



State of Wisconsin
Department of Health Services

Scott Walker, Governor
Dennis G. Smith, Secretary

June 14, 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 Department of Health Services, Wisconsin's State Medicaid and Medicaid Waivers agency, hereby submits the following comments on CMS' proposed rules regarding Home and Community-Based Services (HCBS) Waivers under section 1915(c) of the Social Security Act. For the reasons set forth below, Wisconsin opposes the unwarranted expansion of federal authority through the creation of proposed 42 CFR § 441.301(b)(1)(iv), relating to permissible residential settings for individuals participating in HCBS Waivers.

Wisconsin has obtained approval for Medicaid Home and Community-Based Services (HCBS) Waivers under § 1915(c) of the Social Security Act since 1983. Wisconsin has consistently promoted independence, autonomy and self-determination. A significant element of this is *choice*; expressed as an individual's ability to take part in the decisions regarding his/her long-term care services and where the services are provided.

Wisconsin has promoted inclusive community settings, including people's own homes and apartments for over 30 years. When a larger setting is used as the community living arrangement, Wisconsin has had specific criteria, measures and quality oversight to ensure that the setting is "home-like" and that people have consistent opportunities for inclusion in the community. "Person-centered planning" began in 1981 with the statutory language requiring individual service plans for individuals who choose to live in the community with assistance. In fact, adults with long-term care needs who live in the community are to be provided living arrangements typical of the general population.

Wisconsin promotes self-direction and works with providers to improve opportunities for individuals to express their preferences. Under the proposed rule, long-term care professionals would have little opportunity to negotiate with providers as to development of a range of residential options meeting the needs of all HCBS Waiver participants.

The proposed rule change will greatly challenge our latitude in offering choice for people with disabilities and for frail elders. Current HCBS Waiver participants and new applicants who need 24-hour support and supervision may not be able to obtain that protection without alternate living arrangements. Depending on the needs of the individual, the required level of supervision and/or assistance, including one-to-one staffing, may be cost prohibitive in a certain residential setting and may conflict with the § 1915(c) requirement of cost neutrality.

During 2010, 5,590 fee-for-service HCBS Waiver participants in Wisconsin resided in and received Waiver funding for substitute care or received 24-hour oversight in their living arrangement. Only 368 or 7% of these adults were in licensed facilities resembling individual apartments. This leaves 5,222 or 93% who currently reside in a living situation that would need to be assessed for compliance with the proposed rule and could result in a move when an individual is living in a substitute care facility determined to be “institutional in nature” within the meaning of the proposed rule. The consequences of the proposed rule revisions and the implementation date would be two-fold. First, the stability of living situation and supports for individuals would be affected and could result in transfer trauma for many people. Second, the investment of administrative and care management time to locate appropriate settings and develop the individual settings on a short timeframe would be very costly. Moreover, for some individuals, this could result in an institutional placement which is clearly the opposite of the intended effect of the proposed rule.

Wisconsin has already embraced policies and practices that allow their residents to live in as normative setting and participate in community activities to the maximum extent possible given the needs and choices of the residents. The proposed rule severely restricts the freedom of choice of individuals participating in HCBS Waivers to select their living environment, for which they pay with their own money. At the same time, it is entirely possible that the proposed rule would thwart the achievement of its stated objective, in that it would make it more likely certain individuals who have a need for a residential setting more structured than a fully-integrated setting would only be permitted to reside in an institutional setting like a nursing home or ICF/MR.

In addition to the foregoing policy considerations, there is serious doubt whether HHS possesses the legal authority to adopt the proposed rule. Because § 1915(c) of the Social Security Act prohibits the use of Medicaid funds for the cost of room and board, a rule regulating permissible residential settings of HCBS Waiver participants does not relate to services that are coverable with Medicaid waiver funds. The HHS Secretary’s rulemaking authority is limited to those rules that are “necessary to the efficient administration of the functions with which the Secretary is charged,” Social Security Act § 1102. Because § 1915(c) prohibits Medicaid coverage for the cost of room and board, the Secretary lacks the legal authority to adopt a rule regulating the settings in which HCBS Waiver participants may reside, beyond the federal statutory restrictions against residing in a nursing home or ICF/MR.

In light of HCBS Waiver participants' right under § 1915(c) to choose among available alternatives to institutional care, it might be permissible for HHS to require states to help ensure there are a variety of residential settings from which Waiver participants may choose, but it is beyond the Secretary's authority to restrict that choice to only those settings the Secretary deems "integrated." If the Secretary ultimately dictates where every individual in need of long-term care services will live, states are likely to find the program to be unmanageable.

The proposed rule is also legally objectionable because its language is so expansive and ill-defined as to grant the HHS Secretary virtually unfettered discretion in determining whether a residential setting chosen by a HCBS Waiver participant "has qualities of an institutional setting." For example, under the language of the proposed rule the Secretary presumably could conclude that a residential setting is not sufficiently "integrated in the community" or does not "provide meaningful access to the community and community activities" merely because it is located in a rural area. The rule fails to define the terms "home and community-based," "integrated in the community," "meaningful access to the community and community activities," among others and presumably would leave it up to the Secretary to determine whether individual residential settings meet those undefined standards.

Finally, the stated rationale for the proposed rule is also flawed, in several respects.

First, the suggestion in the preamble to the rule that families prefer more integrated, less congregate settings because they are safer is doubtless true in some cases. However, based on years of experience, the Wisconsin DHS is well aware that many families prefer more congregate settings for family members with severe disabilities, precisely because they believe those settings are safer due to the presence of multiple staff and other residents.

Second, the suggestion in the preamble that the proposed rule is *necessary* in order to comply with the Americans with Disabilities Act (ADA) as interpreted in the US Supreme Court's *Olmstead* decision is far-fetched. *Olmstead*, decided in 1999, only requires states to provide the most integrated appropriate setting for individuals who desire it. States have served millions of people for more than 10 years without this newly discovered imperative. Imposing limitations on the living accommodations that individuals with disabilities eligible for a state's Medicaid waiver program may choose from directly contradicts the *Olmstead* Court's interpretation that the ADA does not require a disabled person to reside in a setting in which he does not wish to live, but rather seeks to provide the individual with a choice of where he will live. In this connection, the Court quotes the applicable federal ADA regulations, which state that "[p]ersons with disabilities must be provided the option of declining to accept a particular accommodation." 28 CFR Part 35, App. A (1998). Moreover, many of the types of residential settings that would be prohibited by the proposed rule in fact may be sufficiently integrated to meet the ADA standard of "most integrated setting appropriate to the needs of the individual," as interpreted in the *Olmstead* decision. The ADA defines an integrated setting as one enabling disabled individuals "to interact with non-disabled individuals to the fullest extent possible." Allowing a person to live in one of the many types of living arrangements that would be prohibited by the proposed rule would not *per se* limit a disabled individual's ability to interact with non-disabled individuals.

Dr. Donald M. Berwick

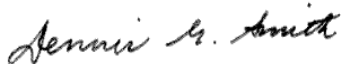
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Whether a resident's ability to interact with non-disabled individuals is maximized is dependent at least as much on the programs and policies of the facility as on the types of factors regarded by the language of the proposed rule as determinative of whether a particular setting is "integrated" or "segregated."

For the reasons set forth above, the Wisconsin Department of Health Services opposes the creation of proposed 42 CFR § 441.301(b)(1)(iv), relating to permissible residential settings for individuals participating in HCBS Waivers. Thank you for the opportunity to comment.

Sincerely,

A handwritten signature in cursive script that reads "Dennis G. Smith".

Dennis G. Smith
Secretary