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June 14, 2011

Dr. Donald Berwick  
Administrator  
Centers for Medicare and Medicaid Services  
Department of Health and Human Services  
Attention: CMS-22296-P  
Mail Stop C4-26-05  
7500 Security Boulevard  
Baltimore, Maryland 21244-1850

**Re: File Code CMS-22296-P  
HCBS Waivers**

Dear Dr. Berwick:

We write on behalf of the Kentucky Equal Justice Center (KEJC) to comment on the proposed rule regarding “Medicaid Program; Home and Community Based Services” (HCBS) Waivers. KEJC is a state-wide, civil legal services organization that works closely with legal services programs across Kentucky. We represent the interests of low-income individuals in Kentucky, including the right to access high-quality health care under Medicaid. We long have advocated for more community-based services to be available through Medicaid and applaud CMS’s efforts to broaden the range of options for consumers.

On the issues where they concur, we generally support the comments submitted separately by the Bazelon Center for Mental Health Law and the National Senior Citizens Law Center. We write separately to emphasize a few points:

- Having a “person-centered” approach to both the planning and process of health care administration is essential. We encourage rules that require the individual to be part of the entire process, including signature on each part of the treatment plan and housing agreement. Further, the requirement of cultural awareness is good, but should be strengthened, defined, and expanded to include linguistic competency as well.
- The definitions included of the qualities of an institution are important to clarify what community-based services are and should be. To strength this portion we encourage CMS to assign an upper limit to the number of bedrooms and/or beds in a HCBS setting. Additionally, we support the change of language from “recipients” to “individuals” or “residents” to clarify that larger settings with many residents would be ineligible, even if some individuals are not receiving Medicaid.

- To protect the rights of consumers we support prohibitions on settings that require the resident to receive or participate in treatment or services.
- Any rule promulgated by CMS must ensure that recipients maintain the right to appeal any decision affecting their care, as well as a Fair Hearing in accordance with 42 C.F.R. Part 431, Subpart E.
- The proposed lease-like provisions are good, but not strong enough. In many jurisdictions, this would only provide residents with 30 days notice before eviction. To encourage aging in place the recipient should be allowed to stay in the setting unless the recipient's care needs cannot be met in the setting, the recipient's presence in the setting endangers the safety or health of others, the setting is ceasing to operate, or the recipient has failed to pay. Additionally the resident should be allowed to maintain in the setting pending the outcome of an appeal or fair hearing.
- Although there should be a penalty if states fail to properly regulate HCBS facilities, we do not support a moratorium on state Medicaid payments if the state is out of compliance. We agree with the National Senior Citizens Law Center that an intermediate penalty, substantial but less than a moratorium, would be appropriate to safeguard the rights and interests of residents.
- Finally, we support the ability of settings to combine services for multiple target populations, as long as this is in the interest of the individual.

Again, thank you for the opportunity to comment on this proposed rule. We hope to continue to work with you to create more community-based services to serve Medicaid beneficiaries needs.

Sincerely,  
Anne Hadreas, Health Law Fellow  
Richard Seckel, Director  
Anne Marie Regan, Senior Staff Attorney