



National Council on Disability

An independent federal agency making recommendations to the President and Congress to enhance the quality of life for all Americans with disabilities and their families.

December 13, 2013

Marilyn B. Tavenner
Administrator
U.S. Department of Health & Human Services
Centers for Medicare & Medicaid Services
Hubert H. Humphrey Building
200 Independence Avenue, SW, Room 445-G
Washington, DC 20201

RE: Amendment to KanCare Medicaid Section 1115

Dear Administrator Tavenner:

The National Council on Disability (NCD) is writing in regard to Kansas' request for approval of an amendment to the KanCare Section 1115 demonstration project. NCD is an independent federal agency charged with advising the President, Congress, and other Federal agencies regarding laws, policies, practices, and procedures affecting people with disabilities. As detailed below, NCD recommends that CMS not approve, at this time, the portion of Kansas' 1115 Waiver Amendment that would transfer the Intellectual Disabilities/Developmental Disabilities (ID/DD) Waiver into managed care. Instead, CMS should delay its consideration of Kansas' proposed 1115 Waiver amendment for 12 months, pending the completion of an extended review by CMS of the concerns raised by both Kansas stakeholders and NCD. Additionally, NCD recommends that CMS require specific changes to the structure of KanCare's application to people with intellectual or developmental disabilities, such as an end to the institutional carve-out, and providing for a more robust and independent Ombudsman's program.

As you may know, NCD recently held its Quarterly Meeting in Topeka, Kansas on December 4 and 5, 2013. The meeting focused significantly on Medicaid managed care, including a panel discussion on the implementation of KanCare. Topeka was the first of four cities NCD plans to visit to gather information about Medicaid managed care, particularly as it relates to people with disabilities. During the meeting, NCD heard from KanCare consumers, advocates, and state officials on the implementation of KanCare. The disability community shared their struggles with the implementation of KanCare, including some individuals facing substantial cuts to necessary care. Conversely, Kansas state officials largely praised KanCare, however also admitted that there were some challenges. Based on the testimony received, it is clear to NCD that many unresolved issues remain for people with disabilities.

NCD is deeply concerned about the pending consideration by CMS with regard to the proposed 1115 Waiver Amendment by Kansas to incorporate long-term services and supports (LTSS) for people with

intellectual or developmental disabilities into the State's managed care KanCare program. Specifically, NCD has the following concerns:

- NCD is concerned by the inadequate review and consideration of stakeholder concerns by both Kansas and CMS. We find the start date for inclusion of LTSS into KanCare on January 1, 2014, with public comments open until December 17, 2013, and final CMS approval yet to be determined, suggestive of insufficient consideration, response, or interaction between stakeholders impacted by the proposed waiver amendment and CMS, and state officials;
- Kansas' exclusion of public Intermediate Care Facility institutional services and supports into the proposed waiver should be reviewed and considered for amendment noting that this omission excludes the greatest source of potential improvement in program coordination, improved outcomes, and cost savings. We are also deeply concerned that, despite the state maintaining a gatekeeper function for access to public Intermediate Care Facilities, such an exclusion will result in perverse incentives on Managed Care Organizations (MCOs) participating in the demonstration;
- NCD believes Kansas and its MCO contractors should demonstrate greater stakeholder participation in the design and operation of its managed care system for LTSS. NCD finds the significant public and stakeholder resistance to the inclusion of ID/DD services to KanCare to be indicative of insufficient effort to value the input and considerations of stakeholders and their expertise. We also believe that Kansas should be required to implement and document a more comprehensive process of engagement and planning with multiple community stakeholders in the ID/DD community, including people with intellectual or developmental disabilities, family members, and providers;
- NCD believes an accelerated inclusion of people with intellectual or developmental disabilities in need of LTSS into KanCare without adequate or documented review by both CMS and Kansas of the potential impact on the quality and outcomes to be troublesome and may result in negative consequences;
- NCD believes Kansas must be required to fulfill all requirements of the current 1915 (c) waiver by: 1) eliminating the so-called "underserved" waiting list and providing all necessary services to the upwards of 1,700 Kansans on it; and 2) serving the 9,552 people Kansas has promised to serve in their 1915 (c) waiver application. Approval of Kansas' managed care demonstration for people with ID/DD should be predicated on successful compliance with Kansas' existing commitments under the 1915(c) waiver; and
- NCD is concerned that Kansas and its participant MCOs address reported payment delays to providers. Before the inclusion of additional ID/DD providers, including many small providers dependent upon timely reimbursement, NCD believes KanCare contractors must demonstrate its ability to address documented delays in payment to existing providers. In addition, Kansas must outline in greater detail the steps it intends to take to preserve the viability of small providers in Kansas' ID/DD system, consistent with CMS' technical assistance documents on this topic.

