

Executive Director
Gerald T. (Jerry) Henry
jhenry@asnek.org

Associate Director
Lois Reid
lreid@asnek.org

Board of Directors
Glenda LaBarbera, Pres.
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Achievement Services empowers persons with disabilities in their quest to live, work, and pursue leisure activities as independently as possible.

P.O. Box 186
Atchison, KS 66002
Website: www.asnek.org

Administrative Offices
215 N. 5th Street
913-367-2432

Workshop
215 N. 5th Street
913-367-0760

Residential Sites
1527 Center Street
417 N. 6th Street

To the Senate Public Health and Welfare Committee:
February 9, 2018.

Testimony in support of Senate Bill 332.

My name is Jerry Henry and I am the Executive Director of Achievement Services for Northeast Kansas, Inc. located in Atchison County. I was hired in 1978 to develop community programs for developmentally disabled citizens of northeast Kansas. I have just recently entered my 40th year as the Executive Director of Achievement Services. I clearly remember that when I was hired in 1978 that there were over 4,000 developmentally disabled adults living in State of Kansas owned and operated hospitals located in various locations across the State of Kansas. These hospitals were staffed by State of Kansas employees. I was elected to the Kansas House of Representatives in 1993. I served in the House of Representatives for 24 years.

In 1995, the Kansas legislature approved the Developmental Disabilities Reform Act (DDRA) with the objective of protecting and promoting access to such services and supports for persons with I/DD that guarantees choice and increases their independence, productivity, integration and inclusion in the community. In addition, the DDRA created 27 community developmental disability organizations (CDDO), each of which is tasked with determining eligibility for HCBS and ensuring access to supports and services. This system has allowed for broad flexibility, including: local control, better efficiencies, clear decision making and less bureaucracy.

As a member of the Developmental Disabilities Reform Act Task Force that was organized in 1995 to develop and implement the rules and regulations that now governs the DDRA, I wanted to spend a little bit of time today to discuss the issue of conflict of interest that has been discussed as a result of the passage of the DDRA. Members of the Kansas Legislature, state agencies that implemented the DDRA and community organizations spent a great deal of time discussing the issue of the potential of conflict of interest in the DDRA system implemented in 1995. To insure that potential conflicts of interest were held in check, a number of processes were developed to expose any potential conflicts of interest that would arise from the implementation of this 1995 DDRA. These processes include the development of local councils of community members, the involvement of local county commissioners, regular oversight from the state legislature and constant attention require from state licensing agencies.

Over the past 23 years that the DDRA has been in effect, the Kansas Legislature has routinely requested a Legislative Post Audit be performed to insure that any conflicts of interest that may have arised from providing community programs and services is quickly identified and corrective action instituted. Any recommendations from the Legislative Post Audit reports have been addressed and implemented. Most often the Kansas Legislative Post Audit have reported very few instances of any potential conflicts of interests in the local community support system.

In a recent letter from CMS (Centers for Medicare and Medicaid Services) dated December 1, 2017 (copy of letter attached to this testimony). CMS stated that they have reviewed the safeguards described in the waiver application and determined that they were sufficient to mitigate the conflict inherent in the CDDOs having roles in both case management and service plan development, and direct service provision CMS is not at this time requiring KDADS to make any change to the approved waiver regarding these functions.

I ask that the Senate Committee on Health and Human Services support the passage of Senate Bill 332.

DEPARTMENT OF HEALTH & HUMAN SERVICES
Centers for Medicare & Medicaid Services
601 East 12th Street, Suite 355
Kansas City, Missouri 64106



Division of Medicaid and Children's Health Operations

December 1, 2017

Tim Wood, Executive Director
Interhab
700 SW Jackson, Suite 1100
Topeka, KS 66603

Dear Mr. Wood:

This letter is in response to your letter to me of November 7. In that letter, you asked a number of questions related to policies regarding background checks and conflicts of interest. This letter contains our responses to those questions.

Q1: What are CMS' expectations for a state's background check policy? Must they include juvenile records, or records that have been expunged? Does the national criminal background check process suffice?

A1: In short, CMS expects states to implement background checks as described in the relevant approved 1915(c) waiver. Items C-2-a and C-2-b, respectively, asks states to define whether criminal history/ background checks and abuse registry screenings will be required for waiver service providers. If a state marks "yes" in response to either of those items, then the waiver application asks for descriptions of who the checks will apply to, the scope of the checks, and the process for ensuring that the required checks have been completed. If the national background check process fits the description of the checks described in an approved waiver, then it would suffice to fulfill the requirements of that waiver. If the national background check process does not fulfill the requirements of a particular approved waiver, then it would not be a sufficient check for a provider of services through that waiver.

