

August 17, 2009

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

Re: File Code CMS-2296-ANPRM

To Whom It May Concern:

The National Council for Community Behavioral Healthcare is pleased to offer comments on the Advance notice of proposed rulemaking of changes to the **Medicaid Program; Home and Community-Based Services (HCBS) Waivers**, File Code *CMS-2296-ANPRM*, published in the Federal Register on June 22, 2009.

The National Council for Community Behavioral Healthcare is a non-profit association representing over 1600 community mental health and addiction organizations across the country. We are dedicated to helping its members increase both access to care and the quality of clinical care delivered to persons with mental illnesses and addictions in this country.

The National Council supports the direction of the proposed modification to give states more flexibility to design HCBS waiver service packages based on need, rather than diagnosis or condition. We appreciate CMS efforts to modify the HCBS waiver program to support more person-centered services and to facilitate compliance with Title II of the Americans with Disabilities Act of 1990 (ADA) and the 1999 Supreme Court ruling in *Olmstead v. L.C.*, 527 U.S. 581.

While all states have waiver programs for individuals with developmental disabilities, less than a handful have waivers for adults or children with mental illness. The budget neutrality requirement for a waiver is difficult to meet for adult mental health services due to Medicaid law that specifically excludes payment for services to adults in an institution for mental disease (IMD), and thus states cannot show cost neutrality within Medicaid to serve those individuals in the community. For children, states have been limited in their ability to use a waiver since all waiver recipients must meet the level of care in a hospital and most states try to address health service needs of children in less restrictive environments and before inpatient care is required.

Given the comorbidity of mental illness with other disabilities and medical illness, we believe that beneficiaries would be better served if state and federal governments move toward policies based on needed supports, rather than diagnosis. The federal government should not promote or foster competition between populations in need, or force states to make inappropriate categorical distinctions in diagnosis that are known to significantly overlap and require multiple treatment modalities to address needs effectively. Further, all eligible individuals should receive the supports they need to function in the community, both to comply with the ADA and to eliminate treatment barriers that increase disability and dependence upon institutional care. Thus, we support the CMS plans to require that: “(1) the service planning process be person-centered, and (2) the services specified in the plan of care be based upon the needs of the individual, not on average need among one target group.”

Our preliminary concerns pertain to potential unintended consequences of some of the proposals in the ANPRM. Because of these concerns (outlined below), we encourage CMS to ensure a strong stakeholder-participation process for development of direction and standards for this proposed rule change, and we are very interested in participating in the process. We believe a stakeholders' conference prior to any further rulemaking regarding the characteristics of HCBS service would help to proactively address unintended consequences and maximize the positive impact of a reformed HCBS waiver program.

We believe it will be critical for CMS to clearly adopt regulations that clearly state that additional targeting will not affect cost-neutrality, especially since the existing Section 1915(c) waiver application accommodates multiple levels of care and the corresponding institutional costs. If states were forced to use the same institutional and waiver costs across a mixed population, it could result in fewer services to people or could discourage states from choosing to mix target populations in one waiver.

Additionally, while we certainly support CMS's efforts to ensure that states focus person-centered HCBS services in small settings that support increased independence for the individual, we worry that the approach CMS is considering (requiring states to develop standards for provider-controlled settings within federal guidelines) will result in arbitrary and unintended consequences for individuals in need of HCBS services. Individuals with disabilities live in a wide variety of settings due in part to different abilities and service needs, and due to variations in financing and availability of housing options in communities across the country. The proposed guidelines or regulations of provider-controlled settings will need to be carefully evaluated to ensure individuals do not lose eligibility solely based upon living arrangements.

Many community providers own and operate housing programs in order to more effectively meet and integrate the service needs of the populations they serve. These programs are regulated by state and local housing regulations, as well as HUD regulations that support housing programs for individuals with a wide range of disabilities and housing needs. It will be critical to ensure that new regulations do not conflict with or improperly impede access to housing "that is owned, leased or controlled by a provider of one or more health-related treatment or support services," and further that states do not use the regulations to limit access to needed housing options.

We support CMS attempts to prevent situations where former nursing homes and other facilities abandon their respective facility designations along with the regulations governing that type of setting and, instead, attempt to become HCBS waiver providers. A close evaluation of the impact of these regulations on community based providers of both services and housing will be critical to preventing arbitrary and counterproductive impacts on individuals.

Thank you for your attention to these comments. I am happy to meet with you and members of your staff at any time to clarify these comments and to participate in development of this proposed rule change. Changes to the HCBS waiver program has the potential to significantly advance the health of the millions of people with disabilities we serve every day.

Sincerely,



Linda Rosenberg, MSW
President & CEO