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Important Medicaid Provisions Supporting Choice

1. Freedom of Choice. The Social Security Act requires states to give individuals who require medical assistance the choice to obtain such assistance from any "institution" or "agency" qualified to perform the services required. This "freedom of choice" provision is found in 42 USC Sec. 1396a(a)(23), quoted below.

42 U.S. Code § 1396a - State plans for medical assistance

(a) Contents. A State Plan for medical assistance must:

* * *

(23) provide that (A) any individual eligible for medical assistance (including drugs) may obtain such assistance from any institution, agency, community pharmacy, or person, qualified to perform the service or services required (including an organization which provides such services, or arranges for their availability, on a prepayment basis), who undertakes to provide him such services, . . .

* * *

This statutory provision is supported by federal regulation at 42 CFR Sec. 431.51. This regulation states:

§ 431.51 Free choice of providers.

(a) *Statutory basis.* This section is based on sections 1902(a)(23), 1902(e)(2), and 1915(a) and (b) and 1932(a)(3) of the Act.

(1) Section 1902(a)(23) of the Act provides that beneficiaries may obtain services from any qualified Medicaid provider that undertakes to provide the services to them.

* * *

(b) *State plan requirements.* A State plan, except the plan for Puerto Rico, the Virgin Islands, or Guam, must provide as follows:

(1) Except as provided under paragraph (c) of this section and part 438 of this chapter, a beneficiary may obtain Medicaid services from any institution, agency, pharmacy, person, or organization that is -

(i) Qualified to furnish the services; and

(ii) Willing to furnish them to that particular beneficiary.

This includes an organization that furnishes, or arranges for the furnishing of, Medicaid services on a prepayment basis.

The statutory provision that permits states to offer home and community based services, also stresses that the choice must be left to the individual. 42 USC 1396n(c)(2)(C) provides:

42 U.S. Code § 1396n - Compliance with State plan and payment provisions

* * *

(c) Waiver respecting medical assistance requirement in State plan; scope, etc.; "habilitation services" defined; imposition of certain regulatory limits prohibited; computation of expenditures for certain disabled patients; coordinated services; substitution of participants

* * *

(2) A waiver shall not be granted under this subsection unless the State provides assurances satisfactory to the Secretary that—

* * *

(C) such individuals who are determined to be likely to require the level of care provided in a hospital, nursing facility, or intermediate care facility for the mentally retarded are informed of the feasible alternatives, if available under the waiver, at the choice of such individuals, to the provision of inpatient hospital services, nursing facility services, or services in an intermediate care facility for the mentally retarded;

2. Requirement that States Offer ICF Services. It is often stated that ICFs are an "entitlement." This is a bit misleading. ICFs are not listed in the Social Security Act as a medical service that states must offer. However, in the section of the Social Security Act that permits states to offer home and community based services, the Act states that a state may do so only if it is also paying for ICF services under its State Plan. Melissa Harris at CMS has confirmed that "a state operating a 1915(c) HCBS waiver at an ICF level of care is obligated to provide an ICF option if the individual selects an ICF as opposed to HCBS."

Here is what 42 USC Sec. 1396n(c)(1) states, with the key language underlined:

(1) The Secretary may by waiver provide that a State plan approved under this subchapter may include as "medical assistance" under such plan payment for part or all of the cost of home or community-based services (other than room and board) approved by the Secretary which are provided pursuant to a written plan of care to individuals with respect to whom there has been a determination that but for the provision of such services the individuals would require the level of care provided in a hospital or a nursing facility or intermediate care facility for the mentally retarded the cost of which could be reimbursed under the State plan.

* * *

However, a state can meet this obligation by setting up agreements with other states to place the individual in an out-of-state ICF. A number of states have chosen not to have ICFs in the state and instead pay for ICF services for its citizens in out-of-state ICFs.

3. Reasonable Promptness. Section 1902(a)(8) (42 USC Sec. 1396a(a)(8)) requires states to provide medical assistance to all eligible people with "reasonable promptness."

This statutory provision prohibits states from having waiting lists for ICF services. The section states:

SEC. 1902. [42 U.S.C. 1396a] (a) A State plan for medical assistance must—

* * *

8) provide that all individuals wishing to make application for medical assistance under the plan shall have opportunity to do so, and that such assistance shall be furnished with reasonable promptness to all eligible individuals;

* * *

Federal regulation requires the state Medicaid agency to provide a hearing if an individual believes that the state has not acted on her claim for medical assistance with reasonable promptness. The regulation, 42 CFR Sec. 431.220(a)(1), states:

§ 431.220 When a hearing is required.

(a) The State agency must grant an opportunity for a hearing to the following:

(1) Any individual who requests it because he or she believes the agency has taken an action erroneously, denied his or her claim for eligibility or for covered benefits or services, or issued a determination of an individual's liability, or has not acted upon the claim with reasonable promptness