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## CHAPTER 3

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### Division Operates With Minimal Formal Rules and Makes Policies for the Adult Waiver With Minimal Input

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***There are no rules establishing critical procedures, such as how people move from the waiting list to the waiver.***

Statutes and rules guiding the Developmental Disabilities Division do not specify how the Division will employ the Adult Waiver as the state's sole means of providing services to developmentally disabled adults. Further, the Division has made major policy decisions related to the Adult Waiver, such as changing eligibility criteria, without formal public input or announcement. It lacks rules that establish critical decision-making procedures, including the priority in which people move off the waiting list into waiver services. Rather than formally promulgated rules, the Division relies upon manuals and other provisional documents to convey its procedures and practices.

***The Division relies on provisional documents to convey procedures and practices.***

From a broad range of interviews with system stakeholders, we heard the perspective that the Division is unpredictable, especially with respect to determining who is added to the waiver. We did not conduct the detailed file reviews that would be necessary to substantiate this view. However, the existence of this perception about a program that administers more than \$57 million in annual benefits to individuals is a concern. Promulgating rules reduces the likelihood of arbitrariness and supports a general sense of fairness in administration. Rules also bind administrators, facilitate oversight, and provide predictability about agency behavior.

The Adult Waiver has been in place in Wyoming for more than a decade and now provides an average of upwards of \$57,000 in funding to more than 1,000 individuals, with the number of participants and costs increasing annually. While some Division procedures are primarily administrative, others affect the access developmentally disabled adults have to beneficial services. Thus, the Division and the Department of Health should take steps to formalize Adult Waiver substantive procedures and definitions by formally promulgating them in rules.

## Rules Do Not Reflect the Use of the Waiver

***Existing statutes are broad enough to authorize the current use of the waiver.***

With the implementation of the Weston Consent Decree and the Adult Waiver, the state significantly changed the way it provides services to adults with developmental disabilities. Statutes have not been modified to reflect this major change, but they are still broad enough to encompass the implementation of the waiver by the Department of Health, through the Division. For example, Department of Health statutes (W.S. 9-2-102 through 9-2-109) charge the Department with administering a comprehensive state program for developmental disabilities, and with establishing policies and procedures for the operation of community-based programs. The Division also falls under the authority of the Wyoming Medical Assistance and Services Act (W.S. 42-4-101 through 42-4-118) in that this act lists federal home and community-based waiver services among the 28 it covers.

### **Adult Waiver program operates with minimal promulgated rules**

***The rules that apply to the Adult Waiver are general, and apply to all state Medicaid HCBS waivers.***

Of concern, however, is the dearth of rules that describe how the Department of Health, through the Division, implements the Adult Waiver. The few specific rules for adult developmentally disabled programs and services are dated and for the most part, no longer applicable. They date from when services to developmentally disabled adults were provided under the Community Human Services Act (W.S. 35-1-611 through 35-1-628). Although the Division continues to list this act as its enabling state statutory authority, Division officials also say that it no longer applies to how services for developmentally disabled adults are provided under the waiver.

At present, the Division points to the Wyoming Medicaid Rules for Home or Community Based Waiver Services (Chapter 34) as the primary rules for the Adult Waiver program. These are very general rules that apply to all HCBS waiver services offered by the state, and they date from 1995. Chapter 34 provides little to no specificity about any of the waivers, and points readers to Division documents and Department of Health manuals and bulletins for details. For example, Chapter 34 states that eligibility will be pursuant to the standards and procedures specified in the state application to Medicaid to operate the waiver.

***Department officials say applications and amendments are available on request.***

### **State waiver applications to Medicaid are not reviewed outside of the Department of Health**

The Adult Waiver application is not a publicly conceived or distributed document, although Department officials say it is available for review upon request. The Division, through the State Office of Medicaid, submits the application and subsequent amendments directly to Medicaid. The regional Medicaid office approves these changes, but such changes do not undergo a formal review process outside of the Division and the State Medicaid office. Even service providers, who are fundamentally affected by waiver provisions, reported that they do not have the opportunity to review this application or its amendments.

### **Division Makes Policy Decisions Independently**

As the last chapter discussed, the Division made the major policy decision to eliminate the State Contract program and adopt the Medicaid HCBS waiver as the sole means for adult services. It also broadened eligibility so that more people can be designated at-risk for institutionalization. Although the Division said it had broad support for these policy decisions, its approach to gathering input is informal. Division officials told us they extensively communicated this information to providers, clients, and families through one-on-one and other meetings. However, providers along with advocate representatives told us that the Division makes most major decisions internally.

***The Division's provisional method of establishing requirements lets it bypass rule promulgation procedures.***

Because the Division does not establish its program requirements in rules, it is not bound to follow formal procedures for rule promulgation. These steps include sending copies of rules to the Governor and the Legislature, holding public hearings, summarizing public comments, and filing final rules with the Secretary of State. Further, the Division's informal approach does not allow for formal communication of impending policy change, or for announcement that policy changes have been made.

The Division maintains that the Legislature and the Governor approved its elimination of the State Contract program and broadening eligibility by approving appropriations based on

budget narratives in which these actions are specified. However, from our review of the Division's budget narrative for the biennium in which both these changes occurred (FY 2001-2002), there was no straightforward mention of these impending actions.

### **Eligibility criteria decisions affect costs, involve policy**

State waiver officials told us that ultimately, the Legislature has the final say on any changes that increase costs, such as expanding the number of waiver slots. But the Division did not involve the Legislature in the decision to change eligibility criteria, or even directly communicate that it occurred. According to a primer produced by the U.S. Department of Health and Human Services, setting the clinical criteria for an optional Medicaid service is a fundamental component of state financial decision-making, since the number of people served is a major determinant of total program costs.

