



State of New Mexico
Human Services Department
Human Services Register



I. DEPARTMENT
NEW MEXICO HUMAN SERVICES DEPARTMENT

II. SUBJECT
8.314.5 NMAC, DEVELOPMENTAL DISABILITIES HOME AND COMMUNITY-BASED
SERVICES WAIVER

III. PROGRAM AFFECTED
(TITLE XIX) MEDICAID

IV. ACTION
FINAL RULE

V. BACKGROUND SUMMARY

New Mexico Human Services Register Volume 41, Register 22, dated August 14, 2018, issued the proposed rules, 8.314.5 NMAC, Developmental Disabilities Home and Community-Based Services Waiver.

On June 21, 2017, the Department received approval from the Centers for Medicare and Medicaid Services (CMS) for a renewal of the 1915 (c) Home and Community-Based Services (HCBS) Developmental Disabilities Waiver, with an effective date of July 1, 2016. The program rule, 8.314.5 NMAC, is being amended to align services and definitions with the approved Waiver renewal and the CMS HCBS Settings Final Rule.

Section 9-8-6 NMSA 1978, authorizes the Department Secretary to promulgate rules and regulations that may be necessary to carry out the duties of the Department and its divisions.

Notice Date: August 14, 2018
Hearing Date: September 13, 2018
Adoption Date: Proposed as December 1, 2018
Technical Citations: 42 CFR 438 subparts A through J

A public hearing was held on September 13, 2018, to receive public comments and testimony on this proposed rule. The Human Services Department (the Department) received written comments from two commenters in response to the proposed rule changes.

Summary of Comments:

8.314.5.7(A) Activities of Daily Living (ADLs)

The commenter states the change would narrow the scope of activities included in the definition of "activities of daily living". While the change would conform to the more generally used definition of ADLs, it eliminates a number of activities currently included in the definition used for purposes of the DD waiver. That could limit the services available under other sections of the regulations, including respite (8.314.5.15(C)(2)), intensive medical living (8.314.5.15(C)(5)(c)), assistive technology (8.314.5.15(C) (14)), and customized in-home supports (8.314.5.15(C) (19)). The commenter opposes this change and urges the Department keep the current language of the definition.

The commenter also notes that a number of the revisions proposed for 8.314.5 NMAC were done specifically to emphasize a requirement of person centered planning throughout the DD Waiver system. Examples of this are found in the definition of Person Centered Planning in 8.314.5.7 (J) NMAC, which has been greatly expanded in the proposed rule, significant additions to 8.314.5.9 NMAC that require the provision of services in fully integrated community-based settings, and an added emphasis on person centered planning and recipient participation in Interdisciplinary Team Meetings in proposed 8.314.5.15 (C)(1)(J) NMAC. A focus on person centered planning and fully integrated settings throughout the DD Waiver system is both laudable and necessary, both because it is required by the CMS Final Rule mandating fully integrated settings and because assisting individuals to make determinations about their own activities and supports is the right thing to do. However, any attempt to foster a philosophy of person centered planning and choice is completely irrelevant without the consistent provision of assistance with and services related to IADLs. Without that assistance, living safely in the community would become impossible for a significant number of DD Waiver participants. Because of these concerns, it is important that the previous, broad definition of ADL that incorporated IADLs be reinstated. The deletion of the proposed change must occur in order to make it clear that services that are now covered that include assistance with IADLs will continue to be provided and will not be denied in the future.

Department Response: The Department's change to the definition of Activities of Daily Living (ADLs) follows the Centers for Medicare and Medicaid Services (CMS) recognized definition. The definition does not limit the supports available for services under other sections of the regulations. Rather, specific activities are outlined in the scope of the available waiver service, and the recipient's support needs would be identified in the resulting person-centered planning. The language stands as proposed.

8.314.5.8 Mission Statement

The commenter supports the proposed deletion of the "Mission Statement" and states the language is patronizing and offensive and is particularly inappropriate when applied to individuals with severe intellectual and developmental disabilities.

Department Response: The Department acknowledges but disagrees with this comment.

8.314.5.9 DEVELOPMENTAL DISABILITIES HOME AND COMMUNITY-BASED SERVICES

The commenter recommends that Part A should read “is **fully** integrated” instead of “is integrated”. This section of the proposed rule also states that provider agencies are required to ensure that all settings are fully integrated, provide choices for program participants, and ensure that the rights of program participants are respected. These directives are clearly crucial if person centered services are going to be delivered throughout the DD Waiver system. The commenter suggests that the process the Department uses to ensure provider compliance with these directives be more detailed and should be included in the body of the regulation for the public to see. Will DD Waiver service providers ensure that these requirements are met through self-assessment, or will those individuals receiving services be surveyed to provide input? How often must a provider be assessed to ensure compliance? And, if a DD Waiver service provider is struggling to provide a fully integrated setting, what steps will the Department take to ensure that the provider has the support it needs to address the problem? The commenter is aware that some of these issues were addressed in the plan submitted to CMS detailing the transition to fully integrated community settings. Those steps should be incorporated into the rule for the public to see, follow, and evaluate. DD Waiver service providers are doing excellent work in New Mexico and the waiver participants who rely upon them will benefit if the procedure for transitioning to a fully integrated and person-centered approach is outlined fully, clearly, and without ambiguity.

