DOR DEPARTMENT of REHABILITATION
Employment, Independence & Equality

Edmund G. Brown Jr., Governor

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Jason Bennett
U. S. Department of Health and Human Services
1 Massachusetts Avenue NW
Washington, D.C. 20201

January 8, 2016

Dear Mr. Bennett:

RE: Docket No. HHS-OS-2015-0012
RIN 0985-AA10
Independent Living Services and Centers for Independent Living

The California Department of Rehabilitation (CDOR) welcomes the opportunity to provide comment on the Independent Living Notices of Proposed Rulemaking (NPRMs) issued by the United States Department of Health and Human Services (HHS) in order to further ensure that Californians with disabilities can live, learn, and work in their communities, in accordance with the Rehabilitation Act of 1973 (Act), as amended by the 2014 Workforce Innovation and Opportunity Act (WIOA).

In developing comments, CDOR sought and received input from the public, including from Directors and staff of Independent Living Centers, or Centers for Independent Living, and staff to the California State Independent Living Council (SILC). We identified areas in which the proposed regulations align with or further, the goals and purposes of WIOA and the independent living program. In addition to these areas, however, CDOR has identified some areas that must be modified:

1. Indicators of Minimum Compliance [Page 70730 in Preamble]
2. June 2014 Guidance and Person Centers Planning Requirements [Page 70731 in Preamble]
3. “Guidance” or “Guidelines” To Be Developed
4. Definitions [1329.4]
5. Reporting [45 CFR 1329.6(b)]
6. Enforcement and Appeals Procedures [45 CFR 1329.7]
7. Authorized Uses of Funds for Independent Living Services [45 CFR 1329.10]
8. Role of the Designated State Entity [45 CFR 1329.12]
9. Establishment of a SILC [45 CFR 1329.14]
10. Authorities of the SILC [45 CFR 1329.16]
11. General Requirements For A State Plan [45 CFR 1329.17]

12. Continuation Awards to Entities Eligible For Assistance Under the CIL Program[45 CFR 1329.21]

Indicators of Minimum Compliance [Page 70730 in Preamble]

The preamble to the Notice of Proposed Rulemaking (NPRM) states, "Proposed changes [to the minimum compliance indicators] will be published in the Federal Register in accordance with the requirements of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35."

It is important for a rule to comply with the federal Administrative Procedure Act (APA). Any "statement of general or particular applicability and future effect designed to implement, interpret or prescribe law or policy or describing the organization, procedure or practice requirements of an agency…" is a rule as defined by Title 5 United States Code section 551(4). All rules must follow the formal procedures outlined in the APA to become effective, in addition to the Paperwork Reduction Act if the rule is requiring the collection and reporting of information. Compliance with either the Paperwork Reduction Act or the Administrative Procedure Act does not excuse compliance with the other.

The APA requires a public comment period for regulations in which the public can comment on the content of the proposed rule, not just the burden of the collection. The CDOR maintains that the right of the public to participate in the rulemaking process, particularly those who will be most impacted by regulations, is essential to developing sound public policy.

June 2014 Guidance and Person Centered Planning Requirements [Page 70731 in Preamble]

The preamble to the NPRM describes guidance implementing Section 2402 (a) of the Affordable Care Act issued by HHS on June 6, 2014 and states, "we believe it is important to clarify that the June 2014 guidance, including person-centered planning requirements, applies to IL programs."

In accordance with the language in the June 6, 2014 guidance, CDOR is requesting HHS to clarify that the June 6, 2014 guidance only applies to entities within HHS to provide guidance to those entities when developing and revising regulations, policies, guidance, and other relevant actions. CDOR is requesting that HHS clarify to all

recipients of independent living grants that the guidance cannot be used as "a basis of enforceability on non-Departmental entities." (June 6, 2014 letter from Kathleen Sebelius to Heads of Operating Divisions and Heads of Staff Divisions)

"Guidance" or "Guidelines" To Be Developed

Several of the proposed regulations reference guidelines or guidance to be developed by the Administrator of the Administration for Community Living (ACL). These are found in proposed 45 CFR sections 1329. 7(a), (b); 1329.15(a); 1329.17(b); 1329.23 (a).

