

May 27, 2014

The Administration on Intellectual and Developmental Disabilities (AIDD), Administration for Community Living, US Department of Health and Human Services is pleased to provide comments on the Lanterman Act (“Lanterman Act” or “Act”) revisions. We note that by providing these comments we are not offering legal advice or a binding opinion. The review of the proposed amendments to the Act can in no way supersede or override requirements of the Developmental Disabilities Act (DD Act) and implementing regulations.

AIDD conducted a review and analysis of the proposed changes to the Lanterman Act as part of monitoring the Council’s corrective action plan (CAP) developed in response to the MTARS report issued in December, 2013. The CAP identifies changes to the Lanterman Act as steps to addressing compliance issues noted during the MTARS. We have identified specific MTARS findings 1, 4, 5, 9, and 12 dependent on the revision of the Lanterman Act, as well as portions of other findings that involve Lanterman to an extent. AIDD received a copy of the proposed changes to the Lanterman Act as part of reviewing the Council’s progress on the CAP and provides these comments as it relates to the proposed changes addressing the compliance issues.

Overall Observations

As a general matter, the Lanterman Act, as it is proposed to be amended, continues to impose many specific requirements on the State Council to the extent that specific provisions are viewed as potentially interfering with the State Council’s independence including: 1) requiring a specific organizational structure (e.g., regional offices) which in essence directs the Council’s budget; 2) requiring the State Council to engage in certain activities – particularly direct service activities; and 3) requiring the State Council to respond to petitions or other requests.

We found proposed changes in the Lanterman Act prescribed other additive activities which are not Council activities under the Developmental Disabilities Assistance and Bill of Rights Act of 2000 (DD Act). It should be clear that any non-DD Act related activities if carried out by the Council should be funded with non-federal dollars. Furthermore, while some of the provisions in the Lanterman Act might be advantageous for the Council, at the same time, there should be caution in how much is being asked of the Council so as not to interfere with the Council’s primary responsibilities under the DD Act.

Finally, we found that generally the Lanterman Act prioritizes the State proposed activities over the DD Act requirements, which authorizes the Council program. It leaves the impression that the DD Act and its requirements are secondary to the State’s priorities for the DD Council.

AIDD recommends reviewing other states that have designated the DD Council by statute for examples of how other states have aligned state statute with the DD Act. AIDD can provide some examples if they would be helpful to the Council.

Recommendations for Sections of the Lanterman Act

This section provides specific comments, but we are not including a section by section analysis of the proposed amendments, as the aforementioned general comments can be applied to the whole of the Act.

Section 4520(b) - Directs the Council to establish regional offices. By directing the Council to establish regional offices, it interferes with the Council's independence and directs the Council how to spend their federal funds under the DD Act. The Lanterman Act would require that the Council use the federal DD Council grant award to fund the regional offices when the DD Council should determine how its federal funds are used and for what activities prescribed in the DD Act (Section 124(c)(5)(L)). Additionally, in the document titled "The Federal Review of the California State Council on Developmental Disabilities (SCDD)" (no date given) distributed to the public by the Council, on page four a reference is made to the Area Boards being renamed Regional Offices, however, the functions of the Area Board would continue. As long as the Lanterman Act requires the Council to have regional offices, AIDD is concerned that the Council will be out of compliance with the DD Act.

Section 4433.5 - Provides authority for the Department to contract with the State Council for the purpose of "providing clients' rights advocacy services to individuals with developmental disabilities who reside in developmental centers." Typically State Councils do not provide individually-based advocacy services. Instead, they are increasingly focusing their attention and resources on state level systems change activities. Indeed, while the statute and regulations allow for demonstrations that involve direct services, the regulations require such demonstrations to be "short lived" and "Council funds may not be used to fund on-going services which should be paid for by the State or other sources." 45 C.F.R. § 1386.30(e)(1). AIDD recommends reviewing the remainder of the Act for instances where it appears that the State Council is being charged with providing individually-based, direct services.

Section 4474.1 - Requires the State Department of Developmental Services to seek input from the State Council whenever there is a plan to close a State Developmental Center. While the State Council could certainly be consulted about such closures, to the extent the Lanterman Act contemplates the State Council being required to comment on and be involved in such closures conflicts with non-interference provisions contained in section 124(c)(5)(L) of the DD Act that the State will not "interfere with the advocacy, capacity building, and systemic change activities, budget, personnel, State plan development, or plan implementation of the Council."

The remainder of the Lanterman Act should be reviewed to ensure it does not impose requirements on the State Council to review various policies, closures, or regulations. Provisions to be reviewed include, but are not limited to:

- *Section 4478(a)* - requiring the chairperson of an advisory board advising a developmental center to meet annually with a representative of the State Council – to the extent this would require the State Council to become involved in advising the developmental center;
- *Section 4520* see section notes above;
- *Section 4521(b)(1)* - to the extent it is viewed as requiring regional offices;

- Other sections that cite to regional offices and regional advisory boards to the extent such offices and boards are viewed as required by law – rather than as a function of the State Council’s independently determined budget, State plan development and plan implementation. See e.g., §§ 4544-48, § 4550 (requiring honoraria for regional advisory committee members);

One way to address requirements in the Act that the State Council spend part of its budget on establishing regional offices, or for other tasks, would be to preface legislative language with caveats recognizing the State Council’s independence. For example, in section 4521(b)(1), the language could recognize that the geographic areas will be associated with regional offices, only *if* regional offices are established by the Council.

