

Testimony
Senate Bill 2276
Senate Human Services Committee
January 24th, 2023

Chairwoman Lee and Members of the Senate Human Services Committee, my name is Brittany Armstrong Hanson, I am here today in both a personal capacity as a parent of three children with developmental disabilities, two of which are current ID/DD waiver recipients and as the Council Chair of the North Dakota State Council on Developmental Disabilities.

Please accept this testimony in addition to my personal testimony, previously uploaded, in favor of SB 2276 and as a rebuttal to the DD Division's Testimony and submission of their fiscal note.

Data collection and reporting for purposes of quality assurances, systems integrity, and improvement in and development of services to meet the unmet and ever-changing needs of individuals with disabilities in North Dakota is also historically lacking or at least non-transparent. Requests for results of reviews, numbers of recipients in differing service options, utilization service units/hours versus authorized service units/hours have gone unfulfilled by individuals, advocacy groups, and hired consultants performing systems assessments. When discussing modifying current service options to expand who is eligible to provide the service, the DD Division indicated that they were unaware of the need for the modification and that providing for payment of services to a legally responsible caregiver has never been brought to their attention. This response directly contradicts modifications made to all ND Medicaid Waivers in response to the COVID-19 emergency, Appendix K Amendments. The State submitted Appendix K amendments, for each of the 1915(c) waivers offered in ND, modifying service options within the waivers, beginning in April 2020, with further amendments submitted in March 2021, and rollbacks of the modifications in January 2022.

Examples of modifications in the waiver amendments were:

- > Allow relatives of waiver beneficiaries who reside in the home and out of the home to provide services prior to background check and training for 90 days.
 - o Seen across all waivers
- > Permit payment for services rendered by family caregivers or legally responsible individuals if not already permitted under the waiver
 - o As seen in ID/DD Waiver modifications to multiple Service Options:
 - Residential Habilitation, Independent Habilitation, Day Habilitation, Prevocational Services, Small Group Employment Services may be rendered by legally responsible individuals, who are not residing with the participant, when they have been hired by the DD licensed provider. May be rendered by legally responsible individuals when they have been hired by the DD licensed provider agency. The DD licensed provider agency is responsible for ensuring that services are provided, and billing occurs in accordance with requirements.
- > Modify provider qualifications (for example, expand provider pool, temporarily modify or suspend licensure and certification requirements)
 - o As seen in HCBS Aging modification to the Family Personal Care service option:
 - Payment will only be made to legal spouses or relatives who reside in the same home. Individuals who choose a provider who is not their legal spouse or other live-in relative will be served under Medicaid State plan personal care.
 - Individual providers - Increase maximum rate for family personal care from \$76.67 to no more than \$150 per day. The change in rate is based on the same rate methodology included in the approved waiver. It is being increased to be competitive with other programs and is being increased to assure access to

services and the long-term sustainability of a sufficient provider pool of family caregivers.

We need efficient data collection and the ability to extrapolate the data collected to evaluate the quality and appropriateness of service options from development to implementation and receipt in a constant feedback loop that actively engages with stakeholders ensuring compliance with state and federal law and CMS guidance as a standard of measurement when determining how the State can and/or is meeting the needs and filling the unmet needs of individuals with varying disabilities in North Dakota.

The DD Division indicates in Appendix H: Quality Improvement Strategy of the [Application for 1915\(c\) HCBS Waiver: IID/DD Traditional Medicaid Waiver 1.1.2021](#) that it has done a review and analysis of all settings ... where Home and Community Based Services are provided ... the state has determined ... In-Home Supports waiver service ... to fully comply with the regulatory requirements because ... individualized services are being provided in the recipient's private home and allow full access to community living according to their needs and preferences. Recipients or their primary caregiver get to choose what services and supports they want to receive and who provides them.

