

Provisions of Health Reform Law Promote “Aging in Place”

The Patient Protection and Affordable Care Act (the Act)¹ includes a handful of provisions that are designed to provide new options for states to provide home and community-based services in their Medicaid plans. The efforts of Congress to include these provisions in the Act will likely continue a trend among state Medicaid plans to shift resources away from nursing homes and other forms of institutional care towards home and community-based settings in support of the concept of “aging in place.”

I. *Brief Overview of Home and Community-Based Services*

Home and community-based services can include a combination of traditional medical services, such as nursing services, as well as, non-medical services, such as respite care or personal care services, case management services, and environmental modifications. In some instances, family members and friends are eligible to be providers of services where certain qualifications are met.²

Home and community-based services are offered by the states in a variety of forms and through a variety of funding mechanisms, including through certain Medicaid waivers established under federal law. According to The Centers for Medicare and Medicaid Services (CMS), 48 states and the District of Columbia currently offer home and community-based services through Medicaid waivers.³

II. *Home and Community-Based Services Provisions of the Act*

Section 2406 - Sense of the Senate Regarding Long-Term Care

This provision relied upon the following statistics behind home and community-based services initiatives:

- On average, it is estimated that Medicaid dollars can support nearly three elderly individuals and adults with physical disabilities in home and community-based services for every individual in a nursing home.
- Although every state has chosen to provide certain services under home and community-based waivers, these services are unevenly available within and across states, and reach a small percentage of eligible individuals.

Section 2401 - Community First Choice Option

This provision adds a new waiver under Section 1915 of the Social Security Act⁴ granting states the option, beginning Oct. 1, 2010, to provide home and community-based attendant services and supports for Medicaid-eligible individuals. As noted by the Senate in Section 2406, all states currently provide some level of services under home and community-based waivers. Section 1915(c) and Section 1915(d) of the Social Security Act currently

¹ Patient Protection and Affordable Care Act, Public Law 111-148 (H.R. 3590) (the “Act”)

² *Id.*

³ CMS, *HCBS Waivers - Section 1915(c)*, at [http://www4.cms.gov/MedicaidStWaivProgDemoPGI/05_HCBSWaivers-Section1915\(c\).asp](http://www4.cms.gov/MedicaidStWaivProgDemoPGI/05_HCBSWaivers-Section1915(c).asp).

⁴ 42 U.S.C. § 1396n.

provide for waiver programs for certain home and community-based services⁵ and Section 1915(i) of the Act provides a state plan amendment option for certain home and community-based services⁶; however, the Community First Choice Option differs from existing law in that it eliminates the ability to cap the number of individuals served, prohibits waiting lists, and prevents states from limiting services to specific areas of the state.⁷

Section 2401 will provide additional federal funding for home and community-based services provided through a state plan amendment meeting specified requirements with respect to the level of care, eligibility, and needs-based criteria, with some ‘strings’ attached. The federal medical assistance percentage applicable to the state will increase by 6 percentage points for payments with respect to amounts expended for home and community-based attendant services and supports.⁸

In order to receive funding under the Community First Choice Option, state Medicaid plans will be required to limit availability of services to those Medicaid-eligible individuals whose income does not exceed 150 percent of the poverty line and who, but for the provision of such services, would require care in a hospital, a nursing facility, an intermediate care facility for the mentally retarded, or an institution for mental diseases, for which payment would otherwise be available under the state Medicaid plan.⁹ Increased federal financial participation is conditioned upon states meeting a series of other requirements, including establishing a “Development and Implementation Council” comprised of a majority of members with disabilities, elderly individuals, and their representatives; establishing and maintaining a continuous quality assurance system for the services provided; and meeting certain data collection and reporting requirements.¹⁰

