Community Support Providers
OF SOUTH DAKOTA

April 25, 2024

Dear Senior Policy Advisor Laura Ringling and DHS Secretary Shawnee Rechtenbaugh:

At our meeting on March 5, 2024, to discuss options for crisis stabilization in South Dakota, you asked providers to identify any Administrative Rules of South Dakota (ARSD), regulations, or rigidity of interpretation by state staff that is negatively impacting Community Support Providers (CSPs) to a degree that could jeopardize the participant's community-based services.

Providers agree that temporary placement in a high acuity setting outside of the CSP is the most needed deliverable in the project for crisis stabilization. And after much discussion, providers agree that there are no "quick wins" as it relates to the repeal of rules/regulations so that CSPs are better equipped to handle participants who are in crisis.

However, providers have identified some rules, regulations, and/or interpretations that DHS/DDD could consider amending to aid providers in serving this challenging population. When state rules overreach federal requirements, it creates a burden for providers and service teams, and can negatively impact participants/guardians who do not want multiple levels of oversight for aspects of their service plan and personal lives.

Providers have brought forward on several occasions over the past few years, recommendations for changes to administrative rules or CHOICES waiver language without success. We encourage you to consider changes at your earliest possible opportunity.

Sincerely,

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(1) CSP Concern:

CMS does not expect gradual dose reductions of psychotropic drugs when not clinically contraindicated (per Chapter 24-Subpart G- 483.45 (e). Participants who use psychotropics for mental health diagnosis (not for behavior) should not be required to have a plan of reduction, nor an annual review by a Human Rights Committee.

Recommended ARSD change: 46:11:05:09.01. Use of psychoactive medications.
~~The participant shall have protections through the human rights committee of the provider of direct HCB services for the use of all psychoactive medications. Psychoactive medications shall be reviewed annually by the human rights committee of the provider of direct HCB services and when there is a change in type of medication.~~
The participant's ISP shall include documentation of the team's consensus that the benefits of any psychoactive medication prescribed as either treatment or stabilization or both of psychiatric condition outweigh any harmful side effects ~~and include a plan for reduction or elimination of the psychoactive medication.~~ Any side effects shall be documented in non-technical terms.

(2) CSP Concern:
CMS does not require a restoration plan for rights modifications. CMS only requires due process (per Chapter 42, Subchapter C, 441.725 (b)13).

Recommendation for CHOICES Waiver: Amend pages 140, 144, 146, and any other page that references "restoration plans" to strike the use of the phrase.

Recommended ARSD change: 46:11:03:10. Restoration plans. Repeal

Recommended ARSD change: 46:11:03:08. Rights restriction -- Due process.
Current Language: The rights of the participant may only be restricted to protect the participant from endangering self or others or to provide specific services or supports as provided in SDCL 27B-8-52. Any restriction of rights shall document the least restrictive alternative appropriate to meet the needs of the participant ~~and include a restoration plan as provided in § 46:11:03:10.~~ Prior to restricting a participant's rights, the provider of direct HCB services shall require the participant, the participant's ISP team, the participant's parent, if the participant is under 18 years of age, or the participant's guardian, to review and approve each restriction. The human rights committee of the provider of direct HCB services shall act as an impartial party to review and approve or deny each restriction prior to implementation and at least annually thereafter. (language changes taken directly from CFR Chapter 24. Subpart G-441.725).

(3) CSP Concern:
Recently (past couple of years), there has been a significant change in how rights restrictions are viewed and when these measures are allowed to be implemented into service plans. In the past, providers felt some liberty to implement when assessed safety concerns dictated it appropriate. The focus on rights restrictions came about with the implementation of the HCBS Settings Rule. The administration's view on rights restrictions has made it more difficult to serve challenging participants in HCBS settings.

(a)Federal regulation 441.725(b)13 Person-Centered Service Plans states that providers must document the positive interventions and supports used prior to any modifications to the person-centered service plan. Section 483.450(b)iii states that for behavior supports/ rights restrictions, providers must ensure, prior to the use of more restrictive techniques, that the client's record documents that programs incorporating the use of less intrusive or more positive techniques have been tried systematically and demonstrated to be ineffective.

Providers might question: Were these federal regulations on restrictions talking about life-safety matters OR were they talking about more general access issues like people having access to their money, mail, and friends/visitors without intrusive restrictions placed on them?

Providers are concerned that there may be overreach by DDD in the interpretation of rights restrictions and CMS requirements. For example, the federal regulation lacks clarity about the "systemic" trial of alternative/ positive interventions and demonstration of ineffectiveness. From the provider's perspective, supporting a participant with safety concerns such as sexual or physical offenses against others, elopement without safety skills, access to items that can be used as a weapon or to start a fire, or other harmful behaviors warrants a very small window of time for the trial of techniques before implementing a structured, safety modification.

Recommendation: CSPs would like to return to a commonsense process in which safety-related rights modifications require only basic documentation of the issue and the assessed need, and the safety plan (restriction) to be implemented to promote an environment where the participant and others are safe.

(4) CSP Concern

(b)Federal regulations also require the participant to consent to all rights restrictions. A participant who is legally competent to refuse a restriction may do so. For circumstances involving safety, such as a history of sexual offenses, the provider is left with few options to structure a program and service setting that is safe for the participant, staff, and community. The current, as well as the proposed termination rule, leaves the community and providers at risk if the participant does not have an option for a higher acuity setting that requires, upon admission, consent for any restrictive measures.

The "termination rule"- ARSD 46:11:08:05 Termination of Services - is currently under consideration for a rules revision. The matter of consent (or a participant's refusal to consent to a rights modification that is deemed necessary by the provider/team for the safety of the participant or others) has not been addressed however.

State staff have testified on more than one occasion this year that providers have the right to choose who they serve. This right should be afforded to providers not just during the admission consideration process, but also extend into active service delivery. In cases where a provider deems a rights modification is necessary for safety, it should be expected that a participant consents to remain in services. (SDCL) 27B-1-17 defines informed consent and requires consent to be voluntary and without coercion. However, affording the right to informed consent should not mean the participant is free from living with the consequences

of their decisions. A reasonable consequence of refusing to consent to safety-related modifications could be the refusal of a provider to serve the participant.

Recommended ARSD change: 46:11:08:05 Termination of Services
Insert language that affords providers the right to terminate services if consent is not obtained for services and/or service plan modifications that are deemed necessary to ensure the health, safety, welfare of the participant and others.

(5) CSP Concern
Per the CHOICES Waiver, behavior support plans may only be implemented following the completion of a comprehensive functional "analysis" if alternative nonrestrictive procedures have been proven to be ineffective.

A functional "analysis" must be conducted under the direction of a Board Certified Behavior Analyst (BCBS), of which the state of South Dakota licenses these clinicians. Most CSPs do not have BCBAs. A comprehensive functional behavior "assessment" can be completed without a licensed BCBA. Providers previously requested that DDD change ARSD language to correct this discrepancy.

Recommended ARSD Change: 46:11:05:05:02: Behavior Support Plans may only be implemented following the completion of a comprehensive functional ~~analysis~~ assessment if alternative nonrestrictive procedures have been proven to be ineffective.