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September 14, 2017

Ms. Julie Mochon
Human Service Program Specialist Supervisor
Office of Development Programs
Department of Human Services
Room 502, Health & Welfare Building
625 Forster Street
Harrisburg, PA 17120

Re: Comments on Advance Notice of Final Rulemaking
55 Pa. Code 6100.571 (Fee Schedule Rates)

Dear Ms. Mochon:

The Developmental Disabilities Program of The Salvation Army has offered both residential and non-residential services and supports to individuals with an intellectual disability or autism for over 36 years in Southeastern Pennsylvania. We are pleased that we have the opportunity to submit comments and suggestions in response to the Advance Notice of Final Rulemaking ("Advance Notice") that was published on August 19, 2017 (47 Pa.B. 4831). The Advance Notice addresses how ODP proposes to calculate and adopt the fees to be paid to providers of home and community based services ("HCBS") under the recently renewed Consolidated and Person/Family Directed Support Waivers ("Waivers"). The Salvation Army appreciates ODP's willingness to engage in continued discussions with the individuals and organizations that will be affected by the proposed HCBS regulations.

Our comments to ODP's Advance Notice of Final Rulemaking are as follows:

Discussion: ODP has conducted an active and open community participation process in its commendable effort to solicit essential public input in the formulation of these system altering regulations published in Pennsylvania Bulletin on November 5, 2016. The transformative nature and scope of the proposed regulations, together with the high volume of public comments submitted in response to the Rulemaking, compels us to urge ODP to re-publish all of the proposed regulations for additional public review and comment and not merely the proposed rate setting regulations. Once adopted, the regulations will be immensely impactful for many years to come, and, accordingly, they merit close and

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further public scrutiny. Their publication in the form of an Advance Notice, at this point in time, will not materially or adversely impact ODP. To the contrary, publication for additional review and comment will provide ODP with most helpful guidance (and hopefully support) as it prepares the final regulations for review by the independent oversight entities and the general public.

Recommendation: The Salvation Army Developmental Disabilities Program continues to advocate that all of the HCBS regulations published in November 2016 should be re-published in the form of an Advance Notice. The proposed regulations are most broad in their scope, governing the issuance of licenses to HCBS providers and prescribing the delivery of and payment for HCBS services.

General Comment

As a provider of services, we appreciate ODP's decision to publish the Advance Notice and to request additional public input relating to the proposed regulatory provisions that will govern the calculation and adoption of the fees to be paid to providers of HCBS services under the proposed Chapter 6100 regulations. Providers are entitled to a rate setting process that affords them predictability and reliability regarding payment for services. Payment rates must align with the allowable costs providers will continue to reasonably and routinely incur to recruit and retain professional and dedicated employees who render the day-to-day mandated services consistent with the and strict regulatory licensing and service provision requirements.

Unlike the current Chapter 51 rate setting regulations, and as now emphasized by ODP in the Advance Notice, the rates and fees to be developed under proposed 55 Pa. Code § 6100.571 must comply with applicable federal law (42 U.S.C. § 1396a(a)(30)(A)) and thus must be consistent with efficiency, economy and quality of care and be sufficient to ensure access by eligible consumers to Waiver Program Services. ODP also recognizes, in both the Consolidated and the Person/Family Directed Support Waivers, that the costs it will rely on to establish the fee schedule rates must reflect the costs that are "reasonable, necessary and related to the delivery of the service" as set forth in the December 2014 OMB Guidance Circular. See Consolidated Waiver, Appendix I, at I-2, p. 310; Person/Family Directed Waiver, Appendix I, at I-2, p. 282. Notably, the OMB Guidance Circular, at 2 C.F.R. 200.404, defines "reasonable cost" as:

§ 200.404 Reasonable costs.

