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California's protection and advocacy system

## **Nursing Facility/Acute Hospital Waiver Renewal Process**

### **Disability Rights California Recommendations**

**May 10, 2011**

Disability Rights California is the federally mandated protection and advocacy agency for the State of California. In that capacity, we have worked on Home and Community-Based Services (HCBS) Waiver issues from the legislative, policy, and individual client perspectives. HCBS Waivers in general, and the Nursing Facility/Acute Hospital (NF/AH) Waiver in particular, are a critical means for California to meet its obligations under the Americans with Disabilities Act (ADA) and the Supreme Court's *Olmstead* decision, to prevent and avoid unnecessary institutionalization of individuals with disabilities. Given the importance of this issue, Disability Rights California welcomes the opportunity to provide input into the Nursing Facility/Acute Hospital (NF/AH) Waiver renewal process. Our recommendations are as follows:

1. Increase NF-A/B Waiver slots commensurate with the number of Medi-Cal recipients in nursing facilities or at risk for placement who could benefit from or who desire this alternative
2. Enable individuals whose needs do not fit within existing levels of care to avoid institutionalization by modifying level of care and cost-cap determinations
3. Ensure cost equity between institutional and Waiver services by increasing NF-B cost cap and/or utilizing an aggregate, instead of individual, cost cap
4. Set aside slots for children who need institutional deeming in order to qualify for EPSDT via the NF/AH Waiver

5. Take advantage of the special income eligibility option for medically needy seniors and persons with disabilities
6. Add peer mentoring and structured day program services to the NF/AH Waiver Menu of Services
7. Allow regional centers to act as fiscal intermediaries for NF/AH Waiver nursing services
8. Provide Expedited Enrollment for Individuals at Imminent Risk of Nursing Facility Placement
9. Remove Institutional Placement Requirement for Distinct Part Eligibility

**1. Increase Number of NF/AH Waiver Slots**

The number of NF-A/B waiver (one part of the NF/AH Waiver) slots should increase commensurate with the number of Medi-Cal recipients in nursing facilities or at risk for placement who could benefit from or who desire this alternative. Under the current NF-A/B waiver, capacity is capped at 1680 slots in 2011. Compare this to the 70,000 Medi-Cal recipients residing in nursing facilities at any given time, which is 69% of the total number of nursing facility residents statewide. Disability Rights California strongly recommends that the State use available sources of information to project the need for Waiver slots and use such information to expand the Waiver commensurate with need in the State.

The State should extrapolate from reliable, current data, including MDS data, which reveals that 20-25% of nursing facility residents prefer to live in the community. For California to make headway in meeting its *Olmstead* obligations it must reevaluate the ways it metes out its home and community based services and dollars. Expanding the NF- A/B Waiver to meet a realistic projection of need would be one significant step in the right direction.

**2. Enable Individuals Whose Needs Do Not Fit Within Existing Levels Of Care To Avoid Institutionalization By Modifying Level Of Care And Cost-Cap Determinations**

Consistent with the State's obligations under the Americans with Disabilities Act (ADA) and *Olmstead*, NF/AH waiver eligibility criteria should

be expanded to include individuals whose needs for attendant care, nursing care or skilled monitoring exceeds the nursing facility level B level of care, but whose needs do not fit current Subacute level of care criteria. Such flexibility is also required by the ADA regulations when necessary to ensure that persons with comparable severity of disability and technology have equal access to services and are not subjected to discrimination on the basis of the nature of their disability manifestations.

The NF/AH waiver is an umbrella for three distinct waivers (NF-A/B, Subacute, and Acute), each with distinct eligibility criteria. A common misperception exists that these waivers form a continuum. In fact, there are numbers of individuals who exceed nursing facility skilled level of care (Level B) (and whose needs cannot be met on the NF-A/B Waiver), but who do not meet the specific requirements for Subacute level of care (and therefore do not qualify for the Subacute Waiver). Disability Rights California has represented individuals who remain needlessly in acute care hospitals for extended periods of time, are placed inappropriately in NF-B facilities with resulting hospitalizations and/or negative health consequences, or who remain inadequately served at home and at risk of unnecessary institutional placement.

