



*COMMONWEALTH of VIRGINIA*  
*Virginia Board for People with Disabilities*

June 13, 2011

Centers for Medicare & Medicaid Services (CMS)  
Department of Health and Human Services  
Attention: CMS-2296-P  
P.O. Box 8016  
Baltimore, MD 21244-1850

To Whom It May Concern:

The Virginia Board for People with Disabilities (VBPD), Virginia's Developmental Disabilities Council, authorized and funded under the Developmental Disabilities Act, supports the comment provided on CMS-2296-P by the National Association of Councils on Developmental Disabilities (NACDD). We agree with CMS' strong position on full inclusion of individuals with developmental disabilities into all facets of community life and increased opportunities for self direction.

CMS, in its Advance Notice of Rulemaking, identified standards for community living of "*...optimizing participant independence and community integration, promoting initiative and choice in daily living, and facilitating full access to community services.*" We believe these standards reflect the values and goals that many individuals with developmental disabilities, along with their families and advocates, have struggled to achieve for over 40 years. Home and Community-Based Services (HCBS) waiver funding is the primary source of funding for individuals with developmental disabilities and families in achieving these goals. The proposed rule in CMS-2296-P supports and reinforces the standards for community living articulated by CMS and ensures that the HCBS Waiver funding source continues to be dedicated to furthering these values and goals.

The proposed rule to use public HCBS waiver funds only when standards for community living are met has legal precedence at the federal level. The Developmental Disabilities (DD) Act recognizes the competencies, capabilities and personal goals of individuals with DD with the goal of contributing to a system where individuals with DD have the ability and opportunity to make personal decisions, exert control over their lives, and participate in the same community activities that are available to individuals without disabilities. Inclusion and integration of individuals with DD in the communities of our society, as well as individual choice and control of life decisions and daily living activities, are core intents of the DD Act. Furthermore, the Americans with Disabilities Act (ADA) expressly states that, "no

qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by such entity.” (42 U.S.C. § 12132)

The guiding principle of the U.S. Supreme Court’s landmark 1999 decision in *Olmstead v L.C.* is the inherent right of an individual to be free from unnecessary segregation from the general public. Additional citations and further discussion on federal directives supporting community integration are provided in the Joint Comments of NACDD, NDRN, AUCD to CMS-2296-ANPRM dated 12/6/10.

### **Home and Community Based Settings**

The lynchpin of the proposed rule is the direction from CMS for what is—or is not—a home or community-based setting for the purposes of HCBS waiver funding. The requirements set forth in the rule address not only the location and physical characteristics of the setting, but also those elements of service delivery that are either more institutional in nature or those that enhance integration and self-direction. This mixture of the physical setting and qualities of service delivery is critical because of the many different options for living arrangements that are emerging and the variations of the characteristics and qualities that could either provide a new innovative model that enhances community integration or a new form of a segregated institution. VBPD strongly supports the location and physical characteristics of a home and community-based setting, the qualities of service delivery for home and community-based settings, and the qualities of an institutional setting, as set forth in the proposed rule. These requirements will provide the important guidance and parameters to ensure that HCBS Waiver funds are not used for settings that segregate individuals with developmental disabilities, either by the physical design or the congregate and provider directed form of service delivery.

VBPD agrees with NACDD’s recommendations that that additional language be included in the rule to more fully capture the intent and discussion conveyed in CMS-2296-P.

- In (iv), which provides the qualities of service delivery for home and community-based settings, we recommend adding “support exercising full rights and responsibilities as community citizens” and “individualized services and supports.”
- In (B), we recommend identifying some of the core qualities that would make a setting institutional in nature. Specifically, we recommend the following sentence be added: “Such qualities would include, but not be limited to, regimented meal and sleep time, limitations on residents to those with a diagnosis or disability, limitations on visitors, lack of privacy, limitations on times and frequencies of access to community activities, and any other attributes that segregate the individual or limit an individual’s ability to engage freely in the community.”
- In (A), we recommend adding “segregated” in front of “housing complex designed expressly around an individual’s diagnosis or disability.” The importance of excluding such housing complexes as home and community-based settings is that they will segregate individuals with disabilities from the community if they serve only or predominantly individuals with disabilities and are designed solely around meeting such individuals’ needs. However, there may be housing complexes for multiple types of populations that have been designed to enhance

integration both among the populations in the complexes and within the local communities and include services to support individuals with particular diagnoses or disabilities. If such a setting provides an appropriate level and type of integration of individuals with and without disabilities, meets the stipulated qualities of a home and community-based setting, and does not include the qualities of an institution setting, this setting may be a viable living arrangement option that enhances the success of community integration and should not be excluded.

- In (A) and (B), the proposed rule provides for the Secretary's determination of whether a setting is home and community-based. Additional parameters for such a determination may be beneficial. We recommend adding after "as determined by the Secretary," the following: "consistent with the characteristics, qualities and intent set forth in this rule."

### **Person-Centered Planning**

The new person-centered planning provisions in the proposed rule recognize that optimizing participant independence and promoting initiative and choice in daily living requires the involvement of the individual in developing his/her plan for community living. Minimum person-centered planning requirements are provided for ensuring not only involvement of the individual but the intent that the individual is driving the process. A requirement for a person-centered functional assessment is set forth in the proposed rule which ensures that an objective assessment is the cornerstone for determining level of need. Self-direction begins with participating and driving the service delivery decisions. While many states already offer such a process, the proposed rule provides minimum core requirements for the process and strengthens the intent of the HCBS waiver to promote individual control, responsibility and self direction.

VBPD strongly supports the proposed rules for person-centered planning. For states that have person-centered planning in place, which features individual control and responsibility, we support additional language in the proposed regulations to exceed minimum standards.

### **Combining Target Populations**

VBPD supports the option to combine different populations into one waiver so that individuals receive service based on need vs. diagnosis. VBPD recommends the thoughtful planning process of consolidated waiver creation. As NACDD notes, clearly issues relating to service arrays and caps (both service wise and funding) will need to be addressed. The development of any HCBS waiver that serves multiple target populations should ensure that individual cost caps are not set lower or higher than what would be available to an individual in a single-population waiver. CMS rules should address the concerns of many organizations representing people with DD that this population would have service levels reduced if cost neutrality is determined based on aggregate costs associated with institutional services other than those used by people with DD. Furthermore, the scope of services must be adequate to meet the needs of individuals with significant DD who may need more and different services than what are traditionally offered in waivers for people with physical disabilities or the elderly. CMS rules should take these considerations into account and require states to provide an adequate array of services for all target populations being served in one waiver.

### **Strategies to Ensure Compliance and Amendments to Waivers**

We agree with the NACDD position that supports providing options to ensure compliance in addition to

Centers for Medicare & Medicaid Services (CMS)

Attention: CMS-2296-P

6/14/2011 • Page 4 of 4

termination or nonrenewal. The proposed strategies of a moratorium on waiver enrollments or withholding a portion of the federal payment for waiver services or for administration of waiver services are appropriate interim sanctions that send a message that compliance needs to be achieved, without jeopardizing the health and safety of the waiver participants. Strategies such as this should only be used as a last resort.

VBPD strongly supports the requirement that States establish a public input process for HCBS waiver changes. This provision ensures that the public is informed and has an opportunity to comment on amendments being submitted.

VBPD appreciates that CMS has issued strong regulations that reinforce the values of optimizing participant independence and community integration, promoting initiative and choice in daily living, and facilitating full access to community services. The proposed rules CMS has issued will prevent these gains from being reversed and will help states like Virginia move forward in a progressive manner.

Sincerely,

Heidi L. Lawyer