

**Testimony
Senate Bill No. 2335
Senate Human Services Committee
Senator Lee, Chairman
February 13, 2023**

Chairman Lee, and members of the Senate Human Services Committee, I am Tina Bay, Director of the Developmental Disabilities (DD) Section with the Department of Health and Human Services (Department). I am here today to provide information on Senate Bill 2335 for your consideration as you review the bill.

Before an individual can access the long-term care services that are available through the state's DD system, two eligibility determinations are required. The first is the eligibility per North Dakota Administrative Code (NDAC) 75-04-06 that would allow the individual access to state-funded DD services and coordination of services through DD Program Management. To meet this eligibility, an individual must have a diagnosis of intellectual disability or have a condition other than mental illness that results in a developmental disability (per section 25-01.2-01 of the North Dakota Century Code) which results in impairment of general intellectual functioning or adaptive behavior similar to that of an individual with the condition of intellectual disability.

The second eligibility determination must be completed if the individual wishes to access long term care services that are funded through the Centers for Medicare and Medicaid Services (CMS). To meet this eligibility, the individual must meet the criteria that has been established

for the Intermediate Care Facility for Individuals with an Intellectual Disability (ICF/IID) level of care.

States are advised that this level of care is defined in 42 CFR §440.150(a)(2) as serving persons with “intellectual disability or persons with related conditions.” Participants linked to the ICF/IID level of care must meet the “related condition” definition when they are not diagnosed as having an intellectual disability.

It is important to note that people who qualify as having a “developmental disability” under the Federal Developmental Disabilities Assistance and Bill of Rights Act of 2000 do not always meet an ICF/IID level of care. While there is overlap between “developmental disability” and “related conditions”, they are not equivalent. The definition of related conditions (42 CFR §435.1009) is functional; it is not tied to a fixed list of conditions.

Section 2 of the Bill, page 2, lines 23 through 25, appears to communicate intent is to create automatic eligibility for Medicaid-funded DD services for individuals diagnosed with Fetal Alcohol Spectrum (FAS) disorders. SB 2335 amends the definition of developmental disability in section 25-01.2-01 of the North Dakota Century Code, and therefore automatic eligibility via 75-04-06, access to the waiver and then Medicaid.

As per CMS guidelines, if an individual does not have a diagnosis of intellectual disability, they must meet the definition of “related condition” under 42 CFR §435.1009 to qualify for level of care and waiver services. CMS does not allow states the option to establish automatic eligible by

diagnosis for the DD HCBS waiver; an individualized determination of eligibility is required.

Section 4, pages 4 and 5, calls for the creation of an FAS Council. The Alvarez and Marsal report, which was drafted in response to 67th Legislative Assembly Senate Bill 2256, and HB 1035 which is being considered in the 68th Legislative Assembly, recommend the creation of a cross disability advisory council. FAS would be encompassed in the cross-disability advisory council. The Alvarez and Marsal report also recommends that the level of care for the DD waiver be updated to recognize adaptive social deficits. The implementation of this, and other recommendations, would likely affect individuals with FAS. The Department's ability to work with stakeholders to move this work forward will depend both on legislation under consideration and resources the legislature will make available to support the effort.

Regarding Section 5 the Department requests that the Committee consider removing the requirement, found on page 6 lines 7 through 10, that would require all foster parents "before initial licensure or licensure renewal" to "complete a course of instruction related to fetal alcohol spectrum disorder".

The Department provides training and resources to foster parents related to a variety of the complex needs that children in their care may have. This bill would call out training on FAS as the only diagnosis-specific training requirement for foster families.

This concludes my testimony, and I would be happy to answer any questions you may have.