A cost is reasonable if, in its nature and amount, it does not exceed that which would be incurred by a prudent person under the circumstances prevailing at the time the decision was made to incur the cost. The question of reasonableness is particularly important when the non-Federal entity is predominantly federally funded. In determining reasonableness of a given cost, consideration must be given to:

(a) Whether the cost is of a type generally recognized as ordinary and necessary for the operation of the non-Federal entity or the proper and efficient performance of the Federal award.

(b) The restraints or requirements imposed by such factors as: sound business practices; arm's-length bargaining; federal, state, local, tribal, and other laws and regulations; and terms and conditions of the Federal award.

(c) Market prices for comparable goods or services [inclusive of labor costs] for the geographic area.

(d) Whether the individuals concerned acted with prudence in the circumstances considering their responsibilities to the non-Federal entity, its employees, where applicable its students or membership, the public at large, and the Federal Government.

(e) Whether the non-Federal entity significantly deviates from its established practices and policies regarding the incurrence of costs, which may unjustifiably increase the Federal award's cost.

ODP's adherence to applicable federal law, including the OMB Guidance, will result in payment rates that align with the routine and customary costs that providers must incur to render quality care and services to and meet the documented needs of Waiver Program consumers.

The Salvation Army Developmental Disabilities Program comments to the specific revised sections of 55 Pa. Code § 6100.571 are set forth below. Please note that text in bold proposed by ODP to be added and text in brackets is proposed by ODP to be deleted. Text in italics is proposed by The Salvation Army Developmental Disabilities to be added, and text with strikethrough is proposed by The Salvation Army Developmental Disabilities to be deleted.

Citation: 6100.571 (a)

Discussion: The Salvation Army Developmental Disabilities Program recommends that this sub-section be modified to add another sentence as noted below.

Recommendation: [Fee schedule rates will be established by the Department using a marketbased approach based on current data and independent data sources.] The Department will establish fee schedule rates using a market-based approach so that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that services are available at least to the extent that such services are available to the general population in the geographic area. *Payment rates will reflect the allowable costs that providers must incur to provide quality care and to meet the documented needs of individuals as set forth in their Individual Support Plans and to ensure compliance with the CMS-approved Pennsylvania HCBS Community Settings State Transition Plan.*

Citation: 6100.571(b)

Discussion: The Salvation Army Developmental Disabilities Program recommends that the new regulations contain a provision that supports the application of an annual inflation adjustment to fee schedule rates. The Salvation Army Developmental Disabilities notes that to not calculate and seek funds to support an annual inflation adjustment, without evidence of a decrease in service need and/ or reduction in the provision of services, imposes an impermissible rate reduction based on budgetary considerations contrary to federal law. (42 U. S. C. 1396a(a)(30)(A)) Just as the HealthChoices managed care organizations rely on annual increases to their capitation rates to assure actuarial soundness, and likewise insurance organizations routinely apply for and obtain increases in their premium rates, ID/A providers that certainly are subject to the same health care market forces are no less entitled under law to adjustments in rates and to not be subject to ongoing arbitrary rate freezes. We recommend that this subsection be modified as follows.

Recommendation: The Department will [refresh the market-based data used] examine and use the data sources set forth in subsection (a) (c) to *recalculate and* establish fee schedule rates at least every 3 years. *Every fiscal year, the Department will determine and include in its annual recommended budget request to the Governor the funding amount necessary to support the application of the Medicare Home Health Market Basket Index to recalculate the HCBS fee schedule rates and bring the rates forward through the following fiscal year.*

Citation: § 6100.571(c).

Discussion: We recommend that this subsection be modified to delete (a) and replace with (c).