***Eligibility criteria involve two competing policy objectives: ensuring service for those with needs, and controlling costs.***

The primer also states that setting the clinical eligibility for waiver services involves competing policy objectives: ensuring that the criteria identify all individuals who have legitimate needs for assistance, while needing to control overall costs. By independently making the decisions to restrict eligibility in 1999 and to broaden it in 2001, the Division did not allow open policy discussions to occur.

### **Prevailing Perception Is That the Division Is Unpredictable**

We talked with many individuals professionally involved in seeing that developmentally disabled citizens receive services. A common statement from almost all of them was that the Division's decisions and actions are unpredictable. The Division maintains that new issues and problems constantly occur in this field. We acknowledge that this is a complex program, complicated by the many individual circumstances presented by clients and providers. Nonetheless, the widespread perception that the Division is unpredictable and reactive is a concern.

**There is a concern with how people move from the waiting list onto the waiver**

***Eligible people can move onto the waiver at any time, as long as there is funding for them.***

People who qualify for waiver services cannot immediately access them unless there are empty slots on the waiver and available funding. In this case, individuals go on the waiting list, which is the subject of lawsuits in other states. Eligible people move onto the waiver at any time during the year when slots open up, as long as there is funding for them. Division officials determine who on the waiting list moves onto the waiver and they say they do this according to the severity of people's conditions and needs.

***The Division has complete discretion in determining who moves up from the waiting list.***

However, many stakeholders we interviewed said while this might be the Division's intention, it does not always happen. There was broad agreement, and also discomfort, that high-level advocacy moves people off the waiting list ahead of others with more severe problems. Another perception is that the Division moves people onto the waiver according to how their needs balance with available funding. Thus, a person with less expensive needs can move on sooner than a more severely disabled person. We did not review files to substantiate these perceptions, but note that without formal rules to determine the priority with which people move from the waiting list into services, the Division retains complete discretion in this important and contentious area.

The Division has been more forthright about its procedures for funding emergency placements. These are people who qualify for the waiver throughout the year, whom the Division admits to the waiver using existing funding, and before others on the waiting list. A Division manual, not formal rules, defines an emergency as a "condition of homelessness for currently served persons, or life or health threatening situations involving eligible persons with developmental disabilities." A Division official added that abuse, neglect, and potential for exploitation are also emergency considerations, and that the Division obtained extensive input on these criteria.

## **Division Uses Manuals That Change Annually**

***The Division cautions that information in its manuals is subject to change.***

Chapter 34 of the Wyoming Medicaid Rules for HCBS Waivers allows the Division to issue “provider manuals, provider bulletins, or both to providers and/or other affected parties” to interpret the very general provisions of the actual rules. As a result, the Division issues an annual Adult Waiver provider manual designed to guide and aid primarily case managers, and other interested persons through the waiver process.

It supplements the manual with other publications, such as an eligibility determination handbook and many bulletins, which are issued throughout the year. The Division cautions that information in these documents is subject to change, because “There are no stated or implied guarantees contained in this manual or, for that matter, the Adult Waiver.”

***It relies on provisional documents to convey policies and procedures that warrant a higher level of consistency.***

Division manuals serve primarily to communicate administrative procedures and requirements to the many service providers involved in caring for developmentally disabled adults in the state. Most of the procedures in the provider manual are technical, step-by-step directions for the planning and provision of services. The Division’s frequent changes in these procedures are understandably troublesome to providers, who must make corresponding changes in their business practices. But of more concern is that the Division relies upon provisional documents to convey program policies and procedures that warrant a higher level of consistency.

### **Division should distinguish management procedures from program rules of general applicability**

Some aspects of the implementation of the Adult Waiver, such as eligibility criteria and how people will transition off the waiting list onto the waiver, are not internal management procedures but issues of public policy. The Wyoming Administrative Procedure Act requires all agency statements of general applicability that implement, interpret, or prescribe law or policy to be promulgated as rules.

Further, participating in the rulemaking process would require the Division to bring proposed changes to the attention of the public. This would give stakeholders as well as the general public an opportunity to study them and offer official and documented comments. The rulemaking process would thus allow interested parties outside of the Division to have formal input into its policies and decisions. Now, Division officials make decisions according to their reading of stakeholder consensus on issues, and their interpretation of what will keep the state current with national developments.

**Recommendation: The Division should promulgate formal rules, not provisional manuals, to establish important program rights, definitions, and procedures.**

***Rules support a general sense of fairness in administration.***

To establish policies and procedures for the Adult Waiver, the Division currently relies upon manuals that it acknowledges offer no guarantees. The Division and the Adult Waiver program could benefit from formally promulgated rules, which reduce the likelihood of arbitrariness and support a general sense of fairness in administration. At the least, we believe there are substantive issues defining waiver clinical eligibility, and procedural issues such as how the Division fills waiver openings that warrant formal rules.

***Rulemaking would allow input from the Department of Health Advisory Council as well as legislative review.***

The Division has tended to internally make policy decisions of which other state policy makers should be aware. The rulemaking process requires an opportunity for public comment, which would enable the public as well as affected persons to have some input. This would allow opportunity for input from the Department of Health Advisory Council, which statute requires be consulted on proposed Department rules and policies. Also, the process for legislative review of rules would facilitate the Legislature's review of policy changes.

Finally, we understand that the Department of Health has traditionally allowed the Division to operate with great autonomy,

so that it could advocate independently for its budget and manage its programs from a position of disciplinary expertise. However, we believe that the Department should temper this autonomy in decisions that affect important state policy. The Department of Health statutory Office of Planning and Administration (W.S. 9-2-105) could become involved in ensuring that the Division's program policies are more broadly determined, coordinated, and communicated.