



To: Michael Primo, CDLE  
From: Ellen Jensby, Alliance  
Date: December 16, 2019  
Re: Alliance Comments on Proposed COMPS Order #36

Dear Mr. Primo,

Thank you for the opportunity to comment on Proposed COMPS Order #36. Alliance is a non-profit, statewide association of Community Centered Boards (CCBs) and Program Approved Service Agencies (PASAs) that provide services to people with intellectual and developmental disabilities (IDD) across the state of Colorado. The vast majority of these services are provided through Medicaid Home- and Community-Based Services (HCBS) waiver programs. CCBs and PASAs, herein sometimes collectively referred to as “providers”, receive non-negotiable reimbursements following the delivery of these services. Reimbursement rates are established by the state, and providers cannot charge the people they serve for the services they provide. Outside of fundraising, small state programs, a handful of local mill levies, and reimbursement through the Division of Vocational Rehabilitation for some employment supports, Medicaid is the only payor for these services, which are not available through private insurance. IDD providers rely on Medicaid reimbursements for 90% or more of their revenues and cannot charge the people they serve for the services they provide. Therefore, they cannot increase their revenues to cover increasing costs without increases in reimbursement rates. When costs are increased through regulatory changes such as the COMPS Order, there is no automatic mechanism to increase reimbursement rates to cover them, placing strain on these providers’ ability to serve a population of people who rely on these supports for their most fundamental daily needs.

Since 2012, CCBs and PASAs were exempted from the Colorado Minimum Wage Order, both explicitly by the 2012 Advisory Bulletin, as well as, arguably, because their business functions did not fall under any of the four workforce categories named in the Order. The proposed COMPS Order would newly cover these entities.

CCBs and PASAs are committed to upholding the rights of their employees and paying fair wages, even though their ability to increase compensation is limited by the reimbursement rates they receive. Alliance does not oppose the application of the Order to these entities, but we do request the following narrow exemptions, without which the Order would place undue burden on these providers to continue to provide quality home- and community-based services.

### **State-Level Salary Threshold**

Agencies providing services through Colorado’s Medicaid HCBS waivers should be exempt from the state-level salary threshold.

Because providers rely almost exclusively on non-negotiable, state-established reimbursement rates for their revenues (in the case of IDD agencies, 90-98% of revenues), cannot charge their customers for the services they deliver, and because there will not be a commensurate rate increase to cover the cost of an increasing salary threshold, these agencies will be disproportionately and negatively impacted by the state-level salary threshold. In other states that have adopted a higher salary threshold than the federal one, compliance has put strain on providers to continue to offer services to populations who rely on them for the most basic functions of their daily lives. The salary threshold will hit rural communities especially hard. For example, for one rural provider, only 5 of the agency’s 200 employees would be

eligible for exempt status by 2026 under the proposed threshold. Because overtime is incredibly unpredictable in a sector that supports people around-the-clock, moving employees to an hourly basis creates significant issues for agencies in predicting their employment costs as well as for employees in predicting their pay.

The salary threshold also creates issues in workplace morale when a significant number of employees who have been exempt for years or even decades suddenly have to keep time sheets and track every phone call, text, and email. These morale issues are a serious blow in a sector that already experiences a nearly 40% rate of turnover among Direct Support Professionals and struggles to compete with fast food chains and the like for employees to take on challenging, varied, and sometimes risky job duties to support people with IDD. Furthermore, many of the mid-level employees in our field, including case managers, view themselves as professionals and desire the recognition and flexibility that comes along with being considered an exempt employee. As we attempt to tackle the workforce crisis facing disability providers, which exists both on the state and national levels and is only predicted to grow over the next decade, every opportunity to professionalize our workforce is needed. The state-level salary threshold would hinder rather than help these efforts.