Section 4535(b)(2)(A) thru (E) - The legislation states that it contains merely “authorities” that the Council shall have, however, some of the authorities appear to go beyond State Council functions in the DD Act. For example, as discussed above with respect to section 4433.5 of the California Welfare and Institutions Code, State Councils would not typically act as appointed representatives for individual clients.

In addition, if the authorities listed in section 4535(b)(2) were to detract from the fundamental purpose of the State Council, as specified in section 121 of the DD Act, then a State Council could be viewed as not achieving the fundamental purposes of the DD Act. For instance, reviewing and publicly commenting on significant regulations proposed to be promulgated by “any” state agency, and conducting or causing to be conducted investigations or public hearings to resolve disagreements between state agencies, or between state and regional or local agencies, or between persons with developmental disabilities and agencies receiving state funds, could take a fair amount of time and money and detract from the Council’s primary responsibilities under the DD Act. If these activities are to be mandated by the state and carried out on behalf of the state, they should be funded with non-federal funds. Furthermore, there should be consideration of how much these activities would detract from the resources and efforts of the Council in meeting its requirements under the DD Act.

Finally, while the legislation says that section 4535(b)(2)(E) is merely an “authority” and not a “responsibility,” the expectation is that that the State Council will respond to a regional center’s notice that a publicly funded program is failing to meet its obligations in serving persons with developmental disabilities. To highlight this point, the language says that the “State Council shall inform the director and the managing board of the noncomplying agency, in writing, of its findings. . . the State Council shall pursue informal efforts to resolve the issue. . . the executive director of the State Council shall review the findings . . . the State Council shall review the report of the executive director and shall take any action it deems necessary to resolve the problem.” Similarly, the new 4535(f) states that the report “shall include” certain information. Again, if such activities are to be mandated by the state and carried out on behalf of the state, they should be funded with non-federal funds and should not distract from the Councils’ primary responsibilities under the DD Act.

Section 4540(b) - States the Council is responsible for developing the “California Developmental Disabilities State Plan.” AIDD suggests clarifying the wording so that it is apparent that the Council is not developing the plan for the State DD Agency, but is developing the plan for the *State Council on Developmental Disabilities*.

Section 4540(e)(2)(A) thru (E) - The activities in this section are direct service activities that perhaps should be listed explicitly as state activities and not primary functions of the Council under the DD Act. As such, it may be worth exploring if these activities should be funded through the use of non-federal funds and to ensure that such activities do not distract the Council in meeting the DD Act requirements.

Section 4544(a) - The legislation needs clarification as to whether the Council “shall” or “may” establish regional offices. We recommend consistency within the statute.

Section 4551(a)(2) and (3) - Again, these provisions interfere with the budget and personnel planning of the State Council by dictating minimum salary of the executive director, and then requiring the employment of deputy directors in particular job classifications and particular salaries. While California law may, as a general matter, contain employment provisions for State employees, including particular salary and maintenance of staff provisions within the Developmental Disability provisions of the Welfare and Institutions Code appears to conflict with the DD Act’s requirement that the State not interfere with “budget, personnel, State plan development, or plan implementation of the Council.”

Section 4553 - While this provision states that the “State Council shall have full authority on how it uses its funds for implementation of the State Plan,” such a statement seems to conflict with other provisions of the Lanterman Act, which might be viewed as dictating the Council’s use of its funds.

Sections 4562 thru 4563 - There are several instances where the Council is required to perform tasks. For example, section 4562(c) states that the Council “shall utilize information provided by the regional offices and regional advisory committees.” Section 4563(b) states that regional offices “shall participate” in the development of the implementation of the plan. Rather than requiring these activities of the State Council, the Act could ensure the independence of the Council by replacing “shall” with “may.” Or, the Lanterman Act could indicate that activities are conducted to the “extent the Council determines appropriate,” or “if the Council so directs.” Thus, section 4562(c) would then read “to the extent the Council determines appropriate,” the Council “shall utilize information. . . .” Making this type of modification throughout the Lanterman Act, would ensure the independence of the Council, which is already expressed at section 4553 of the Lanterman Act.

Section 4563(b) – This section discusses the needs of specific regions and not the needs of the state. The Council should be setting the priorities for the state for the state plan.

Section 4566 - Directs the Council to follow the state law first and federal law second. To ensure compliance with the DD Act it may be appropriate to direct the Council to follow the DD Act followed by the state statute.

Section 4648(a)(16)(b)(1)-(2) - Please see the notes under Section 4433.5 above.

Throughout the remainder of the proposed amendments to the Act, it appears that prior functions of the area boards have been reassigned to the State Council or to regional offices of the State Council. Without referencing each provision we note that the Act preserves numerous requirements that go beyond the requirements DD Act. We would recommend ensuring that the Act does not inadvertently direct the budget of the State Council or require the State Council to engage in activities that would interfere with its independence to direct its own activities, budget and

personnel. Some examples of this kind of wholesale replacement are at sections 4635, 4646, 4648(b) and (d), 4649, 4659, 4669.2, 4685.8, 4705, and 4835.

We look forward to continuing working with the Council on helpful changes to the Lanterman Act. If you have questions, please contact the AIDD Policy Analyst, Andrew Morris, at 202-357-3424 or andrew.morris@acl.hhs.gov.