Services that can be provided by state Medicaid plans under the Community First Choice Option include home and community-based services available to assist in accomplishing activities of daily living (ADLs), instrumental activities of daily living (IDLs), and health-related tasks (meaning tasks which can be delegated or assigned by a license healthcare professional under state law to be performed by an attendant).¹¹ Services are to be provided through contract under an agency-provider model or through vouchers, direct cash payments, or through the use of a fiscal agent and could be provided in the home or other community setting, but not in a nursing facility.¹² Individuals qualified to provide the services could include family members.¹³ Services specifically excluded are room and board, special education and related services, certain assistive technology and devices (except for back-up systems such as beepers or other electronic devices), medical supplies and equipment, and home modifications.¹⁴ The selection of caregivers and direction of services is intended to be “consumer controlled” meaning that the method of selecting and providing services and supports must allow the individual or his or her representative maximum control of the services and supports.¹⁵

Section 2402 - Removal of Barriers to Providing Home and Community-Based Services

This provision further expands state options for providing home and community-based services to individuals eligible for services for elderly and disabled individuals under a waiver. Section 2402 amends Section 1915(i) of the Social

⁵ 42 U.S.C. § 1396n(c), (d).

⁶ 42 U.S.C. § 1396n(i).

⁷ Cf. 42 U.S.C. § 1396n(k).

⁸ 42 U.S.C. § 1396n(k)(2).

⁹ 42 U.S.C. § 1396n(k)(1).

¹⁰ 42 U.S.C. § 1396n (k)(3).

¹¹ 42 U.S.C. § 1396n (k)(1)(A)

¹² *Id.*

¹³ 42 U.S.C. § 1396n (k)(1)(A)(iv).

¹⁴ 42 U.S.C. § 1396n (k)(1)(C).

¹⁵ 42 U.S.C. § 1396n (k)(3)(B).

Security Act to grant states the option of expanding existing home and community-based services to certain waiver-eligible individuals with income up to 300 percent of the supplemental security income benefit rate (compared to 150 percent of the poverty line under existing Section 1915(i)(1)).¹⁶ The expanded services may differ in type, amount, duration, or scope from existing home and community-based waiver services, but must be provided in the same manner and subject to the same requirements as apply to existing home and community-based waiver services.¹⁷ States will no longer be permitted to limit the number of individuals who are eligible for the waived services and will no longer be permitted to establish waiting lists for the receipt of such services as was permitted by the previous statute. No effective date is stated for this change so it appears as though this provision became effective as of the date the Act was signed into law.¹⁸

Section 2402 of the Act also amends Section 1902(a)(10)(A)(ii) of the Social Security Act to allow states the option of creating an additional Medicaid eligibility category for individuals that qualify to receive home and community-based services through Section 1915(i) waivers under both existing eligibility levels and expanded eligibility levels adopted pursuant to Section 2402 of the Act discussed above. Accordingly, individuals qualifying for home and community-based waivers services would be eligible to receive full Medicaid benefits.¹⁹

Lastly, Section 2402 requires the Secretary of Health and Human Services (the Secretary) to promulgate regulations to ensure that all states develop service systems that are designed to allocate resources services in a manner that maximizes beneficiary independence and is responsive to the changing needs and choices of beneficiaries receiving non-institutionally-based long-term services and supports, including services provided outside state Medicaid plans.²⁰ The Secretary will also be required to promulgate regulations to improve coordination among, and the regulations of, all providers of non-institutionally-based long-term services under federally and state-funded programs in order to achieve consistent administration of policies across programs and to monitor all services to assure coordination and effectiveness of eligibility determinations and individual assessments and to assure an adequate number of qualified direct care workers to provide self-directed personal assistance services.²¹ There is no date specified for completion of these regulations.

Section 2403 - Extension of Money Follows the Person Rebalancing Demonstration

This provision extends the current Money Follows the Person Rebalancing Demonstration Program for an additional five-year period. The demonstration program was scheduled to terminate on Sept. 30, 2011, but will now continue through Sept. 30, 2016. Section 2403 also requires a change to the eligibility rules for individuals to participate in the demonstration project, to be effective 30 days following the enactment of the Act (*i.e.*, April 22, 2010), to require that individuals reside in an inpatient facility for at least 90 consecutive days prior to eligibility.²²

The Money Follows the Person Rebalancing Demonstration Program, established by Section 6071 of the Deficit Reduction Act of 2005,²³ offered \$1.75 billion in competitive grants to states for the purpose achieving the following objectives: 1) increasing the use of home and community-based services as opposed to institutional long term care services; 2) eliminating barriers in state law or funding that prevent or restrict the flexible use of Medicaid funds to enable Medicaid recipients to receive long term care services in the setting of their choice; 3) increase the ability of state Medicaid plans to assure continued provision of home and community-based services to those transitioning

¹⁶ 42 U.S.C. § 1396n(i)(6)(A).

