

OFFICE OF HEALTH CARE OMBUDSMAN

264 NORTH WINOOSKI AVE.
P.O. BOX 1367
BURLINGTON, VT 05402
(802) 863- 2316, (800) 917-7787 (VOICE)
(802) 863-2473, (888) 884-1955 (TTY)
(802) 863-7152 (FAX)

September 19, 2003

Joan Senecal
Department of Aging and Disabilities
103 South Main Street
Waterbury, VT 05671

By email and regular mail

RE: Long Term Care Demonstration Waiver Proposal

Dear Joan,

I am writing to comment on the Department's draft Long Term Care Demonstration Waiver Proposal. I want to compliment the Department for its efforts to expand access to long term care services.

My comments will be relatively brief. I did not receive a copy of the draft when it was sent out, and only inadvertently found out about the comment deadline at the end of last week. I am concerned about the very short public comment period for such a major proposal.

The Department regrets that you learned about the proposal late. We have been engaged in a very intensive sharing of information with many individuals and organizations, going back to last fall. We will be sure to include your office in all future notices.

Regulations

My most important comment is that the Department must commit to promulgating regulations pursuant to the Vermont Administrative Procedures Act to implement this waiver. It is a serious flaw to the current Home and Community Based Services waiver that the Department has never promulgated regulations, despite being required to do so by state and federal law. The Department must commit to doing so in writing in this waiver proposal. Promulgating regulations ensures adequate and full public comment on the details of the waiver in such critical areas as eligibility criteria and the appeals process. The development of an operational protocol is not sufficient to comply with the rule making requirements.

We agree that regulations are important for the implementation of this Demonstration Waiver. The Department is forming a work group to deliberate on the development of regulations for the proposed 1115 Waiver. The first meeting is scheduled for November 18, from 1-4 p.m. in

the Cyprian Learning Center, Waterbury Office Complex.

Eligibility

The waiver proposal does not clearly state that the eligibility criteria for entitlement to long term care services for those with the highest need will be stricter under the waiver proposal than they are under the current waiver. I am concerned about the 200-300 current beneficiaries that the Department believes will not be eligible under the new waiver, and what will happen to these beneficiaries who are currently receiving services.

Starting on page 24, the final proposal clearly explains that eligibility for the entitlement under this proposal will be higher than current nursing home level of care criteria.

The Department fully expects that all of the 200-300 persons who are not in the entitlement group will still be served. There are approximately 3300 people on Medicaid in nursing homes and on the Waivers today; funds under the demonstration should be sufficient to continue to serve this same number of people unless either or both of the follow scenarios occur. . The first would be that more people choose nursing home care. Of course, this could happen today and there would be no protection for others seeking home- and community-based services because only nursing home care is an entitlement. The second possibility is that we find more people eligible for the entitlement group than anticipated, the so-called woodwork effect. However, the net result of this scenario is that more people would still be served, and since they would be in the entitlement group, they would be higher needs individuals who should receive those necessary services.

Under the proposal, individuals currently receiving services would be “grandfathered” into the new long-term care program.

The waiver proposal appears to rule out eligibility for those with a mental health diagnosis This is an issue of real concern because there are certainly Vermonters who need long term care services and who would otherwise be eligible under the waiver proposal. How will these individuals be served?

Individuals with mental illness or a developmental disability can access services through the Department of Developmental and Mental Health Services and this Department also has a Traumatic Brain Injury Waiver that is working well. To a large extent, the 1115 proposal incorporates the populations served by our current 1915(c) Waivers and by nursing homes. This demonstration waiver proposes a major change in Vermont’s long-term care system. The Department wants to ensure that the program is done well. There are a myriad of details to work through and many twists and turns along the way. It seems prudent to keep the demonstration to a workable size by including only nursing homes and the two home-and community-based waivers.

The description of eligibility levels is very confusing. The distinction between those with the highest need, high need and moderate need is not clear.

The steps involved in determining eligibility (Appendix B) are very hard to wade through. There are many double negatives in the steps which make them hard to follow.

We received several comments to this effect and have spent time refining the eligibility criteria

for all three groups. Appendix B of the final proposal contains the new language for the Highest Need group. We will be reconvening the Eligibility Workgroup to review the eligibility criteria proposed for all three groups.

Provisions of Medicaid law asking to be waived

I am concerned that the Department is asking for a waiver of the “amount, duration, and scope” provisions of Medicaid law. This provision of federal Medicaid law serves to ensure that beneficiaries receive medically necessary care in the amount, duration and scope necessary. A waiver of this requirement could render access to services meaningless if the Department is free to limit the amount, duration, and scope of services as it wishes for any one individual.

This waiver request actually asks CMS to permit the State to “...restrict the amount, duration and scope of services provided to a Demonstration enrollee to those services included on the approved Comprehensive Plan of Care.” This simply means that the funds in this Waiver should and would be used only to meet the services identified on the plan of care and not for other services.

The Department is asking that the 3 month retroactive benefits requirement be waived, but it doesn’t explain why. Again, this is a fundamental provision of Medicaid law that should be retained.

We have reviewed the comments on this issue and will retain the benefits requirement as it exists today.

I am concerned that the Department is asking for a waiver to assess cost-sharing on individuals in the waiver. It’s unclear how these beneficiaries will have any income with which to pay cost-sharing on mandatory services.

The cost-sharing requirement would apply to individuals in the Moderate Need group. These individuals would also have the \$10,000 resource cap, if they are receiving services at home. Consumers in the Highest Need and High Need groups would still be subject to the current requirements concerning patient share contributions.

Appeals Process

The appeals process needs to be clarified and more clearly articulated. For example, with presumptive eligibility determinations, will beneficiaries possibly have to appeal to both the Department of Aging and Disabilities and Department of PATH?

We agree that details are needed. They will be included in the Policies and Procedures for the 1115 Demonstration.

Administration

What does it mean that DAD will “reorganize its core business operations to function as a managed long term care plan”? If DAD is envisioning functioning as a managed care plan, has it evaluated how this will fit with Vermont’s laws and regulations governing managed care plans. For example, the applicable Rule 10 requirements are incorporated into the PATH regulations governing its managed care plan, Primary Care Plus.

This statement refers to the way the Department will organize its internal operations to ensure smooth operation of this demonstration and good customer service. The Department will not actually operate a managed care plan so the Rule 10 requirements are not pertinent.

Thank you for considering these comments. I have reviewed the comments of Jackie Majoros, the State Long Term Care Ombudsman, and Jane Callahan of the Disability Law Project, and agree with their comments as well.

I would appreciate it if you would add my name to the list of interested parties to whom information is sent regarding this waiver proposal. Thank you.

Sincerely,

Donna Sutton Fay
State Health Care Ombudsman