The Department will assure continued compliance with the HCB settings rule by implementing and enforcing policy that will assure the continued integrity of the HCB characteristic that these services provide to waiver recipients. In addition, the State monitors all individual care plans, conducts case management reviews, client interviews/ quality reviews to assure clients are free to choose what services and supports they wish to receive and who provides them.

In response to the DD Division's submitted [fiscal note](#).

The DD Division stated that SB 2276 creates a new service, to be available in North Dakota's Medicaid 1915(c), waivers that would support a person who is served by the waiver by allowing the person's primary caregiver (legally responsible person) to forgo work outside of the home when the person has extraordinary care needs.

The DD Division further stated that Section 1 of SB 2276 requires the Department to create a new service for individuals who provide extraordinary care to eligible individuals.

Section 1 2. actually states that "The department shall work with the centers for Medicare and Medicaid services to implement a service option that will allow payment to a legally responsible individual who provides extraordinary care to an eligible individual. This service option must be available for participants in the Medicaid 1915(c) waivers and any subsequent Medicaid waivers to be developed.

Nothing in Section 1 requires the department to "*create a new service*". To clarify, there are multiple 1915(c) waivers and each waiver has multiple service options. We are talking about *one* of the service options within the waivers. *To further clarify, the service described as the in-home supports service option is currently offered in the ID/D Waiver and Children's Medically Fragile Waiver. Similar service options are currently available in the Autism Waiver, Children's Hospice Waiver, and the Aging and Disabled HCBS Waiver as Respite and Family Personal Care. Different service option names reflect the slight variations to the service options depending on the waiver recipient target population and administering division.

<https://www.ndpanda.org/sites/www/files/documents/ndmedicaidchart.pdf>

<https://www.nd.gov/dhs/info/pubs/docs/medicaid/hcbs-waiver-1915i-comparison.pdf>

None of these similar waiver service options nor the In-Home Supports option has a singular FTE specifically assigned for administration and management of the service option. For that matter, there are currently approximately 5,600 ID/DD Waiver recipients and one FTE that in-home supports and equipment and supplies requests are routed to. I am not certain that these two duties are the only duties this particular FTE is responsible for.

The DD Division stated: To be able to administer this service, the Department would need three new FTEs, one to administer the DD program, one to administer the Medical program and one who would provide service authorizations and monitoring of service delivery.

The Department does NOT currently utilize an entire FTE to separately administer “the DD Program” for any other service option within any 1915(c)-waiver.

The Department does NOT currently utilize an entire FTE to separately administer the “Medical program” for any other service option within any 1915(c)-waiver.

The Department does NOT currently utilize an entire FTE to separately “provide service authorizations and monitoring of service delivery” for any other service option within any 1915(c)-waiver.

The DD Division state: The fiscal impact related to these three FTEs would be \$566,432 for the 2023-2025 biennium. The Department would contract out an Intermediary fiscal agent who would work with and on behalf of the individuals who would utilize the service. There would be an initial set up fee with the Intermediary estimated at \$50,000. The Department estimates that the Intermediary fiscal agent would charge \$95 per client per month, and this is set to begin July 1, 2024, with a cost of \$364,800.

The department already contracts with a fiscal agent, Veridian Fiscal Services, that self-directed service recipients utilize for all billing purposes, after Department issues service authorizations.

Veridian would not need to alter service delivery as far as self-directed services are concerned, from brief idea sharing discussions I have had with higher level individuals at Veridian. There are a few minor changes to the Employee Agreement and Statement of Relationship forms currently utilized by self-directed employers. Electronic Visit Verification is also NOT required of legally responsible individuals providing in-home cares/services, per CMS.

The DD Division stated: The Department would need to build an interface to the Medicaid Management and Information System (MMIS) to be able to receive the service authorizations and issue payments to the family caregivers. The interface is estimated to cost \$200,000.

The Department estimates the program would serve 320 individuals at various age levels (due to different levels of need at each different age group). The hourly rate would be \$25.26 with a maximum of 40 hours per week. The estimated cost for the service delivery for the 2023-2025 biennium is \$10,914,826.