It is important for a rule to comply with the federal Administrative Procedure Act (APA). Any "statement of general or particular applicability and future effect designed to implement, interpret or prescribe law or policy or describing the organization, procedure or practice requirements of an agency…" is a rule as defined by Title 5 United States Code section 551(4). All rules must follow the formal procedures outlined in the APA to become effective, including allowing an opportunity for the public to comment. The CDOR maintains that the right of the public to participate in the rulemaking process, particularly those who will be most impacted by regulations, is essential to developing sound public policy.

In addition to future guidance not satisfying the APA, establishing the guidance or standards into regulation will provide clarity, save time, and ease the administrative burden on designated state entities (DSEs), CILs, and SILCs in complying.

Definitions [1329.4]

Proposed 45 CFR 1329.4 provides a definition of independent living core services that is identical to the definition in the Act. The preamble to the proposed regulations states, "To achieve the right balance between clarity and flexibility in implementing the new core services, ACL is considering the appropriate level of detail…Under our proposed approach, we have chosen not to define the terms "institutions," "home and community-based residences" and "at risk of institutionalization" at this time. CDOR supports the flexible approach of ACL. CDOR believes that it is critical that the federal regulations provide flexibility, so that the unique needs of each Californian with a disability seeking independent living services throughout our diverse state may be met most effectively.

Reporting [45 CFR 1329.6]

Proposed 45 CFR 1329.6(b) requires the DSU in each state to "submit a report in a manner and at a time described by the Administrator, consistent with section 704(c)(4) of the Act." CDOR finds that this rule exceeds statutory authority as the referenced statute, section 704(c)(4), only requires the designated state unit to "submit such additional information or provide such assurances as the Administrator may require." The statute does not require the DSE to file a report, unlike section 704(m)(4)(D) which explicitly requires the CILs to "submit such reports with respect to such records as the Administrator determines to be appropriate." CDOR recommends deleting subsection (b) of 1329.6.

Enforcement and Appeals Procedures [45 CFR 1329.7]

The prior independent living regulations at 34 CFR Parts 364-366 outlined enforcement and appeals procedures for CILs funded under Title VII C grants but did not outline a corresponding process for Title VII B funds. Proposed 45 CFR 1329.7 outlines detailed enforcement and appeals procedures for both Title VII B and Title VII C funds.

CDOR has identified three major concerns with the proposed enforcement and appeals process. First, subsections (a)(4) and (b)(3) of proposed 45 CFR 1329.7 outline a procedure for when there is "an imminent threat of termination or withholding of funds." Both of these subsections exceed statutory authority. The Act does not provide any authority for termination of Title VII B funding, let alone imminent termination of funding and the Act explicitly requires 90-day notice before Title VII C funding may be terminated. CDOR recommends deleting subsections (a)(4) and (b)(3) as they exceed statutory authority.

Second, CDOR identified that the enforcement and appeals procedures outlined in proposed 45 CFR 1329.7 contain many discretionary steps that HHS may engage in before reducing, terminating, or withholding funds, but only contains one mandatory step. The previous Department of Education regulations contained several mandatory steps the Department of Education was required to engage in before negatively affecting Title VII C funding. To allow grantees full opportunity to correct identified deficiencies and provide assurance to the grantees that HHS will not arbitrarily skip the discretionary steps, CDOR recommends modifying the language in 1329.7 to impose mandatory steps HHS must engage in before reducing, withholding, or terminating funding.

Third, as discussed above, the Act does not provide any statutory authority for termination of Title VII B funding to DSEs. In the preamble, HHS notes that the previous Department of Education Independent Living regulations did not contain any enforcement and appeals process for Title VIIB funding. The Department of Education likely recognized that the Act did not contain any statutory authority for termination of funding and any addition in the regulations would exceed statutory authority. As WIOA did not amend the Act to provide authority to reduce, terminate, or withhold Title VII B funds, HHS should similarly recognize that the Act does not provide any statutory authority to reduce, terminate, or withhold funds and should delete subsection (b) in its entirety from the final regulations.

Authorized Uses of Funds for Independent Living Services [45 CFR 1329.10]

WIOA amended the Act to require the Administrator of ACL to reserve between 1.8% to 2% of the funds appropriated for Title VII B grants to provide training and technical assistance to SILCs.

Proposed 45 CFR 1329.10(a) requires each State, not the Administrator to reserve these funds. CDOR finds that this rule is unauthorized as it exceeds the authority of the statute. Further, proposed 45 CFR 1329.10(a) is contradictory to proposed 45 CFR 1329.13(d) which mirrors the statutory language and requires the Administrator to reserve the funds for SILC training and technical assistance, not the States.

