that HCBS programs enable people to fully participate in their communities. On behalf of our member state agencies we want to thank the Center for Medicare & Medicaid Services (CMS) for the tremendous, multi-year effort it took to advance this community-based focus.

While the general direction of the regulation is positive, the rule does raise new issues and concerns pertaining to CMS' expectations for state implementation plans and ongoing compliance activities. At its core, the final rule represents a paradigm shift in how CMS intends for states to structure their HCBS programs. Thus, the steps CMS and the states take during these early months and years will likely set the stage for the next several decades of HCBS policy for publicly funded systems as well as the private market.

We are writing to draw your attention to some of the critical challenges that are already apparent as well as our recommendations to address these. The two overarching steps that we believe would facilitate a more efficient transition process for states, and ultimately to ensure Medicaid clients can fully integrate into their communities are as follows:

- The nature of the implementation issues and concerns require expeditious and consistent coordination with several entities within the Department of Health and Human Services.
- The policy and operational issues involved require ongoing collaboration with state agencies responsible for overseeing and administering home and community-based systems.

We hope the more detailed explanations and recommendations that follow can serve as a foundation for discussion with your agencies.

1) Develop a systemic approach to implementation

In order to assure that the rule results in the intended outcome, i.e. that individuals are offered opportunities for full community integration, states need to approach implementation systemically. This will involve assessing all components of their systems that involve or impact compliance, and making systemic modifications, where necessary. States will need to examine elements such as state statutes, policies and regulations, service definitions and standards, provider qualifications, training requirements, rate methodologies, individual assessment and planning processes, quality management, outcome measurement and performance metrics — and ensure that the requirements of the rule are evident in these operational and oversight components of the state system.

Recommendation:

As a first step, CMS should allow states to describe the changes they plan to make to the administrative components of their systems and then measure the adherence to their own settings rules. Where needed, an assessment of individual settings could follow. Focusing on the step-wise approach of broader systemic assessment and change will allow states to set clear standards and expectations across systems, rather than engaging settings on an individual basis.

In addition, CMS should provide timely information to states which clarifies that a systemic approach is acceptable. Many states are already in the process of developing their transition plans and some states have submitted preliminary plans. CMS must act quickly in order to maximize efforts during this transition period.

2) Convene with states to enhance the understanding of the settings requirement

Because the purpose of the rule is to define what is and is not allowed and what is or is not eligible for Federal Financial Participation (FFP), clarity is important. The definition of community in the regulations does not provide such clarity on its own accord. The definition expresses the desired outcomes for community services, but does not provide examples of allowable activities, acceptable physical characteristics, required certifications or a benchmark for expected outcomes that are reflective the diverse populations served through HCBS programs. While flexibility for states to develop policy is a good thing, the ambiguity and expansiveness of the settings rule is so great that it can lead to confusion and greater exposure for non-compliance in the future.

Recommendation:

HHS should establish a workgroup that would focus on developing guidance, ensuring coordination and strengthening the partnership across the federal agencies and with states. We recommend the group consist of representatives of state agencies, including Medicaid and operating agencies, and HHS staff from the key agencies. As noted in the previous

recommendation, this workgroup process must move quickly enough to be helpful to states that are already taking steps to comply. It requires a strong and ongoing commitment from all partners, and we propose that the workgroup meet no less than monthly to vet questions and issues and to develop solutions.

Specifically, the purpose of the group is to do the following:

- Inform implementation materials and tools such as:
    - Guidance on conducting a systemic review of the state system;
    - Examples of service definitions for settings;
    - Review criteria and performance measures used by CMS to determine state compliance;
    - Guidance on person-centered planning and conflict free case management; and
    - A technical assistance plan to support implementation of the rule. This will be needed since states vary so broadly based on statues and funding.
- Provide HHS officials with an immediate sounding board of state agencies to better understand the issues and to develop effective and consistent responses for states.
- Coordinate with the Administration for Community Living (ACL) and Department of Justice to build as much consistency in interpreting the regulation across federal agencies as is possible.

3) Ensure consistent messaging from all HHS entities

Many stakeholders recognize the impact of the HCBS regulation on the future of our delivery systems. Consequently, it is not only state agencies that are attempting to interpret the rule. We are concerned that the limited guidance published thus far has allowed other federally funded entities at the national, state and local level to promote their own policy interpretations. For example, state Developmental Disabilities Councils, University Centers for Excellence in Developmental Disabilities, Protection and Advocacy Agencies, Area Agencies on Aging, Independent Living Centers, Aging and Disability Resource Centers, managed care entities, and CMS regional offices are all engaging in dialogue about the rule. While we believe there is a role for these entities to help educate others about the new rule, doing so without more guidance from CMS in some instances is leading to entities making definitive statements about which types of services and settings are allowable and which are not.

All stakeholders, from the states to individual consumers, need a well-developed message that is consistently delivered by all HHS entities — the Center for Medicare & Medicaid Services including its regional offices, Administration for Community Living, Substance Abuse Mental Health Services Administration, and Office of Civil Rights. HHS officials must be clear about the aspirational goals of the regulations and provide more clarity on its expectations for what is and what is not allowable. This message should be straightforward and used consistently, whether in public speeches, presentations or in one-on-one negotiations with states.

Recommendation:

Develop a well-structured communication plan to disseminate the guidance throughout HHS, its regional offices and community affiliates, state agencies and other stakeholders in order to provide clarity and consistency for all interested entities.

4) Educate audit and program integrity entities

The Government Accountability Office, the HHS Office of the Inspector General as well as CMS program integrity staff play key roles in ensuring that public resources are utilized prudently and as intended. However, with respect to HCBS, these entities largely still employ a medical model framework.

The new regulation moves our service systems away from the medical model to an extensive degree which, without proper education, could raise concerns about the appropriateness of Medicaid-funded services. HHS must work with these entities to develop a comprehensive understanding of the HCBS program generally and more specifically how CMS envisions this rule supporting individuals to successfully live in the community. In particular, we want to ensure that oversight and enforcement activities are consistent with the HCBS program parameters and tools states have to meet the goals of this rule.

Recommendation:

CMS should develop an ongoing training strategy and written guidance to communicate the expectations of the HCBS program to oversight entities, with input and participation from state agencies.

In closing, we again reiterate appreciation for the leadership demonstrated by HHS in the development of these landmark regulations, and look forward to an opportunity to engage with you to develop essential tools to ensure their aspirational goals are fully realized.

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