This gap could be filled in a number of ways, including:

- **Consider the actual likely institutional placement as the institutional alternative for cost cap purposes. For individuals with developmental disabilities, this could include a developmental center, ICF-DD-CNC, or ICF-DDN. For others, an acute care hospital may be the only alternative.**

The current NF/AH Waiver utilizes five institutional equivalents for cost-cap purposes (NF-A, NF-B, Distinct Part, Subacute, and Acute Hospital). Disability Rights California recommends that the NF/AH Waiver be clarified or amended so that for individuals who meet the level of care for and who would otherwise likely be placed in the nursing facility or acute units at State Developmental Centers (DC), the institutional equivalent for cost-neutrality purposes be deemed the DC cost. For individuals who meet the level of care for and who would otherwise likely be placed in a Continuing Nursing Care (CNC) facility, the institutional equivalent for cost-neutrality purposes be deemed the CNC facility cost. This is consistent with federal requirements and would result in the most cost-effective use of public

funds, as it will allow such individuals to live at home with HCBS Waiver services with maximum federal matching funds for services they need to remain there.

- **Eligibility for Subacute Waiver Services should include those who functionally equal the standards set out in the Subacute regulation and manual of criteria.**

From our experience, a review of residents of Subacute facilities would include those who do not squarely meet the Subacute requirements but who functionally equal the requirements in terms of technology dependence and level of nursing care needed. That flexibility is consistent with how Social Security applies its disability standards – i.e., you are found to meet a listing of impairment by equaling or medically equaling a listed impairment such as when a particular eligibility criterion is much more severe than that required and offsets another area.

Moreover, increasingly, children and adults and their families are electing to forego tracheotomies for quality of life reasons, including avoiding the increased risk of infections that goes with having a tracheostomy, avoiding another surgery and the frequent laser surgery follow ups, retaining the ability to speak or make noise, and importantly, retaining the ability to swim or float in a tub which is an important source of pleasure and relaxation for many persons who are otherwise unable to move about. The evaluators should treat children and adults who would have to have tracheotomies if admitted to institutional care as if they had tracheostomies for purposes of determining eligibility for Subacute level of waiver support.

Thus, we recommend that the Subacute Level of Care criteria be amended to include individuals who: a) have a comparable level of nursing needs as Subacute level individuals but who do not meet the Subacute facility eligibility criteria; b) were eligible for the pediatric Subacute level of care but who do not meet more rigid adult Subacute facility level of care criteria; and/or c) would qualify for a tracheostomy but who, for quality of life reasons, have opted not to have one and therefore have an increased and/or more complex suctioning needs.

- **Address the needs of those whose care needs significantly exceed those which can be met within the staffing requirements of level B nursing facilities by including such persons under Distinct Part cost-cap.**

We have clients whose needs are beyond those that can be appropriately addressed by level B nursing facilities within the staffing limitations of such nursing facilities and need at least the more intensive nurse staffing available in distinct part nursing facilities. These are persons with more intensive needs – such as a need for frequent suctioning on an as needed basis of once an hour or more-- or persons with multiple interacting medical problems requiring frequent assessment and adjustment of care regimens. These persons, if in a level B nursing facility, endure multiple hospitalizations or complications that should not occur if they received the needed level of nursing care. Our experience is that hospital based distinct part units have significantly higher staff to patient ratios than the minimum requirement, as reflected in daily rates double that of freestanding Level B nursing facilities. Thus, allowing a higher Waiver rate for such individuals would be in line with their higher need level.

Consistent with the State's obligations under 42 C.F.R. §§ 441.302(c)(1)(ii) and 441.302(d); 42 U.S.C. § 1396n(c)(2)(C) to identify and authorize an institutional placement for those found eligible for waiver services but choose institutional services instead, and consistent with the requirement to ensure the health and safety of waiver participants, we therefore suggest that the "distinct part" language currently at Appendix B-1: 3 (7-1-07) be amended as follows:

Distinct Part NF, described in Title 22, CCR, sections 51124 and 51335, and the waiver participant is currently residing in or has been discharged from a Distinct Part Facility, having spent 30 consecutive days or greater and was referred to the waiver within 90 days after discharge, *or has care needs beyond what can be met in a Level B nursing facility as evidenced by hospitalizations or complications while in a Level B Nursing Facility, or if not in a level B nursing facility, evidence that no*