Recommendation: [The market-based approach specified in subsection (a) will review and consider] In establishing the fee schedule rates in subsection (a) (c) the Department will examine and use the following factors:

Citation: 6100.571 (c)(1)

Discussion: The Salvation Army Developmental Disabilities Program recommends that this subsection be modified as follows:

Recommendation: The [support] service needs of the individuals *as documented in their Individual Support Plans.*

Citation: 6100.571(c)(2)

Discussion: The Salvation Army Developmental Disabilities Program recommends that this subsection be modified. ODP has noted that approximately 85% of the total costs incurred by ID/A providers relate to staffing and staff related costs. Providers in PA are dedicated to securing wages and benefits for ID/A

employees that constitute a living wage within the geographic regions where the employees reside in Pennsylvania. Quality of care is best assured by retaining and recruiting competent and caring employees who are given the opportunity to earn fair wages that reasonably align with the physically, intellectually and emotionally challenging duties they routinely perform day-to-day throughout the year. Quality of care cannot be assured when, in the aggregate, across the state, providers experience staff vacancies exceeding 3500 at any given time and confront the loss of over 9500 staff who leave the ID/A field annually, causing instability for consumers and families. We recommend that this subsection be modified to include a nationally recognized economic index that is used to determine the funding level that is needed to support a living wage for the individuals who provide day-to-day high quality care and services to individuals with an intellectual disability or autism.

Recommendation: *The development of staff wages and staff related costs including such as training, benefits, educational and professional experience and licensure and certification requirements, will utilize an independent, nationally recognized index, such as the Massachusetts Institute of Technology's annual Living Wage Calculator.*

Citation: 6100.571 (c)(3)

Discussion: What data sources will ODP rely on to obtain relevant cost data about staff-related expenses? The Salvation Army Developmental Disabilities Program also recommends that this provision be modified as follows:

Recommendation: *Staff-related expenses, including healthcare, retirement and other staff benefits, training, recruitment, and supervision.*

Citation: 6100.571 (c)(5)

Recommendation: *ODP needs to explain how it intends to define and apply "occupancy" in establishing fees and provide the opportunity for public comment on the explanation.*

Citation: 6100.571(c)(6)

Recommendation: *ODP must identify the "direct and indirect program and administration related expenses" and the source of the expenses relied upon as factors that ODP will consider to set fees and provide the opportunity for public comment on the explanation.*

Citation: 6100.571(c)(8)

Discussion: The Waivers incorporate the definition of “reasonable costs” under federal law (2 C.F.R. § 200.404). That definition refers to determining the reasonableness of a cost as considering whether the cost is “ordinary and necessary for the operation” of the entity. (emphasis added). See regulatory definition, *supra*. at 2. We recommend that this subsection be modified as follows:

Recommendation: [A review of] Federally-approved HCBS definitions in the waiver and determinations made about cost components that reflect *reasonable and necessary* costs [necessary and] related to the delivery of each HCBS as defined at 2 C.F.R. § 200.404.

Citation: 6100.571(c)(10)

Discussion: The Salvation Army Developmental Disabilities Program recommends that this subsection be modified as follows:

Recommendation: Other [criteria] factors that impact *the costs providers incur to render quality care and services in to comply with applicable HCBS regulations and ODP directives.*

Citation: 6100.571(c)(7)

Discussion: We agree with this factor in conjunction with our comment 6100.571(c)(2).

Citation: 6100.571(d)

Discussion: As written, this subsection contemplates the publication of a Notice that, in “summary” fashion, will explain the proposed rate setting methodology to include: (1) the data and data sources relied upon; (2) how the factors listed in subsection (c) were utilized; and (3) the fee schedule rates themselves. The regulation does not specify that the Notice will be published annually or that after receipt of comments, ODP will publish a final Notice that responds to the comments it received. The proposed regulation also does not specify that the Notice will identify and explain the presumptions and assumptions that ODP relied upon in calculating the proposed fees. In consideration of not adopting, in regulation, an established formula to establish the fees, ODP must otherwise be clear and precise in explaining all of the factors and data that will inform its calculation of the fee schedule rates and must respond to the comments that it receives about proposed fees just as it would do in response to comments to proposed rulemaking.

Absent the adoption of the public process described below, ODP must, in the alternative, re-publish, for comment, a fixed rate setting methodology (see, e.g., the methodology that governs payments to skilled nursing facilities (55 Pa. Code Chapter 1187) as a proposed regulation.

