



October 9, 2024

TO: Representative Will Carpenter and
Members of the Legislative Special Committee on IDD Targeted Case Management

FR: Matt Fletcher, Executive Director, InterHab

RE: Responding to CMS Conflict of Interest Concerns Regarding Kansas TCM System for persons
with intellectual and developmental disabilities (IDD)

Chairman Carpenter and members of the committee, thank you for the opportunity to share concerns raised by the organizational members of InterHab regarding how our state may choose to respond to concerns raised by the Centers for Medicare and Medicaid Services (CMS) on IDD Targeted Case Management (TCM). InterHab's members strongly believe that any attempt to respond to those concerns should only occur after significant examination of all potential ramifications that changes to TCM could cause. To date, our state has not completed such an examination.

In my following comments, I will attempt to outline unanswered questions that remain regarding how Kansas will respond to federal concerns regarding TCM. We urge that this committee engage assertively in ensuring that any state response to such concerns fully account for the following potential impacts.

Background on the Conflict of Interest Issue:

On January 16, 2014, CMS released final regulations regarding home-and community-based services (HCBS) requirements (79 FR 2947).¹ Otherwise known as the HCBS Medicaid Settings Final Rule, those regulations aimed to improve the quality of HCBS programs, promote person-centered planning, and reinforce CMS's commitment to ensuring that individuals receiving services under various federal programs could fully engage in their communities and access services in the most integrated settings of their choosing. A component of those regulations included ensuring that case management is delivered without conflicts of interest.

CMS has pushed states to respond to TCM conflict of interest concerns since that time.² Some states chose to require that service providers divest from case management provision. Other states chose different paths. If the Kansas approach would be to divest it could cause many of the largest providers of TCM in our state to eliminate their TCM programs. This would undoubtedly cause significant disruption to TCM in in communities across the entire state.

InterHab's organizational membership is comprised of many of the largest service providers across Kansas. Among our membership, more than 70% of service providers also maintain TCM programs. All those TCM programs would be in jeopardy if our state chooses to force service providers to divest from TCM provision. Forced divestiture on such a large scale across Kansas is unprecedented and will have enormous impact on TCM service capacity. A heat map of the geographic regions in Kansas would show that that our entire state would be affected if providers were required to divest from TCM. Every legislative district represented on this committee would be impacted significantly, including Kansans receiving services in your home communities.

¹ HCBS Settings Final Rule, Federal Register <https://www.federalregister.gov/documents/2014/01/16/2014-00487/medicaid-program-state-plan-home-and-community-based-services-5-year-period-for-waivers-provider>

²'Conflict-Free Case Management' on a Collision Course with Integrated Care, The Health Lawyer Volume 28 Number 4, April 2016

During the past few years, The Kansas Department for Aging and Disability Services (KDADS) has worked with Public Consulting Group LLC (PCG) to assess strategies for bringing Kansas' IDD TCM system into compliance with federal regulation (42 CFR 441.301(c)(1)(vi)). This regulation prohibits providers of home and community-based services (HCBS) from delivering both targeted case management and person-centered service planning, except in limited cases with conflict-of-interest protections.

PCG was tasked to review the current TCM system, including its structure and workflows between Managed Care Organizations (MCOs) and Community Developmental Disabilities Organizations (CDDOs), as well as analyze other state IDD TCM models. The goal of the project was to recommend ways to reduce conflicts of interest.

Options for reducing conflict of interest that have been proposed by PCG include:³

- TCM would be a function of CDDOs and non-agency-based TCM providers.
- TCM would solely be a function of non-agency-based TCM providers.
- TCM would be a function of all agencies, but not to the same individual.

The first option proposed by PCG is not feasible as it would require CDDOs to expand into service delivery, which they historically have been kept from engaging in. CMS has also expressed separate conflict of interest concerns regarding CDDOs, further reducing any chance that CDDO participation in TCM would be a viable strategy.

The second option proposed by PCG represents a draconian cleaving of TCM programs from service providers. As referenced above, this option will result in wide-spread TCM capacity challenges across the state.

The third option, while less radical, presents a multitude of logistical challenges as service providers will be required to 'swap out' TCM clients to other providers for services.

All three options would disenfranchise thousands of Kansans with IDD from the personal choices they have made regarding who they wish to be their case manager and where they wish to receive services.

Unanswered Questions:

InterHab's members believe that a significant examination of potential impacts from changing the Kansas IDD TCM system has yet to be performed. In particular, we believe that our state lacks information on the following critical questions that must be answered before a thoughtful response to federal conflict of interest concerns can be devised.

TCM capacity - Insufficient analysis has been conducted regarding the current state of TCM service capacity across Kansas. Community Developmental Disability Organizations (CDDOs), the entities responsible for ensuring provider capacity, report capacity challenges and shortages in case managers in a number of regions due to difficulties in recruitment and retention. What current capacity challenges exist? Which regions of the state do they exist in? Why have shortages in case managers occurred? What plan will the State put in place to develop adequate and sustainable TCM service capacity as part of its response to federal conflict of interest concerns?

