



Protecting and Promoting the Rights of Kentuckians with Disabilities

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December 12, 2016

Department for Medicaid Services
MPW Waiver Renewal
Commissioners Office
275 E. Main St., 6W-A
Frankfort, KY 40621

Via email MedicaidPublicComment@ky.gov and U.S. Mail

RE: The Michelle P. Waiver Renewal Application

Dear Department for Medicaid Services:

Kentucky Protection and Advocacy (P&A) offers the following comments on the Michelle P. Waiver (MPW) Renewal Application. The Department for Medicaid Services (DMS) posted on its website a notification of intent to submit the MPW Renewal to the Center for Medicare and Medicaid Services (CMS), and the public has until December 17, 2016 to submit comments about the Renewal Application.

P&A is in a unique position to comment as we represented individuals and a class in federal litigation that eventually led to the creation of MPW. MPW was a landmark result that helped more than 10,000 persons with intellectual or developmental disabilities (ID/DD) avoid institutionalization by providing access to community-based services and supports. We continue to represent individuals with ID/DD, have followed the implementation of MPW, and are concerned that certain aspects of the MPW Renewal jeopardize the hope of life in the community MPW has come to represent for so many Kentuckians.

I. Limiting MPW services to just 40 hours per week

The participant directed services—Community Day Supports on page 61 and Home and Community Services on page 67—are limited to 160 units per week in combination with other services, excluding Case Management and Respite. This caps participant directed services at 40 hours per week. There should not

be a combined limit. If there is such a limit, there should be an exception process that would allow consumers in certain circumstances to exceed the combined 40-hour cap. We participated in round-tables with DMS expressing these concerns and wrote a letter to DMS that we incorporate by reference to these comments. Many individuals attend traditional Adult Day Treatment or Adult Day Health Care. These day services can devour all or almost all of a MPW recipient's 40 hour per week service cap, leaving nothing left for other essential services like assistance with bathing, eating, dressing, medication monitoring, socialization, relationship building, shopping, and participating in community activities. Certain MPW recipients, to avoid unnecessary institutionalization, must have access to more than 40 hours per week of services.

CMS instructs us that a waiver program like MPW must contain certain basics.¹ The Waiver must, among other things, be cost neutral, protect health and welfare, and ensure services follow an individualized and person-centered plan of care. The 40-hour cap hinders all of these requirements.

Regarding cost neutrality, Kentucky's yearly ICF/IID rate far exceeds the cost of MPW. Page 153 of the MPW Renewal shows us that a year in an ICF/IID in Kentucky costs \$342,997.95 per recipient and MPW is just \$38,135.33 per recipient. The 40-hour cap will force some MPW recipients to either move into an ICF/IID or nursing facility, or to apply for Kentucky's other ID/DD Waiver called Supports for Community Living (SCL). SCL costs about \$73,000 per year per recipient. Some individuals with ID/DD might also qualify for Kentucky's nursing facility waiver called the Home and Community Based Waiver (HCBW), but the HCBW participant directed pay rate of \$11.52 per hour is insufficient to meet the needs of many individuals with ID/DD. The 40-hour cap, when viewed in the context of the consequences for recipients, is simply not cost neutral.

The 40-hour cap also moves Kentucky backwards from protecting the health and welfare of our ID/DD citizens. Where MPW recipients desire to remain in the community and cannot obtain funding through SCL (there is a substantial waiting list for even emergency SCL), they will be forced to decide between accepting reduced, and perhaps insufficient, services or be institutionalized at an ICF/IID or a nursing home. As a result, the 40-hour cap will increase vulnerability and will likely endanger the health and welfare of this vulnerable population.

The 40-hour cap also negates person centered planning. A MPW recipient's person centered plan might show a need for more than 40 hours per week of

¹ <https://www.medicaid.gov/medicaid/hcbs/authorities/1915-c/index.html>

service. Under the MPW Renewal, however, 40 hours is all that is available regardless of what the plan reveals as a need.

We suggest the following in order of preference. DMS should incorporate language in the MPW Renewal that allows DMS to grant MPW recipients access to services based on their plan of care and DMS should set participant directed pay rates equal to traditional services. Alternatively, cap services at a realistic amount that will help Kentucky's citizens with ID/DD avoid institutionalization. And if those services are capped, there should be an exception process based on the plan of care. Lastly, if the plan of care will not be used to drive services, and there is no exception process, then we suggest the following language when limiting the amount, frequency, or duration of Community Day Supports and Home and Community Services:

Limited to 160 units per week in combination with other services, excluding Case Management, Respite, and Behavioral Supports or limited to 220 units per week in combination with Adult Day Training or Adult Day Health Care, excluding Case Management, Respite, and Behavioral Supports.

II. Utilizing captive rather than conflict-free Support Broker

Both the SCL and HCBW Renewals replaced the Support Broker Service with Case Managers. The MPW Renewal keeps the Support Broker Service and page 70 shows that the provider types for Support Brokers are limited to Area Agencies on Aging and Independent Living (AAA) and the Community Mental Health Centers (CMHC). We question whether limiting consumer choice to just AAAs or CMHCs runs afoul of the recently amended federal final rule for home and community-based waiver programs. The final rule requires states to offer conflict-free case management to waiver participants.² Also, because of these provider type limits, some MPW recipients will forgo consumer directed services altogether based on their previous dealings with the AAAs or CMHCs. We ask that if the Support Broker service remains, DMS opens up the provider types to more than just the AAAs and CMHCs to match the provider type for Case Management—"[l]icensed and certified Medicaid providers." Page 43, MPW Renewal.