### **Exempt Employees Duties Test**

The duties test for exempt employees should mirror that in the Fair Labor Standards Act. In the disability provider field, we see issues with the following two exemptions:

- Executives and supervisors: by narrowing the duties test to require that the employee must spend at least 50% of the workweek in duties directly related to supervision, the number of employees who would be considered exempt is dramatically decreased. Due to the unpredictable needs of the people served and recruitment and retention challenges faced by IDD providers, many supervisors – and even executive directors of small agencies – regularly have to jump in and provide direct care to waiver participants, which would place their exempt status in question.
- Administrative employees: because the Order requires these employees to report directly to the CEO, a number of program managers would no longer be exempt.

### **Rest Periods**

The Order's rest period provisions should not apply to employees of waiver providers when performing certain services, because the nature of the work does not practically allow for a guaranteed rest period.

By law, providers are responsible for ensuring the health and safety of the waiver participants they serve. Many individuals with disabilities served under Colorado's Medicaid waivers require constant or near-constant supervision and need support with activities of daily living that cannot be scheduled. The workers providing these services, called Direct Support Professionals, are assisting waiver participants with varied and multiple aspects of their daily lives. For example, the same employee may support a person with toileting, taking medication, and managing a panic attack all in the same hour. Additionally, the home- and community-based service model emphasizes individualized services with efficient staffing to meet people's needs in order to allow people to live in the least restrictive (*i.e.*, least institutional) setting. Per federal regulations, and in alignment with best practice, providers are increasingly required to provide waiver participants with meaningful community activities, including employment, in which they can be as independent as possible. This means that an individual or small group of individuals may be working at, volunteering for, or visiting other community businesses or locations not owned or operated by the provider. Often, there is only one worker on-site to provide support, making a guaranteed rest period impractical. Additionally, requiring providers to pay staff for rest periods not

taken would increase costs without providing a mechanism to increase revenues to cover those costs. Therefore, we request a narrow exemption to encompass the following services and situations:

- Residential habilitation
- Supported Employment
- Services that involve supporting individuals to participate in community activities
- Personal care and respite services provided on a 1:1 basis
- Services provided when the individual served would be a risk to themselves or others if left unsupervised

We advise against establishing an exemption by listing specific services, and propose adding the following exemption to Rule 5.2 of the Order:

**“Direct Support Professionals/Direct Care Workers** when providing support to participants in Colorado’s Home- and Community-Based Services Waivers when such support requires continuous supervision of the waiver participant, when a rest period would interfere with ensuring the participants’ health and safety, or when the structure of the service makes a guaranteed rest period impractical due to limited staffing or other circumstances.”

#### **Overtime Over Twelve Hours**

The Order’s requirements to pay overtime over 12 hours should not apply to employees providing residential and respite services to HCBS waiver participants.

Because of the supervision and support needs of individuals receiving residential waiver services, agencies have unique staffing models that utilize 16-hour, 18-hour, and 2.5-day shifts to ensure continuity of support and minimize disruption in waiver participants’ homes. These shifts are also attractive for DSPs because they can work shorter weeks. Because providers would receive no additional funding to compensate for paying overtime to these staff, making them subject to the wage order’s overtime provisions would require drastic staffing changes which would be problematic for providers, employees, and the individuals they serve. Respite services can also be provided for an entire day, with only one respite worker available to support the individual. Again, the goal of home- and community-based services is to provide people with disabilities with support that allows them to live in homes and communities of their choosing with as little disruption as possible. Unique staffing models in these individual’s homes makes this possible while also helping with the recruitment and retention challenges mentioned above.

We propose the following exemption language to Rule 4 of the Order:

**“Direct Support Professionals/Direct Care Workers** when performing residential or respite supports that require flexible staffing models utilizing shifts beyond twelve hours.”

In conclusion, thank you for considering these comments. Alliance would be happy to work with the Department on specific language to implement these narrow exemptions or answer any questions you may have.

Sincerely,

Ellen Jensby  
Senior Director of Public Policy & Operations  
Alliance