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Kathy Cooper

From: KATHY BROWN-MCHALE <KMCHALE@spininc.org>
Sent: Tuesday, October 16, 2018 9:30 AM
To: IRRC
Subject: Comments on Regulation#14-540: Home and Community Based Supports and Licensing

Mr. David Sumner
Executive Director
Independent Regulatory Review Commission
14th Floor, Harristown 2
333 Market Street
Harrisburg, PA 17101



Re: SPIN Comments on Regulation #14-540: Home and Community Based Supports and Licensing

Dear Mr. Sumner:

Since 1971, SPIN has provided services to children and adults with Intellectual Disability and Autism. Today, SPIN provides services to over 3,700 children and adults in Philadelphia and surrounding Counties including the Lehigh Valley area.

As such, Regulation #14-540, "Home and Community Based Supports and Licensing," that is currently before the Independent Regulatory Review Commission (IRRC) for review is of great interest and concern to our organization and the people we serve. These regulations represent the most significant set of changes to Pennsylvania's Intellectual Disability and Autism (ID/A) service delivery system in decades.

The regulations are five separate but related sets of regulations that establish program, operational and licensing standards that will govern the day-to-day provision of care, supports and services to persons with ID/A throughout Pennsylvania. Additionally, the regulations will control the fees paid to providers under the Medical Assistance Program which is the sole payer for ID/A services and supports.

SPIN acknowledges and appreciates the efforts of DHS and ODP to engage the public in a lengthy dialogue about the proposed rulemaking. We understand that numerous regulations reflect consensus among ODP, providers, consumers, families and advocacy communities and the regulations will promote improved outcomes for ID/A consumers and families consistent with federal guidelines.

In our review of the Final Form regulations, however, we are concerned with critically important regulatory provisions that remain vague and unclear.

Providers, such as SPIN in this system, need clarity and transparency in regulations that govern our performance and payment. We request the Commission to ask DHS to provide clarity to the following regulations.

1. Final Form Regulation: 6100.571(a) Fee Schedule Rates

- (a) The Department will establish fee schedule rates, based on the factors in subsection (b), using a market-based approach so that payments are consistent with efficiency, economy and quality of care and sufficient

to enlist enough providers so that services are available to at least the extent that such services are available to the general population in the geographic area.

Comment/Concern:

Subsection (a) within Chapter 6100 (and other definitions and text) does not define what the “market-based approach” standard actually means and how it will guide ODP in setting fee schedule rates.

Given the fact that the ID/A system is a single payer (ODP) system and that ODP sets the rates, what does ODP mean that it intends to use a “market-based approach” identified in subsection (a) when it uses the “factors” identified in subsection (b) of the regulation to set fee schedule rates? SPIN believes that a “market-based approach” should include the most current wage scale data for a given geographical region and a nationally recognized inflation index to establish fee schedule rates every fiscal year. Furthermore, SPIN believes the market-based approach needs to account for the current market conditions that affect recruitment and retention of direct support employees and the annual staff turnover rate and vacancies that result in high overtime requirements.

2. Final Form Regulation: 6100.571(b)

(b) In establishing the fee schedule rates in subsection (a) the Department will examine and use data relating to the following factors:

(1) The service needs of the individuals.

(2) Staff wages, including education, experience, licensure requirements and certification requirements.

(3) Staff-related expenses, including benefits, training, recruitment and supervision.

(4) Productivity. Productivity is the amount of service delivered relative to the level of staffing provided.

(5) Occupancy. Occupancy is the cost related to occupying a space, including rent, taxes, insurance, depreciation and amortization expenses.

(6) Direct and indirect program and administration-related expenses.

(7) Geographic costs based on the location where the HCBS is provided.

(8) Federally-approved HCBS definitions in the waiver and determinations made about cost components that reflect reasonable and necessary costs related to the delivery of each HCBS.

(9) The cost of implementing applicable Federal and State statutes and regulations and local ordinances.

(10) Other factors that impact costs.

Comment/Concern:

This subsection lists the specific data factors that the Department “will examine and use” in establishing the fee schedule rates in accordance with the “market-based approach” directive established in subsection (a).

ODP does not explain the inconsistency between its “market-based approach” to setting rates and its failure to use an index to update the data factors and re-set fees annually. The Department stated it will not apply an inflation adjustment as a factor in 6100.571 because the inclusion of such a factor is a task for the General Assembly since the General Assembly “appropriates HCBS funds through the Commonwealth’s annual budgeting process.” The General Assembly, however, does not establish ID/A payment rates just as it does not establish the capitation rates paid to managed care organizations under the Department’s HealthChoices Program.

The Department’s refusal to include an annual inflation adjustment to the fee schedule rates between the eventual “updates” of the data factors imposes a rate freeze in the interim fiscal years. Allowing rates to remain stagnant from year to year does not reasonably account for the impact of rising costs that providers, such as SPIN, incur each year, documented by nationally-recognized indexes. This stagnation causes harm to the individuals served and to the providers that support them.

3. Final Form REGULATION: 6100.671(c)

(c) The Department will update the data used in subsection (b) at least every three years.

Comment/Concern:

There is no explanation as to how the Department intends to update the data in the RAF nor in any of the Responses to Comments nor will the Department issue a pre-adoption interpretation of this most critical regulatory provision.

ODP revised fee schedule rates for the first time in a decade on July 1, 2017. Outside of the rulemaking process, ODP has stated that the July 2017 fees relied on May 2015 Bureau of Labor Statistics for compensation-related data with no known use of an inflation index to bring the data forward to be current. Given the current fee schedule rates were established on the basis of “market-based data” from 2015, under the plain text of the regulation, and given the absence of a data “update” in FY 16/17, FY 17/18, and so far in FY 18/19, there should be an “update” in FY 18/19. It is unclear when the Department will update the data used to determine rates.

As indicated, SPIN is very concerned with the lack of clarity in these regulations and requests the IRRC to seek answers to those areas that remain vague and have great capacity to harm individuals in service. SPIN also fully supports all comments provided to the IRRC by PAR, our provider membership organization.

We thank you for your review of these regulations.

Sincerely,

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