The rate stated is for self-directed services. At \$25.26 per hour, the authorization amount, is further reduced by employer taxes. As the legally authorized representative, I am the employer of record for my boys in-home support services, using the tax rate that I was recently notified of, by the currently contracted fiscal agent, $\$25.26 \times 10.03\% = \22.72 per hour being available to pay an employee.

Now, compared to a licensed DD Provider rate, and self-directed services, with ND's services delivery options, cannot offer any fringe benefits, despite being able to pay an employee a full-time wage.

***The Department's budget does not include requests for appropriation for all of the hours and units that they have authorized. The department has stated that they budget based on utilization, not authorization. I challenge you to understand that. This fiscal note is far-fetched, at best, and is based on maximum utilization and shows no offset by reduction of utilization in hours already authorized in the current in-home supports service option that would be used if the Department "creates a new service option" in that option or an equalization, a wash, of hours currently authorized that would just simply be used as currently authorized.

The DD Provider rate is reported in units, \$9.10/unit or \$36.40 per hour.

5,830 Waiver recipients in Waiver Year 1 – 6,830 Waiver recipients in Waiver Year 5

[1.1.2021 ND ID/DD HCBS Waiver](#) (*Appendix J: Cost Neutrality Demonstration cost neutrality tables pgs 189-202*)

A fiscal agent is used for self-directed service payments. In self-directed services, participants directly bill or invoice to the Fiscal Agent. The Fiscal Agent pays the vendor, codes the claims as to specific type, and bills through the state claims payment system. Monthly balance sheet reports are available for participants and the Department. The DDPM monitors individual budgets and account balances.

Billings flow directly from the provider of the service to the State's claim payment system for all services except self-directed services. In self-directed services, participants directly bill or invoice the Fiscal Agent. The Fiscal Agent pays the vendor, codes the claims as to specific type, and bills through the state claims payment system.

Application for a §1915(c) Home and Community-Based Waiver [Version 3.6, January 2019] Instructions, Technical Guide and Review Criteria https://wms-mmdl.cms.gov/WMS/help/35/Instructions_TechnicalGuide_V3.6.pdf

Technical Guidance

CMS policy is that payments for personal care or similar services delivered by legally responsible individuals (as defined in state law but typically the parent of a minor child or a spouse) are not eligible for federal financial participation. Legally responsible individuals do not include the parent of an adult beneficiary (including a parent who also may be a legal guardian) or other types of relatives, except as provided in state law). 42 CFR §440.167 prohibits FFP for payments to legally responsible individuals for the provision of state plan personal care services. This prohibition is based on the presumption that legally responsible individuals may not be paid for supports that they are ordinarily obligated to provide. See also Section 4442.3.B.1 of the State Medicaid Manual.

Through an HCBS waiver, a state may elect to make payment for personal care or similar services that are rendered by legally responsible individuals when such services are deemed extraordinary care so long as the state specifies satisfactory criteria for authorizing such payments. The criteria must include how the state will distinguish extraordinary from ordinary care. By extraordinary, CMS means care exceeding the range of activities that a legally responsible individual would ordinarily perform in the household on behalf of a person without a disability or chronic illness of the same age, and which are necessary to assure the health and welfare of the participant and avoid institutionalization.

State policies should include additional safeguards such as:

- *Determining that the provision of personal care or similar services by a legally responsible individual is in the best interests of the waiver participant. A state*

should consider establishing safeguards when the legally responsible individual has decision-making authority over the selection of providers of waiver services to guard against self-referral.

- Limiting the amount of services that a legally responsible individual may furnish. For example, a state may decide to limit the amount to no more than 40 hours in a week and thereby take into account the amount of care that a legally responsible individual ordinarily would provide.*
- Implementing payment review procedures to ensure that the services for which payment is made have been rendered in accordance with the service plan and the conditions that the state has placed on the provision of such services.*
- Addressing other foreseeable risks that might attend the provision of services by legally responsible individuals.*

In addition, states should be aware that unless the waiver uses institutional eligibility rules that disregard the family income of a child waiver participant, paying a legally responsible relative may affect the child's eligibility for Medicaid.

