

June 9, 2011

Donald M. Berwick, M.D., M.P.P.  
Administrator  
Centers for Medicare and Medicaid Services  
Department of Health and Human Services  
Room 445-G  
Hubert H. Humphrey Building  
200 Independence Avenue, S.W.  
Washington, D.C. 20201

**RE: CMS-22296-P – Medicaid Program; Home- and Community-Based Services (HCBS) Waivers**

Dear Dr. Berwick:

The Wisconsin Association of Homes and Services for the Aging (WAHSA) is a statewide trade association representing 172 not-for-profit corporations which offer the continuum of aging services ranging from nursing homes, assisted living facilities, intermediate care facilities for the mentally retarded (ICF-MR), senior housing, home health, hospice, child and adult day care and Alzheimer's support to Meals on Wheels.

WAHSA members appreciate this opportunity to comment on the proposed rule "Medicaid Program; Home- and Community-Based Services (HCBS) Waivers. Those comments will focus primarily on the provisions in the proposed rule which address the definition of home and community-based characteristics.

**Simply stated, WAHSA members believe the proposed rule, if implemented, would deny Medicaid waiver funding to a significant proportion of Wisconsin's current assisted living elderly population.** Although many WAHSA members provide care and services to persons with a disability, the majority serve an elderly population and that's where our comments will focus.



Wisconsin currently operates three 1915(c) home- and community-based Medicaid waiver programs:

1. Community Integration Program – CIP II which provides MA waiver funding to individuals who either are over 65 years of age or physically disabled who are relocated or diverted from nursing homes. In calendar year 2009 (the latest year for available data), there were 1,388 elderly CIP II recipients and 1,157 physically disabled CIP II recipients, for a total number of 2,545 CIP II recipients;
2. Community Options Program Waiver – COP-W which provides services to elderly and physically disabled individuals who would otherwise receive care in a nursing facility. In calendar year 2009, there were 2,610 elderly COP-W recipients and 1,204 physically disabled COP-W recipients, for a total of 3,814 COP-W recipients; and
3. Family Care, Wisconsin’s long-term care managed care program which serves 31,541 enrollees who either are frail elderly or have physical or developmental disabilities in one of 9 managed care organizations (MCO) which encompass 58 of Wisconsin’s 72 counties. Of those 31,541 Family Care enrollees, 15,147 are frail elderly, 11,811 have a developmental disability, and 4,446 have a physical disability (125 enrollees have an “unknown” target group).

Of the 3,998 elderly CIP II/COP-W recipients, 1,427 live in an assisted living setting called a community-based residential facility (CBRF) in Wisconsin. Of the 15,147 elderly Family Care enrollees, 2,391 reside in CBRFs. Of the total number of 31,541 frail elderly, developmentally disabled and physically disabled Family Care enrollees, 5,507 reside in CBRFs (another 3,934 Family Care enrollees reside in an assisted living setting known as adult family homes; all but 172 of those individuals have a developmental disability).

NOTE: The Family Care enrollee numbers are as of March 1, 2011; the CBRF Family Care residential arrangement figures are from June 2010.

**It is this population of CIP II/COP-W/Family Care recipients living in Wisconsin CBRFs that we believe would be denied MA waiver funding under the proposed rule because Wisconsin CBRFs do not appear to meet the “home- and community-based” criteria outlined in s. 444.301(b)(1)(iv)(A) and (B) of the proposed rule.**

That section of the proposed rule would not permit the issuance of a 1915(c) home- and community-based MA waiver “in a building on the grounds of, or immediately adjacent to, a public institution; or a housing complex designed expressly around an individual’s diagnosis or disability.” Most WAHSA-member CBRFs are located on campuses which also include a nursing home as well as senior housing. Would a nursing home under this proposed rule be considered “a public institution?” If a CBRF only served individuals who were frail elderly, is that a housing complex “designed expressly around an individual’s diagnosis or disability?”

Of greater concern to WAHSA members is a provision that was discussed in the Responses to Comments Received on ANPRM section of the proposed rule notice but was not included in the proposed rule itself.

Specifically, it states on pages 13-16 of the proposed rule notice that CMS would permit individuals residing in assisted living facilities or continuing care retirement communities who otherwise would be eligible for 1915(c) home- and community-based MA waiver funding to be eligible for that funding if

certain conditions were met. Unfortunately for Wisconsin CBRF residents, one of those conditions is that the setting must be “an apartment with individual living, sleeping, bathing and cooking areas” where “individuals have lockable access to and egress from their own apartments.”

That condition mirrors the definition of a “residential care apartment complex” (RCAC), another Wisconsin assisted living setting. **Unfortunately, only a handful of Wisconsin’s 905 CBRFs that principally serve the frail elderly consist of individual apartments that would meet the conditions set forth in the proposed rule. Therefore, this proposed rule seemingly would deny HCBS waiver funding to over 3,800 elderly residents of Wisconsin CBRFs who receive CIP II/COP-W or Family Care funding under the state’s current 1915(c) waiver.**

NOTE: That figure may or may not be on the conservative side because it does not include the 1,837 Family Care enrollees with developmental disabilities who resided in CBRFs as of June 2010 and the 3,412 Family Care enrollees with developmental disabilities who resided in adult family homes, also as of June 2010; it is uncertain whether that population in those settings would be eligible for 1915(c) waiver funding under this proposed rule.

WAHSA members recognize the difficulty CMS has had in trying to define or describe what is “home- and community-based.” We’re fairly certain, however, that the 3,800+ elderly residents of Wisconsin’s CBRFs who may be in danger of losing their MA waiver funding under this proposed rule would argue that CMS missed the mark in trying to define something as personal as “home” and “community-based.” We also believe they’d beg to differ that this proposed rule “would not have a significant economic impact” or “will have no consequential effect” on their lives, if not on State, local, or tribal governments or on the private sector.

Under s. 50.01(1g), Wis. Stats., a “community-based residential facility” is defined to mean “a place where 5 or more adults who are not related to the operator or administrator and who do not require care above intermediate level nursing care reside and receive care, treatment or services that are above the level of room and board but that include no more than 3 hours of nursing care per week per resident.” The definition of an “adult family home” under s. 50.01(1) is similar to that of a CBRF but is limited to 3-4 adults. This is “home” to these residents. They should not be penalized by an arbitrary, one-size-fits-all definition of home and community.

**On behalf of those residents, we ask that the proposed rule be amended to permit residents of Wisconsin CBRFs and adult family homes to remain eligible for HCBS waiver funds under a revised 1915(c) waiver program.**

Once again, we appreciate the opportunity you have provided us to comment on this proposed rule and your efforts to ensure quality care and a quality life to the nation’s frail elderly and persons with a disability.

Sincerely,



John Sauer  
Executive Director