The Salvation Army Developmental Disabilities Program recommends that this section be rewritten as follows:

Recommendation: *The Department, on or before May 1 of each year, will publish a Notice in the Pennsylvania Bulletin that: (1) identifies the proposed Fee Schedule Rates for the next fiscal year, and (2) explains in specific detail the fee schedule rate setting methodology. The proposed rate setting methodology shall describe how the Department determined and applied the factors set forth in subsection (c) above, including the identification of all presumptions, assumptions, and independent data sources (including reports and cost related studies) that it used to establish the fee schedule rates and how such factors were utilized to calculate the rates.*

(2) The Department will solicit public comments for 30 days regarding the proposed fee schedule rates and the rate setting methodology.

(3) The Department, after review and consideration of the public comments, will publish a Notice in the Pennsylvania Bulletin that adopts the final fee schedule rates and rate setting methodology and that includes its response to each public comment that it received in response to the Notice of Proposed Fee Schedule Rates and Rate Setting Methodology.

Support Intensity Scale and PA PLUS

The application of the Support Intensity Scale and PA Plus ("SIS Scale") has a fundamental impact on service provision and provider payment and the proposed rulemaking must address the standards that comprise the SIS Scale and how the SIS Scale is applied in practice. ODP has engaged the public in an open dialogue regarding the purpose of and need for a reliable and valid tool to measure support needs. But given the impact of the scores on determining the frequency, intensity and duration of an individual's needs and the corresponding impact on payments to providers, informal dialogue is insufficient protection for the individuals who are assessed and the providers that are confronted with erroneous evaluations.

The Salvation Army Developmental Disabilities Program recommends that the proposed regulations include a separate sub-section that sets forth the standards that comprise the Pennsylvania SIS Scale and that govern its use and application consistent with the following factors:

1. The assessment will be:
 - a. externally validated and produce an accurate, objective, and reliable measure of need in all bio-psychosocial domains regarding the individual;
 - b. representative of the frequency, intensity, and duration of an individual's needs;
 - c. age appropriate and developmentally representative;
 - d. fairly and consistently applied to measure an individual's needs against the typical population;
 - e. person-centered and representative of specialized populations' exception needs, such as medical fragility, dual/triple/quadruple diagnoses, sexual offender status, genetic indications, etc; and
 - f. inclusionary and transparent.

2. Administration of Assessment Tool

- a. A conflict-free entity should administer the assessment tool;
- b. the assessment tool should be administered by a representative who is a degreed professional with experience in human services;
- c. the assessment shall be transparent and inclusionary of all team members (including, at a minimum, the individual, support staff, family, and administrator of provider agency); and
- d. the assessment shall be administered at a time convenient to ensure meaningful representation from all participants.

3. Assessment Results and Reconsideration

- a. The assessment results will be forwarded within 15 days of administration to the individual, Supports Coordinator, Provider, Administrative Entity, and the individual's family members.
- b. This information shall include a copy of the assessment domain results as well as the final score.
- c. Any team member may request reconsideration of the assessment determination by way of written or electronic notice communicated to the Supports Coordinator within 15 days of the receipt of the results of the initial assessment.
- d. A reassessment shall be conducted by a different representative of the agency that administers assessments.
- e. The re-assessment meeting will include the individual, family member(s), support staff, and administrator or designee of the provider agency at a time convenient for all and that reasonably allows representation for all interested participants.

4. Appeal Process

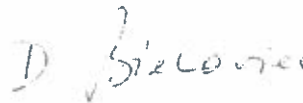
- a. The individual and/or the provider may appeal the redetermination outcome.

The Salvation Army Developmental Disabilities Program thanks the Department again for the opportunity to comment on these critical regulations that will profoundly impact the lives of individuals with intellectual disability or autism to whom we and other providers render services.

Sincerely,



Maureen McGlinchey
Executive Director
The Salvation Army
Developmental Disabilities Program



Donna Bielawiec
Controller
The Salvation Army
Eastern Pennsylvania & Delaware Division