*Level B nursing facility would accept the waiver applicant because of the intensity of his or her care needs.*

### **3. Ensure Cost Equity for HCBS Services**

Steps should be taken to increase the nursing facility Level B cost-cap to be equivalent to the nursing facility Level B Medi-Cal rate; and to drop the individual cost cap in favor of an aggregate cost-cap. Federal requirements for HCBS waivers include a cost-neutrality provision. Federal cost-neutrality means that providing HCBS waiver services to an individual, or a group of individuals, cannot cost the Medi-Cal program more than serving that individual, or that group of individuals in an institutional setting. California applies a more rigorous standard that favors institutional placements. Specifically, California's 2010 nursing facility Level B waiver cost-cap (set at \$51,115), which is \$9000 below the average nursing facility Medi-Cal rate, poses an unnecessary and unwarranted barrier to community living for many individuals with higher care needs. Moreover, despite a federal option to utilize an "aggregate" cost-cap, California has opted instead to utilize an "individual" cost-cap, which does not permit the State to offset the waiver costs of higher need individuals with the lower cost of lower-need individuals. The Developmental Disabilities HCBS waiver utilizes such an aggregate cost-cap with great success.

### **4. Set Aside Slots for Children who need Institutional Deeming**

We urge that sufficient slots be set aside on the NF/AH Waiver for children who do not qualify for the DD Waiver and need institutional deeming to qualify for full-scope Medi-Cal, so that waiting lists for children can be avoided. Children with severe disabilities should be treated fairly and should not be denied access to services because they do not qualify for regional center services.

A child who needs to qualify for NF/AH waiver services in order to qualify for institutional deeming and EPSDT because of the severity of his/her disability may wait for up to two years to secure such services. The current system excludes children with significant needs, such as: children with significant physical disabilities and illnesses; and children who are clients of regional centers but ineligible for the DD waiver because they are under the age of three and are receiving prevention or early intervention services and have not yet been found eligible for ongoing regional center services.

Private health plans do not cover the community-based services needed by children with severe disabilities: home nursing, occupational, physical and speech therapy beyond minimal limits, medical supplies, durable medical equipment that costs more than \$2000, environmental adaptations, case management. Access to institutional deeming is needed to ensure timely access to services and treatment to minimize the long-term disabling effects of the disability and resulting cost to the public system.

For a child with severe disabilities who is ineligible for Medi-Cal because of family income or resources, the alternatives to institutional deeming through a waiver are particularly unpleasant: (a) placing a child in a medical facility until he or she qualifies for Medi-Cal so that the child will qualify for Medi-Cal upon returning home under the Continuous Eligibility for Children program, (b) the primary wage earner leaving the family home so that the child can qualify based on the at-home parent's income, (c) placing the child with a grandparent or relative caregiver. These harmful results could be avoided simply by making institutional deeming available to these children and their families.

#### **5. Take Advantage of Special Income Eligibility Option for Medically Needy Seniors and Persons with Disabilities**

The Special Income Eligibility Option is discussed at pages 200-201 of the Mollica & Hendrickson 2009 Recommendations to Improve Access to Home and Community-Based Long-Term Care for Californians.

<http://www.hcbs.org/files/162/8056/CARreport.doc> This option provides for a living allowance of up to 300% of the SSI Federal Benefit Rate (FBR) – or \$2022 in 2011 based on the 2011 FBR of \$674.