To summarize, when a state provides for payment to legally responsible individuals for the provision of personal care or similar services, the services will be equivalent to services supplied by other types of providers, with some additional protections. The waiver must specify:

- Whether payment is made to the parent(s) of minor children, spouses, or both or other (as defined by state law);*
- The waiver personal care or similar services for which payment will be made;*
- How the state distinguishes extraordinary care from ordinary care and any limitations of the circumstances under which payment will be authorized;*
- Limitations on the amount of services for which payment will be made;*

- *How it is established that the provision of personal care or similar services by a legally responsible individual is in the best interests of the participant; and,*
- *How it is determined that payments are made for services rendered.*

CMS Review Criteria

When the waiver provides for the payment for personal care or similar services to legally responsible individuals for extraordinary care, the waiver specifies:

- *The types of legally responsible individuals to whom payment may be made;*
- *The waiver personal care or similar services for which payment may be made;*
- *The method for determining that the amount of personal care or similar services provided by legally responsible individual is “extraordinary care,” exceeding the ordinary care that would be provided to a person without a disability of the same age;*
- *Limitations on the amount of personal care or similar services for which payment may be made;*
- *How it is established that the provision of personal care or similar services by a legally responsible individual is in the best interests of the participant; and,*
- *The procedures that are used to ensure that payments are made for when the waiver provides for the payment of services furnished by relatives or legal guardians:*
 - *The types of relatives or legal guardians to whom payment may be made are specified.*
 - *The waiver services for which payment may be made to relatives or legal guardians are specified.*

- *When relatives or legal guardians may be paid to furnish waiver services only in specific circumstances, the waiver specifies the circumstances and the method of determining that such circumstances apply.*
- *Limitations on the amount of services that may be furnished by a relative or legal guardian are specified.*
- *When a legal guardian who exercises decision making authority may be paid to provide waiver services, the waiver specifies how it is established that the provision of services by the guardian are in the best interests of the participant.*
- *The waiver specifies the procedures that are employed to ensure that payment is made only for services rendered and that services are furnished in the best interest of the individual.*

SENATE BILL NO. 2276

Introduced by

Senators Cleary, Dever, Lee

1 A BILL for an Act to create and enact a new section to chapter 50-24.1 of the North Dakota
2 Century Code, relating to legally responsible individuals providing Medicaid waiver services.

3 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

4 **SECTION 1.** A new section to chapter 50-24.1 of the North Dakota Century Code is created
5 and enacted as follows:

6 **Eligibility of legally responsible individuals.**

7 1. As used in this section:

8 a. "Extraordinary care" means care exceeding the range of activities a legally
9 responsible individual would ordinarily perform in the household on behalf of an
10 individual without extraordinary medical needs, and which is necessary to assure
11 the health and welfare of the individual and avoid institutionalization.

12 b. "Legally responsible individual" includes a legal decisionmaker, guardian, or
13 parent who is next-of-kin to an individual with extraordinary medical needs.

14 2. The department shall work with the centers for Medicare and Medicaid services to
15 implement a service option that will allow payment to a legally responsible individual
16 who provides extraordinary care to an eligible individual. This service option must be
17 available for participants in the Medicaid 1915(c) waivers and any subsequent
18 Medicaid waivers to be developed.

19 3. A waiver under this section which provides for coverage of self-directed in-home
20 support services must include coverage of services provided by a legally responsible
21 individual.

22 4. The department may utilize an annual assessment of an eligible individual under this
23 section to determine the level of care authorized and to determine the best interests of
24 the individual.

- 1 5. Under this section, the payment rate for a legally responsible individual must be the
- 2 same as the rate for a nonlegally responsible individual.