Agency-based TCM providers forced to divest - Insufficient analysis has been conducted regarding service providers who also maintain TCM programs. How many such providers exist within the current Kansas service network? How many Kansans with IDD do they provide services to as well as TCM? What percentage of current TCM service capacity is represented by agency-based TCM programs? How many of those service providers would select to divest from TCM or alternatively divest from service provision, if forced by the State to choose? How many Kansans with IDD would be

impacted by those choices?

TCM funding adequacy – Insufficient analysis has been conducted regarding funding adequacy for TCM service provision. No examination has occurred to determine if current reimbursement is adequate to support a large-scale shift of TCM from agency-based to non-agency-based TCM, which will require massive upstarts in non-agency-based TCM programs across the state. No analysis has been performed to understand what additional funding would be required to develop replacement TCM capacity. No examination performed by the State has revealed that many other states fund IDD TCM at a much higher level and also structure TCM funding very differently than Kansas.

Service structure of TCM – No examination has focused on the differences between Kansas and many other states in terms of the funding structure for TCM. For example, Kansas IDD TCM is reimbursed in 15-minute units and only four activities (assessment, service plan development, referral and monitoring) are reimbursable. Many other states use alternative funding structures, such as “encounter-based” approaches that offer greater flexibility/workability for TCM reimbursement.

Non-agency-based TCM growth – Insufficient analysis has been conducted on past growth of non-agency-based TCM across Kansas. Have barriers to growth of non-agency-based TCM been identified by the State and if so, how does the state intend to remove those barriers? How will the State ensure the growth of non-agency-based TCM is sustainable over the long-term?

Non-agency-based TCM oversight – Analysis has not included challenges inherent in providing adequate oversight to ensure that the quality of TCM service provision will remain at acceptable levels when significant amounts of TCM service capacity will be shifted to non-agency-based TCM entities. The system has experienced challenges related to the level of quality in supports provided by such entities in the past, which will be exacerbated without an additional focus by the State to provide increased oversight.

Retention of existing TCM workforce – Insufficient analysis has been conducted regarding the current TCM workforce to determine what impacts those workers will experience in a significant shift from agency-based to non-agency-based TCM programs. For example, will case managers be able to retain their level of wages and benefits when they are forced to work for another TCM entity? Has the State adequately examined disparities that will arise for these workers such as a loss of access to KPERS benefits? Has the State modeled how wages and benefits will be impacted? Has the State surveyed this workforce to determine how many would even be willing to continue in their careers as case managers if they were forced to leave their current employer? Even simple data such as current retention and vacancy rates for case managers would be important information to have in any effort to respond to federal conflict of interest concerns.

Resources for new non-agency-based entities to become sound businesses – While the State has indicated that some remaining federal ARPA funds will be used to assist in organizational startups, has the State examined all the elements that will be necessary for new entities to become sustainable businesses? For example, will newly started entities have ongoing access to human resources and financial expertise necessary to remain stable and solvent?

Loss of personal choice and disruption of vital relationships – Personal choice is a hallmark of federal initiatives such as the CMS Medicaid Final Settings Rule. How will the State protect the personal choice of Kansans with IDD in their case management relationships in any response to federal conflict of interest concerns? Insufficient analysis has been conducted to identify how many existing case management relationships will be disrupted as well as how many Kansans with IDD may be forced from vital service settings.

A good case study regarding how Kansans with IDD may be impacted is a gentleman who submitted written-only testimony for this committee’s hearing. His name is **Dustin Winfry** and I encourage you to read his short one-page testimony. Dustin will face a series of highly unfair decisions if service providers are forced to divest of TCM. Dustin will have to choose between a case manager he personally selected to best meet his needs and the provider that helps him maintain his job in the community. Dustin also receives residential services from that same provider, which means he might also have to

relocate to another residence if he is made to choose between the case manager he wants and the services he is so successful in.

How will the State prioritize the personal choice of the thousands of Kansans with IDD, like Dustin, and minimize disruptions to them in any response to federal conflict of interest concerns?

Kansas-Based Common Sense Strategies:

InterHab’s members urge that the State look for common sense approaches that would avoid upheavals to the system and the loss of critical TCM relationships to Kansans with IDD. It is clear, from examining other states, that a wide range of allowable strategies have been approved by CMS as responses to the Medicaid HCBS Settings Final Rule.⁴

Similarly, we believe that Kansas can respond to CMS conflict of interest concerns without employing draconian measures that would upend the TCM system. We are aware of other states that have successfully employed such strategies, and CMS itself has acknowledged multiple means of TCM conflict of interest mitigation, including placing “appropriate firewalls in place” and ensuring that “there is robust monitoring and oversight”.⁵

It is important to note that the states of Montana, Colorado and Wyoming have had conflict of interest responses approved by CMS that allowed for the implementation of clear firewalls to ensure choice and access.⁶