Taking advantage of the Special Income Eligibility Option would keep in the community severely disabled persons qualifying for NF/AH waiver services through the Medi-Cal medically needy program, which requires them to spend all their income above \$600 a month each and every month on medical and remedial services. This option could allow them to retain an additional living allowance so that they would have the same countable income to live on as persons who qualify for Medi-Cal under the Aged & Disabled Federal Poverty Level (A&D FPL) program: \$1138 a month. The 1915(c) HCBS waiver preprints expressly provide for this flexibility in the post-eligibility process. That post-eligibility flexibility has been underscored by the Affordable Care Act's (ACA) provision of this option for eligibility under 1915(i) waivers as an exception to comparability. The ACA's

amendments to Section 1915(i) authorizes a State to set higher living allowances for persons who also meet the acuity requirements for eligibility under a 1915(c) or (d) or (e) waiver. See the CMS Dear State Medicaid Director Letters SMDL#s 10-013 and 10-015 (August 6, 2010)

For current residents of nursing facilities whose countable income would leave them with only \$600 to live on under the Medi-Cal medically needy program if they were in the community, post eligibility flexibility is a key to enabling them to return to the community. Absent a willing family member or friend to move in with for little or no rent, there is no community option for them. Remaining in a nursing facility is their only option. Setting the post eligibility income level at the A&D FPL income ceiling would give them a chance at living in the community – and would result in significant savings to the State by enabling more people to leave nursing facilities.

#### **6. Add Peer Mentoring and Structured Day Program Services**

The transition from an institutional life to an independent one is often fraught with initial difficulties such as feelings of isolation, lack of social interaction, and fear of independence. Such issues are not trivial — they can lead to medical and mental health deterioration and re-institutionalization. Peer mentoring services can provide essential support during and after the transition to mitigate these difficulties. San Francisco, for example, has experienced success with its peer mentors working with Laguna Honda residents on successful transitions to the community, and significant retention there. If peer mentoring were a NF/AH Waiver service, more communities would be able to include it among the services offered to increase successful community placements.

Many individuals leaving nursing facilities desire meaningful day activities and work, and many people need assistance to participate in a range of social and community-based activities, in order for community living to be successful. Including community-based day activity funding in the NF/AH Waiver would enable Waiver participants to participate in activities that currently may not be available to them.

#### **7. Expand Access To In-Home Nursing By Authorizing Regional Centers To Act As The Fiscal Intermediary For Nursing Services Authorized Under The NF/AH Waiver For Participants Who Are Also Clients Of The Regional Center.**

A number of NF/AH waiver participants are also clients of regional centers. Our experience is that some individual nurses and home health agencies are more willing to be vendored by regional centers than by the Medi-Cal program even though in fact the regional center vendored services are usually Medi-Cal funded. As a result regional centers have access to smaller agencies with more diverse language capabilities than those who work with In-Home Operations. These are also nurses who are familiar with both the developmental and medical needs of regional center clients who are also NF/AH waiver participants.

Thus we request that those regional centers who wish to do so be authorized to act as fiscal intermediaries for nursing services authorized for their clients under the NF/AH waiver. Such authorization would also mean that the regional center's case management services would also be involved in the delivery of services.

#### **8. Expedited Enrollment on NF/AH Waiver**

Individuals can easily be admitted to nursing facilities within a matter of days, but the process for enrolling on the NF/AH Waiver takes much longer. There currently is not even a procedure for discharging ventilator using patients from acute inpatient rehabilitation hospitals to Subacute waiver slots. Disability Rights California recommends that the State implement Welfare and Institutions Code section 14132.99(c) by developing a mechanism by which individuals who are at imminent risk of nursing facility placement will be informed about, and assessed for, NF/AH Waiver services in an expedited manner (i.e., three days). Individuals who are determined eligible for and desire NF/AH Waiver services should have their applications processed in an expedited fashion in order to avoid unnecessary nursing facility placement. To ensure availability of Waiver slots, the Waiver should increase the overall number of NF-A/B slots and/or set aside slots for such individuals.

#### **9. Remove Institutional Placement Requirement for Distinct Part Eligibility**

The current NF/AH Waiver requires that in order to qualify for the Distinct Part facility rate, an individual must reside in such a facility for 30 consecutive days or more. This provision should be removed, consistent with the ADA and the *Olmstead* decision. Specifically, an individual should not be forced to submit to unnecessary institutionalization in order to qualify

for a community-based alternative. Such a requirement is not cost-effective, places the individual at risk of losing his or her housing, and poses health and other risks to the individual. As with the other Waiver levels of care, qualification for the distinct part rate can easily be evaluated based on the individual's health and functional status, as well as the likelihood that in the absence of the Waiver, the individual would be placed in a distinct part facility.