CDOR recommends modifying 45 CFR 1329.10(a) by deleting the requirement for the states to reserve the funds.

Role of the Designated State Entity [45 CFR 1329.12]

WIOA amended the Act to prevent the DSEs from using more than five percent of the funds received by the state for administrative and related functions.

Proposed 45 CFR 1329.12(a)(5) prevents the state from using more than five percent of the federal Title VII B funds as well as the required state match for administrative and related functions. CDOR finds that this rule is unauthorized as it exceeds the authority of the statute. The Act applies the five percent cap to funds “received by the state.” State match funds are not funds received by the state, but are provided by the state. Therefore, CDOR recommends omitting proposed 45 CFR 1329.12(a)(5) absent

any need to clarify the statutory requirement that the State not expend more than five percent of the federal Title VII B funds for administrative and related functions.

Establishment of a SILC & Authorities of the SILC [45 CFR 1329.14 & 45 CFR 1329.15]

The Act prohibits the State from establishing the SILC as an entity within a State agency. WIOA did not amend this language within the Act. Proposed 45 CFR 1329.14(b) provides that the "SILC shall be independent of and autonomous from the DSE and all other State agencies." Related, proposed 45 CFR 1329.15(c)(4) provides that no "conditions or requirements may be included in the SILC's resource plan that may compromise the independence of the SILC."

CDOR finds that these related rules are unauthorized as they each exceed the authority of the statute and are contradictory to numerous other requirements in the Act and the term "independent of and autonomous from" lack the specificity needed of a regulation. The true meaning of independence and autonomy suggests no reliance upon any state agency. If promulgated, these regulations conflict with other requirements in the Act. For example, the Act requires, among others: (1) that the state establish and maintain a SILC, (2) that the Governor appoint members of the SILC, and (3) that the SILC engage in certain activities and not engage in certain activities.

CDOR recommends omitting proposed 45 CFR 1329.14(b) and 45 CFR 1329.15(c)(4) absent any need to clarify the statutory requirement that the State not establish a SILC within any state agency.

Authorities of the SILC [45 CFR 1329.16]

Proposed 45 CFR 1329.16(b)(3) requires SILCs to "comply with Federal prohibitions against lobbying." The proposed regulation fails to provide (1) a reference to the statute or regulation that prohibits lobbying, (2) what specific conduct is prohibited, (3) the scope of the prohibition, and (4) consequences of failing to abide by the prohibition.

CDOR recommends modifying the language in proposed 45 CFR 1329.16(b)(3) to provide the necessary information to SILC members to ensure that they are able to understand and comply with the prohibition on lobbying.

General Requirements For A State Plan [45 CFR 1329.17]

WIOA amended the Act to require the State Plan for Independent Living (SPIL) be signed by the Chairperson of the SILC, the director of the DSE, and at not less than 51% of the directors of CILs.

Proposed 45 CFR 1329.17(d)(2)(iii) defines what constitutes a CIL for SPIL signature purposes as: "If a legal entity that constitutes the ILC has multiple Part C grants considered as separate centers for all other purposes, it is only considered as one center." CDOR supports this definition and the clarity the regulation provides.

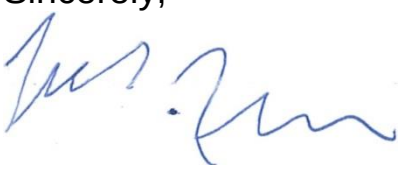
Continuation Awards to Entities Eligible For Assistance Under the CIL Program[45 CFR 1329.21]

Proposed 45 CFR 1329.21(a)(2) requires CILs to submit "an approvable annual performance report demonstrating that the Center meets the indicators of minimum compliance referenced in 1329.5" to receive a continuation award for Fiscal Year 2016. Proposed 1329.5 references the new indicators of compliance that HHS has not yet developed. Therefore, to receive continuation awards for FY 2016, the CILs would have to demonstrate that they meet indicators of compliance that have not yet been developed.

CDOR recommends modifying subsection (a) to read, "In any State in which the Administrator has approved the State plan required by section 704 of the Act, an eligible agency funded under Part C in a fiscal year may receive a continuation award in the succeeding fiscal year if the Center has…".

This recommended language removes the references to any particular year, thereby resolving the inconsistent language for FY 2016 and aligning the regulation with HHS' stated intent in the Preamble to continue to apply the current indicators of minimum compliance until new indicators are developed.

Sincerely,



Joe Xavier
Director