Beyond what is approved in the waivers themselves, CMS has little guidance on what types of background checks should be implemented, or what the scope of those checks should be. CMS guidance does not address whether juvenile or expunged records must be considered; that issue would usually be defined in state rules or policy.

Q2: Does Kansas' approved I/DD waiver prevent conditional employment pending the completion of a background check? If not, would creation of such a program/policy require opening the waiver? What limits should be placed on a conditional employee, should such employment be authorized?

A2: The current I/DD waiver prevents the provision of waiver services by any individual who has not passed the required background checks. Agencies can hire new employees before receiving their background check results if they wish to; but waiver services must not be provided, nor claims

submitted for any work done by individuals who have not yet passed the required background checks.

An important distinction to recognize is the difference between criminal background checks and checking the status of potential new employees on the Federal exclusions lists (the List of Excluded Individuals and Entities, the Excluded Parties List System, and the System for Award Management). An agency could choose to hire a new employee prior to receiving the results of his/her background checks, and pay that person out of the agency's revenue from any source. However, an excluded person can never be paid with any Federal healthcare funds. Therefore, if an agency wanted to hire a new employee prior to receiving his/her background check results, that agency should still ascertain the potential employee's exclusion status before making an offer of employment.

Allowing employees who have not yet passed the required background checks to provide waiver services during the period of provisional employment would require amending the current IDD waiver to alter the current background check and provider qualification requirements. CMS has no guidance on what limits should be placed on provisional employees; if a state wanted to allow provisional employment in an HCBS waiver, it would be up to the state to determine such limits.

Q3: With regard to the conflicts of interest language in 42 CFR § 441.301(c)(1)(vi), does "provider" refer to individuals providing direct supports and services to consumers, or does it refer to CSPs?

A3: "Provider" in § 441.301(c)(1)(vi) has been interpreted to mean both individual workers and provider agencies.

Q4: If "provider" refers to individual DSPs, does the current system for conflict mitigation with regard to case management and court-appointed guardians run afoul of this regulation? If "provider" refers to CSPs, does the current system for conflict mitigation by those CSPs who also function as CDDOs run afoul of this regulation?

A4: Item C-2-e of the current IDD waiver describes the circumstances in which relatives and legal guardians can be paid to provide waiver services. It notes that court-appointed legal guardians of IDD waiver members must comply with State law regarding reporting potential conflicts of interest to the court. If a conflict exists, a representative must be designated to direct the waiver member's services (that is, when a conflict exists, the legal guardian cannot both direct the member's services, and be paid to provide the member services).

Federal rules at 441.301(c)(1)(vi) state that providers of HCBS for an individual (or someone who stands to benefit financially from providing services to an individual) cannot provide case management or develop the person-centered plan for that individual. Although the portion of C-2-e described above addresses directing a member's services, not providing case management or person-centered planning, it appears to fulfill the intent of the cited federal rule, since it prohibits one person from inappropriately benefitting by both directing and providing services to a waiver member.

We understand that Kansas has published further guidance about mitigating conflicts of interest for legal guardians in state policy; however, we have not reviewed that policy. For CMS' response to the question about CSPs who also function as CDDOs, please see A5 below.

Q5: KDADS interprets 42 CFR § 441.301(c)(1)(vi) as indicating that the current systems for conflict mitigation are not compliant. InterHab doubts this contention, given that CMS has repeatedly approved Kansas' 1915 and 1115 waivers with such mitigation system in place. Is there any aspect of the current systems for conflict mitigation that is not compliant with federal law/regulation? Is CMS requiring KDADS to implement a conflicts policy that would require the separation of CDDO functions from CSPs that currently operate in both capacities?

A5: At the time of the last IDD waiver amendment, CMS reviewed the safeguards described in the waiver application and determined that they were sufficient to mitigate the conflict inherent in the CDDOs having roles in both case management and service plan development, and direct service provision. CMS is not at this time requiring KDADS to make any change to the approved waiver regarding these functions. We cannot speculate on potential changes to these functions that CMS might require in future amendments or renewals. Our past approval of the safeguards described in the current approved waiver does not preclude us from requiring changes to it in any future amendment or renewal, due to change to or additions in CMS policy.

If you have any concerns or questions regarding this letter, please contact Michala Walker of my staff, at (816) 426-5925.

Sincerely,

12/1/2017



James G. Scott
Associate Regional Administrator
for Medicaid and Children's Health Operations

Signed by: James G. Scott -A

cc:

Bernice Denbow, CMS
Brad Ridley
Amy Penrod
Fran Seymour-Hunter