¹⁷ 42 U.S.C. § 1396n(i)(6)(B), (C).

¹⁸ 42 U.S.C. § 1396n(i)(1)(C).

¹⁹ 42 U.S.C. § 1396a(a)(10)(A)(ii)(XXII).

²⁰ The Act, § 2402(a)(1).

²¹ The Act, § 2402(a)(3).

²² The Act, § 2403(b).

²³ Deficit Reduction Act of 2005, P.L. 109-171.

from a community setting; and 4) ensure that procedures are in place to provide quality assurance for home and community-based services.²⁴ According to CMS, \$1,435,709,479 in total grants were awarded in 2007 to 30 states and the District of Columbia proposing to transition over 34,000 individuals out of institutional settings over the five-year demonstration period.²⁵

Section 2404 - Protection Against Spousal Impoverishment

This provision will require states to apply existing spousal impoverishment rules to Medicaid beneficiaries who receive home and community-based services for a five-year period beginning on Jan. 1, 2014.²⁶ The Medicaid spousal impoverishment rules prevent the impoverishment of a spouse whose husband or wife seeks Medicaid coverage for certain long term services and supports.²⁷ Currently, the law only grants states the option to apply spousal impoverishment rules to the eligibility determination for persons applying to Section 1915(c) and (d) waivers for home and community-based services. The impact of this change would be to provide additional financial protections for individuals and families that receive home and community-based services pursuant to Section 1915(c), (d), (i), or (k) waivers and State plan amendments in the same manner as those protections are available for nursing home residents.

Section 2405 - Funding to Expand State Aging and Disability Resource Centers

This provision appropriates \$50 million for each of fiscal years 2010 through 2014 (\$10 million per fiscal year) to carry out Aging and Disability Resource Center initiatives under the Older Americans Act of 1965.²⁸ An Aging and Disability Resource Center (ADRC) is an entity established by a state to coordinate a single point of entry for comprehensive information on the full range of available public and private long-term care programs, options, service providers, and resources within a community; personal counseling to assist individuals in assessing their existing or anticipated long-term care needs, and developing and implementing a plan for long-term care designed to meet their specific needs and circumstances; and consumer access to the range of publicly-supported long-term care programs for which consumers may be eligible.²⁹ The ADRC program is funded through grants collaboratively administered by the Administration on Aging and CMS.³⁰ There are currently over 200 ADRC sites across the nation and nearly 30 states have appropriated state funding or passed legislation to support ADRC programs.³¹

III. *Conclusion*

The home and community-based services provisions of the Patient Protection and Affordable Care Act could have a profound impact on the structure of our current long term care delivery and financing system. A shift towards home and community-based care away from institutional care and a growing recognition of the value and financial benefits and cost-savings associated with “aging in place” has been underway for some time, but with the elderly population growing exponentially with the “graying of America,” longer life expectancies, and continued pressures on State budgets associated with funding benefits for senior and disabled citizens through state Medicaid plans, this shift appears to be on-track to accelerate over the coming years.

²⁴ *Id.* at 6071(a)

²⁵ CMS, *Money Follow the Person Grants*, at http://www1.cms.gov/DeficitReductionAct/20_MFP.asp.

²⁶ The Act, § 2404.

²⁷ 42 U.S.C. §1396r-5.

²⁸ The Act, § 2405.

²⁹ 42 U.S.C. § 3002(4)

³⁰ Administration on Aging, *Aging and Disability Resource Center Fact Sheet*, at http://www.aoa.gov/AoAroot/AoA_Programs/HCLTC/ADRC/index.aspx.

³¹ *Id.*

If you have any specific questions about how these provisions of the Act will affect your organization, please contact a member of the McGuireWoods' Healthcare Department.