III. Including Therapies

The MPW Renewal includes, on page 37, speech, occupational, and physical therapy services. DMS recently removed these services from HCBW. We are encouraged that these services will remain in the MPW Renewal.

² http://chfs.ky.gov/NR/rdonlyres/CEA45907-55BD-46DF-994F-A823803B0C63/0/HCBSFinalRules_ComplianceFAQ_Final2.pdf

IV. Violating *Olmstead*

We ask that DMS review the total number of MPW recipients. Page 154 shows that the number of recipients stays firm at 10,500 for the next five years. The MPW waiting list continues to grow, and it is currently at over 5,000. If the number of recipients is not increased over the 5-year waiver period, the waiting list might actually exceed the number served by MPW. DMS should increase this number to meet demand and thereby not violate *Olmstead's* rule to not unnecessarily institutionalize individuals with disabilities.

V. Including Transportation

Please clarify that transportation to community activities and appointments is part of the Community Living Supports, Community Day Supports, and Home and Community Services. Kentucky is mostly a rural state and many MPW recipients lack access to public transportation. HCBW allows transportation under Attendant Care and Home and Community Support Service, as part of the unit cost for those services, to places specified in the person-centered plan.³ Individuals in MPW and HCBW meet different levels of care—the former ICF/IID and the later nursing facility—and thus we can understand why the service array offered to each population could differ in type and amount, but with respect to transportation, the populations should receive the same service.

VI. Not forcing recipients to pay for background checks

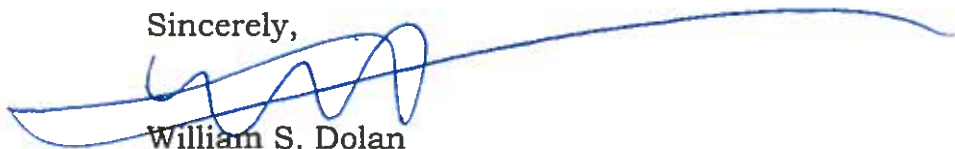
Page 115 of the MPW Renewal indicates that recipients who participant direct their services must “as the employer, [be] responsible for the cost of obtaining criminal background checks.” P&A is consumer driven and consumers have consistently told us that they cannot afford to pay for background checks. The cost of background checks per employee typically exceed several hundred dollars. We have repeatedly conveyed this to DMS and also maintained this practice limits consumer choice and it may go against protecting health and welfare when recipients, because of cost, cannot replace unsatisfactory employees.

Most P&A clients' sole source of income is Supplemental Security Income (\$733/month), thus the cost of background checks, for many, is an insurmountable hurdle to accessing participant directed services. We suggest allowing consumers to include all of the employee start-up costs as a budget item or include the costs as an administrative expense. The costs could also be included in the rate paid to Financial Management Services.

³ <http://www.lrc.ky.gov/kar/907/007/010.htm>

Thank you for your consideration of our comments and concerns. Please contact me if you have any questions.

Sincerely,



William S. Dolan
Staff Attorney Supervisor

Enc. ~ Letter to Division of Community Alternatives Director Leslie Hoffman





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April 15, 2016

Leslie Hoffman, Director
Division of Community Alternatives
Department for Medicaid Services
275 East Main Street, 6W-B
Frankfort, KY 40621

Dear Ms. Hoffman,

Thank you for inviting us to participate in the recent Michelle P. Waiver stakeholder meetings. We sincerely appreciate the opportunity to share our thoughts regarding the upcoming waiver renewal and look forward to working with the Department as the process moves forward. While we anticipate many positive changes to the waiver, we would like to take this opportunity to reiterate our concerns regarding the 40 hour per week service limit.

From its inception, the waiver has always had a 40 hour per week limit on traditional services. However, as you are aware, it has been a longstanding practice to allow recipients the flexibility to blend traditional and consumer-directed services in excess of 40 hours as long as total services do not exceed the annual global cap of \$63,000 found in 907 KAR 1:835 Section 8. Since the Department has recently changed its interpretation of the regulation and intends, as you have previously indicated, to implement a 40 hour cap on all services in the renewal waiver, we strongly suggest that some form of exception to the 40 hour rule be included in the renewal waiver.

Many of the current waiver recipients who blend services in excess of 40 hours per week are adults who rely on these services to remain in the community. Many lack meaningful alternatives, such as natural supports and access to other Medicaid and general fund programs, should their services be reduced to 40 hours a week and would likely face institutionalization as a result. We believe, given the integration mandate of the Olmstead decision, it is imperative that an exception to the 40 hour rule be available to address such cases. Without such an exception, Kentucky will ultimately spend more money forcibly institutionalizing its citizens.

The current Michelle P. regulation contains an exception process for those who seek an increase in their consumer-directed budgets to avoid imminent institutionalization. We suggest that a similar process and language be included in the renewal waiver to give those recipients who require more than 40 hours per week of service to remain in the community the ability to do so using this vital program.

Thank you again for seeking our input on the Michelle P. Waiver renewal. We look forward to hearing from you.

Sincerely,



Kevin McManis
ITO Team Supervisor



William Dolan
Adult Team Supervisor



Camille Collins
PADD Program Coordinator