We recommend an approach that would build upon the variety of conflict of interest responses from other states to create a best-fit solution for Kansas, including:

- **Collaborate** closely with the provider community and the individuals they serve to design a system that not only complies with regulations but also carefully addresses the challenges and disruptions that come with system redesign.
- **Flexible approach** such as considering adopting a system redesign that allows both individual and agency-based case managers, ensuring full freedom of choice among all qualified providers. This approach can be particularly beneficial in rural or frontier areas, as it enables the development of individual practitioners to meet the unique needs of these regions.
- **Recruitment and development** of additional provider agencies to ensure choice among members. Develop needs assessment to study current barriers to organizational provision of case management services (i.e., rates, workforce).
- **Identification of specific geographic** locations where a lack of access may exist and where there may be a lack of both case management providers and service providers.
- **Partner** with service providers and case management agencies to **assess and understand the financial impact** of complying with new regulations. This joint effort will help facilitate a smooth transition to the new system, ensuring that providers are adequately prepared and supported throughout the process.

4 Statewide Transition Plans, Medicaid.gov website. <https://www.medicaid.gov/medicaid/home-community-based-services/statewide-transition-plans/index.html>

5 Balancing Incentive Program, Summary of Conflict-Free Case Management, West Virginia Department of Health and Human Services. <https://dhhr.wv.gov/bms/Programs/WaiverPrograms/CFCM/Documents/Balancing%20Incentive%20Program%20Summary%20of%20Conflict-Free%20Case%20Management.pdf>

6 National Association of State Developmental Disabilities Directors (NASDDDS) Medicaid and Case Management for People with Developmental Disabilities: Structure, Practice, and Issues Third Edition April 2019 <https://www.nasddds.org/wp-content/uploads/2022/09/MedicaidCaseManagement.pdf>

Further, any system change should be driven by the following values:

- Ensure **continued provision of high-quality services and service continuity** for Kansans with IDD.
- **Maintain or increase level of access** to services for Kansans with IDD.
- **Guarantee broad communication with all stakeholders** throughout transition.
- **Understand current fiscal and network realities** in the provision of case management in both urban and rural/frontier communities.
- **Develop contingency plans** for the fiscal impact this may have on service providers.
- **Avoid unintended consequences** of change such as decreasing service access or creating new conflicts.

Finally, it's important to note that our state already has a number of conflict of interest protections built into our system, including:

- Initial and annual eligibility determination is completed by the CDDO.
- Provider choice and referral are completed through the CDDO. At a minimum, the CDDO reviews provider choice and satisfaction annually with the person and their guardian.
- Managed Care Organizations complete authorizations to approve service(s) funding.
- KDADS developed Rules of Conduct for IDD case managers to guide them on principles of practice. Among the Rules of Conduct is, "The TCM should be alert to and avoid any conflicts of interest that interfere with the exercise of professional discretion and impartial judgment. In some cases, protecting the consumers' interests may require termination of the professional relationship with the proper referral of the consumer."⁷
- Kansas administrative regulations direct that, "...no case manager shall be supervised by anyone directly responsible for the provision of any other type of direct service provided to any person or responsible for supervision of those services" and "...each case manager shall comply with the division's "rules of conduct for case managers serving people with developmental disabilities..."⁸
- Accessible pathways are established for individuals to submit grievances and/or appeals to their provider, managed care organization and/or State for assistance regarding concerns about choice, quality, eligibility determination, service provision and outcomes.
- State quality management staff track and document individual's experiences with measures (National Core Indicator) that capture the quality of care coordination and case management services.

Conclusion:

We respectfully request that this committee express its desire for common sense approaches to be applied in response to federal conflict of interest concerns. We should build upon elements already in place in our state. We should preserve existing TCM capacity to the greatest degree possible. We should pursue flexible strategies that reflect the different realities of urban and rural service provision. We should ensure that adequate resources exist for significant change initiatives. We should respect case managers as professionals and preserve their rights, wages and benefits. We should push back on any federal assertions we feel are unfair or a poor fit for Kansas. We should respect the personal choices of Kansans with IDD above and beyond all other considerations.

The members of InterHab remain committed to seeking out common sense solutions and will gladly assist our State partners in developing such responses.

⁷ KDADS Services CSP Commission Rules of Conduct for Case Managers Serving People with Developmental Disabilities Revised 3/01/2014 [case-manager-rules-of-conductcd465fa0172e66d690a7ff00009edf98.pdf](https://www.ks.gov/casemanager-rules-of-conductcd465fa0172e66d690a7ff00009edf98.pdf) (ks.gov)

⁸ Kansas Administrative Regulations 30-63-32 <https://casetext.com/regulation/kansas-administrative-code/agency-30-kansas-department-for-children-and-families/article-63-developmental-disabilities-licensing-providers-of-community-services/section-30-63-32-case-management>