September 14, 2018

New Mexico Human Services Department
Office of the Secretary
ATTN: Medical Assistance Division Public Comments
madrules@state.nm.us

Re: Comments concerning proposed changes to 8.314.5 NMAC

To Whom It May Concern:

Disability Rights New Mexico (DRNM) is a private, non-profit organization whose mission is to protect, promote, and expand the rights of individuals with disabilities in our state. As a significant part of that mission, DRNM provides legal representation and advocacy services to many clients who utilize services available through the Developmental Disabilities Home and Community-Based Services Waiver (“DD Waiver”). These services assist our constituents and other similarly situated persons to live and thrive within their community.

The DD Waiver provides services that are absolutely critical to the well being and independence of thousands of New Mexicans with disabilities. The program enables participants to reside in fully integrated community settings with opportunities for independence and freedom that are a crucial part of life for every individual. DRNM is hopeful that the following comments will support the administration of the DD Waiver program, which must be revised in the following manner to provide greater support and choice for each participant served by the waiver.

8.314.5.7 (Definitions; Activities of Daily Living)

The definition of Activities of Daily Living (“ADL”) has been significantly narrowed by the proposed changes to 8.314.5 NMAC. The previous definition of ADL incorporated both ADLs and Instrumental Activities of Daily Living (“IADL”). IADLs, which include activities fundamentally necessary for independent living in the community such as house cleaning, shopping and meal preparation, have been completely omitted from both the proposed ADL definition and the “Definitions” section as a whole. This is an unwelcome development. DRNM is concerned that this change could mean that services vital to community access and safety that are currently covered could now be denied under the new definition.
DRNM 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.

8.314.5.9 (Developmental Disabilities Home and Community-Based Services)

-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. DRNM suggests that the process HSD uses to ensure provider compliance with these directives needs more detail-detail that 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 HSD take to ensure that the provider has the support it needs to address the problem?

DRNM 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. Both the DD Waiver service providers 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.
First, DRNM notes its general approval of the language used to define the use and purpose of the Proposed Budget Levels (“PBL”). It is very important for HSD 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. DRNM believes that the language proposed by HSD clearly conveys these important principles, and we appreciate that effort.

Second, DRNM suggests that 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.” Finally, in the second sentence of the section, the word “assumption” should be replaced by the phrase “most common”.

The proposed revision to this section caps provider agency responsibility for substitute coverage for the direct care providers at 750 hours. DRNM asserts that this restriction should be removed, and that 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.

In the proposed changes to 8.314.5.15 NMAC, the classroom is specifically eliminated as a venue where an individual can receive customized community supports. This appears to be an unreasonable restriction; a DD Waiver participant should be able to receive community supports anywhere that would further the goals of community integration, participation, and personal growth. Further, simply refusing to cover services because they would be provided in a school setting is not permitted. 34 CFR § 300.154. The proposed change should be removed, restoring the classroom as a place where customized community supports can be received.

The current version of 8.314.5.20 NMAC states that individuals utilizing DD Waiver services have the right to participate in an agency review conference prior to a fair hearing if they choose to. The Department of Health (“DOH”) is required to offer the opportunity for a conference to all
participants who request a fair hearing, and to engage in the process once that offer is accepted. The agency conference is a useful tool that allows DOH and individuals utilizing DD Waiver services to informally resolve disputes over adverse actions without the time, energy, or expense of a fair hearing.

The proposed revisions to 8.314.5.20 NMAC remove the language that makes the agency review conference an absolute right for DD Waiver participants. Instead, DOH now has the discretion to decide whether an agency review conference will be offered to the participant. DRNM respectfully asserts that this change is a mistake that must be swiftly corrected for the benefit of both DD Waiver participants and DOH.

Simply put, the agency review conference is a useful tool for the informal resolution of disputes over potentially adverse actions. If they want or need it, DD Waiver participants receive an opportunity to discuss their case in an environment much less stressful and taxing than a formal fair hearing. DOH receives a chance to potentially resolve a case without the expense and time necessary for a fair hearing and possible appeal. DRNM has had significant success over the years resolving cases through the agency review process, to the benefit of both our constituents and DOH.

This process will be undercut if DOH retains the authority to offer this process to some but not to others. Chances are good that this process will become underutilized, and it is a certainty that participants who would have greatly benefitted from discussing their position at an agency review conference will be missed. The point of the entire administrative hearing process is to provide claimants with a manageable way to contest adverse actions that negatively impact their DD Waiver services. One of the things that makes the process more manageable for many participants is the consistent availability of the agency review conference.

The individual DD Waiver participant must be able to decide whether an agency review conference is necessary in their case. And, the positive outcomes from these meetings benefit DOH, and are a significant reason why DD Waiver fair hearings have been limited over the past few years. The change to the agency review conference process should be retracted, reinstating the conference as an absolute right to be utilized at the option of the participant.

Thank you for the opportunity to comment on these proposed regulations.

Sincerely,

Jason C. Gordon
Litigation Manager
Disability Rights New Mexico