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Social Services Appropriations Subcommittee
Utah State Capitol
350 North State Street
Salt Lake City, UT 84114

Sent Via Electronic Mail

Re: New Choices Waiver Funding: #14 on the New Funding Request Sheet, HCBS Waiver Rate Increase from the Governor's Proposed Budget

Everette Bacon

Jodie Palmer

Joey Hanna

Libby Oseguera

Lurena Mead

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Meghann Mills

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Rena Rogers

Committee Members:

The Disability Law Center (DLC), established in 1978, is a private, independent nonprofit organization designated by the governor as the federally-mandated Protection and Advocacy (P&A) agency for the State of Utah. We engage in high-impact individual and class action legal representation, as well as investigation, outreach, public policy, and other nonlegal advocacy to advance our mission to enforce and strengthen laws that protect the opportunities, choices, and legal rights of people with disabilities in Utah. The DLC advocates for the full inclusion of people with disabilities into the larger community by promoting comprehensive, quality community-based services as an alternative to institutional settings.

Sheridan Taylor

Stacy Stanford

We are grateful for the opportunity to address the subcommittee today regarding significant issues with the New Choices Waiver (NCW), Utah's Medicaid funded nursing home diversion program. The NCW was designed to help individuals remain in their homes or in assisted living settings, rather than being placed in nursing homes. However, the program is currently facing a crisis. Many assisted living facilities (ALFs) are increasingly unwilling to accept or retain NCW participants. We have received reports of numerous facilities either discharging current NCW residents, refusing to admit new NCW participants, or withdrawing from the NCW program entirely. In some cases, ALFs have even shut down their operations altogether. Furthermore, NCW participants and their families are being burdened with additional fees, including charges for the use of power wheelchairs.

EXECUTIVE DIRECTOR

Adina Zahradnikova

LEGAL DIRECTOR

Laura Henrie

Our understanding is that these issues primarily stem from the extremely low Medicaid reimbursement rates for providers under the NCW. In addition to the inadequate NCW rates, the majority of nursing homes in the state benefit from the Upper Payment Limit (UPL) program, which provides enhanced Medicaid reimbursements. By prioritizing these enhanced payments for nursing homes while failing to properly fund the NCW, the state has created a system that disproportionately favors institutional care over community-based settings. This imbalance is evident in

Utah's long-term care data, which shows that 32.8% of adults receiving Medicaid reside in institutions—significantly higher than the national average of 21.3%.

The state's policy choices are having severe and troubling consequences. One example is a client who was abruptly discharged from an assisted living facility without notice, based on claims that she posed a safety risk. Our investigation revealed that the discharge was, in fact, a result of her participation in the NCW program, and that her behaviors—stemming from mild dementia and co-occurring mental health conditions—were non-aggressive. At the same time, another resident, who was a private pay patient, was not discharged despite being accused of sexual assault by multiple residents. Unfortunately, the only available placement for our client was in a nursing home that had one of the highest COVID-19 mortality rates in the state, where she tragically passed away in 2020. This case underscores the devastating impact of current policies that prioritize institutional care over community-based alternatives.

Under Title II of the Americans with Disabilities Act (“ADA”), section 504 of the Rehabilitation Act, and the *Olmstead* Supreme Court decision, government has an obligation to serve people with disabilities in integrated settings appropriate to their needs. It is long held Supreme Court precedent that unnecessary institutionalization is a form of discrimination prohibited by Title II of the ADA. Without an increase to the Medicaid reimbursement rates for the NCW, assisted living facilities will continue to discharge and/or refuse to accept NCW participants and the more reliant the state will become on segregated settings—violating Title II of the ADA. The federal Fair Housing Act prohibits state governments from enacting policies or practices that disproportionately impact protected classes, including individuals with disabilities. It also forbids housing providers, such as assisted living facilities, from discriminating against people with disabilities. 42 U.S.C. §§ 3601-19. Additionally, the state Fair Housing Act adds source of income as a protected class, which would include individuals receiving the NCW. *See* Utah Code 57-21-5.

We are deeply concerned that Utah’s current administration of the New Choices Waiver (NCW) program fails to ensure people with disabilities have access to community-based care, in violation of Title II of the Americans with Disabilities Act (ADA). Furthermore, the state’s current policies and practices may constitute disability discrimination under both the state and federal Fair Housing Acts. We would urge the state to immediately increase reimbursement rates for the NCW and to also evaluate its system to prevent and address the institutionalization of individuals in nursing homes who could be living in the community. This request is before the Committee from the Governor’s Proposed Budget, and it is #14 on the New Funding Request Sheet, HCBS Waiver Rate Increase.

Again, we thank you for the opportunity to provide this feedback to the Social Services Appropriations Subcommittee. Should you have any questions or require additional information, please do not hesitate to reach out.

Sincerely,



Nate Crippes
Public Affairs Supervising Attorney
Disability Law Center