Department Response: The proposed language is in alignment with the CMS Home and Community Based Services (HCBS) Final Rule released January 16, 2014. Additional comments related to the Statewide Transition Plan are noted by the Department. The language stands as proposed. The Statewide Transition Plan can be viewed at the following link:
<http://www.hsd.state.nm.us/LookingForInformation/cms-home-and-community-based-services-final-rule.aspx>

8.314.5.10(U)(7) Qualifications Of A Socialization And Sexuality Education Provider

Agency

The commenter states the regulations currently include a bachelor’s degree in special education as a qualifying credential to act as a Socialization and Sexuality Education provider. The Department proposes to add psychology, social work and public health administration as related fields that would also qualify a provider for this service. The commenter agrees that psychology and social work appear to be appropriately related fields and notes that they are already included in the regulations for those holding advanced degrees. However, the commenter questions the inclusion of public health administration (PHA), which is not included in those earlier subsections.

Department Response: The Department is in agreement and has removed “public health administration” as a related field.

8.314.5.15(A) DDW COVERED WAIVER SERVICES FOR IDENTIFIED POPULATIONS 18 YEARS OF AGE AND OLDER

The commenter notes general approval of the language used to define the use and purpose of the Proposed Budget Levels (“PBL”). It is very important for the Department to be clear that while the PBL can be considered when a DD Waiver budget is being created, the participant and his or her IDT will ultimately decide what budget to submit for consideration following a person-

centered planning process. That budget can be over or under the amount suggested by the PBL, and the PBL does not limit any request for services or require a set budget amount. In other words, ultimate control of the budget creation process rests with the individual and his or her IDT. The Commenter believes that the language proposed by the Department clearly conveys these important principles, and appreciates that effort. The Commenter suggests the first line of this section read: “proposed budget levels (PBL) which the IDT use for **person centered planning**” instead of “proposed budget levels (PBL) which the IDT use for planning.”

Department Response: The Department is in agreement and has incorporated the suggested change adding “person centered planning.”

8.314.5.15(A) DDW COVERED WAIVER SERVICES FOR IDENTIFIED POPULATIONS 18 YEARS OF AGE AND OLDER

The Commenter suggests the word “assumption” should be replaced by the phrase “most common” in the second sentence of the section.

Department Response: The Department has revised the sentence in accordance with the DD Waiver Service Standards. The phrase “assumptions about types and amounts of services” has been replaced with “typical service options”.

8.314.5.15(C)(5)(a) Family Living

The Commenter states the proposed revision to this section caps provider agency responsibility for substitute coverage for the direct care providers at 750 hours. This restriction should be removed, and the amount of substitute care necessary to facilitate family living services should be decided by the individual and his or her IDT on a case by case basis. Family living is a key service for ensuring person centered community access, and substitute care for those providing those services is crucial if the service is going to operate properly. In contrast, overly broad restrictions will discourage its use and limit opportunities for community participation. Caregivers should be given maximum opportunity to utilize substitute care, based upon need and not arbitrary system wide caps or restrictions.

Department Response: Substitute coverage for direct care providers was updated to 750 hours in August 2012. The Department revised the rule in accordance with the DD Waiver Service Standards. The language stands as proposed.

8.314.5.15(C)(6)(d) Customized Community Supports

The Commenter state the Department proposes to delete “classroom” from the settings where Customized Community Supports may be provided. No reasoning is given for this change, so it is not clear why the change is proposed. However, the Commenter objects to it. As recognized in the existing regulations, these services are of a type that is appropriate to be provided in a school setting for an individual of school age. If the Department’s justification is that these services should be paid for by the school under the Individuals with Disabilities Education Act and not covered by Medicaid, that is contrary to federal law and policy, which place the responsibility to pay for these services on the Medicaid program. See 42 USC §1396b(c), 34 CFR §34.154.

Department Response: The Department has added the word “classroom” to be aligned with the service description as outlined in the approved waiver application.

8.314.5.20 RIGHT TO A HSD ADMINISTRATIVE HEARING

The Commenter states the Department's notice of the proposed regulatory changes, dated August 14, 2018, describes the changes to this section as "clarifying" the agency review conference (ARC) and fair hearing process, but the proposed change goes much further and would eliminate the right of a recipient to an ARC, giving the Department of Health complete control over whether such a conference takes place. The commenter objects to this change.

Department Response: The Code of Federal Regulations at section 431.200 define State Medicaid requirements for a recipient fair hearing. The Department offers agency conferences as a courtesy to individuals who want to resolve issues prior to the hearing or to provide individuals and families with information to other applicable resources. The Department believes that the agency conference is a useful tool and will continue to offer and encourage agency conferences. The language stands as proposed.

VI. RULES

These amendments are contained in 8.314.5 NMAC, Developmental Disabilities Home and Community Based Services Waiver. The final register and rule languages are available on the HSD website at: <http://www.hsd.state.nm.us/LookingForInformation/registers.aspx> and <http://www.hsd.state.nm.us/providers/rules-nm-administrative-code-.aspx>. If you do not have internet access, a copy of the final register and rules may be requested by contacting the Medical Assistance Division at (505) 827-1337.

VII. EFFECTIVE DATE

This rule will have an effective date December 1, 2018.

VIII. PUBLICATION

Publication of these rules approved by:



BRENT EARNEST, SECRETARY
HUMAN SERVICES DEPARTMENT