NCD has dedicated significant time and resources to examining the impact of managed care on people with disabilities. On March 18, 2013, NCD issued a report titled *Managed Care for People with Disabilities: Policy and Implementation Considerations for State and Federal Policymakers*, to assist with the implementation of managed care reforms without harming Americans with disabilities.¹ In the report, NCD outlines twenty-two principles to guide the design and implementation of managed care services for people with disabilities. NCD also recommends that CMS create and circulate a comprehensive, easy-to-understand procedure spelling out the process for determining state demonstration waiver requests that seek to link Medicaid managed long-term services and supports.

¹ National Council on Disability, "Managed Care for People with Disabilities: Policy and Implementation Considerations for State and Federal Policymakers," March 2013, available at <http://www.ncd.gov/publications/2013/20130315/>.

NCD recognizes that both state and federal government leaders may find distinct advantages, both fiscal and programmatic in utilizing a managed care approach to the delivery of health care services, as states and the federal government look for ways to improve care and manage Medicaid spending more effectively. With strong oversight and equally strong planning, managed care can offer opportunities to improve the quality and cost effectiveness of care for Medicaid beneficiaries in the setting of their choice. However, as NCD has repeatedly stated, transitioning people with disabilities into managed care involves many challenges and must be tailored to meet the unique challenges of people with disabilities.

Accordingly, NCD offers the following recommendations with regard to KanCare:

- Kansas should operate a successful regional pilot project that tests, documents, and evaluates what the State is proposing with the shift of the ID/DD Waiver into its 1115 Amendment Demonstration;
- Kansas should create a robust, independent Ombudsman program outside of State government who will be an independent advocate to help members navigate the process. We recommend that Kansas outline in its revised applications the financial resources it will allocate to the Ombudsman's program in order to bring its capabilities in line with the needs of Kansas Medicaid beneficiaries within the KanCare program;
- CMS should require Kansas to include all institutional services within the 1115 Demonstration should it desire to shift HCBS services for people with ID/DD into KanCare;
- CMS should not grant its approval for a January 1, 2014 inclusion of LTSS for people with ID/DD into the KanCare program. NCD recommends a 12-month delay of further consideration of the proposed amendment pending the completion of an extended review by CMS of the concerns raised by both Kansas stakeholders and NCD;
- CMS should follow through to ensure that Kansas upholds its obligation to address the current waiting list within its DD Waiver and that additional attention is paid to ensure Kansas serve the total unduplicated count of Kansans with ID/DD, which was promised in the State's DD Waiver application;
- CMS and Kansas should engage in further direct dialogue and examination of available data that can shed light on the programmatic and fiscal impact of including ID/DD LTSS consistent with the Managed Care Recommendations and Principles published by NCD. NCD is available to assist in this effort;
- CMS should create a definition of medical necessity that includes LTSS. Such services should include, but not be limited to independent living, employment, and other services that ensure full community participation;
- CMS should conduct an oversight review of the current administration of KanCare. NCD is deeply concerned about the administration of diagnostic and evaluative metrics and tools used by the MCOs that are resulting in significant reductions of service for individuals with disabilities. The Council notes the example of one individual qualified by the former Medicaid office for 24/7 in home supports and services who has been recommended by his MCO for a 76% reduction in services in supports. Kansas' Secretary of Disability and Aging Services testified to NCD that the former Medicaid office and the participant MCO utilize identical evaluative tools instances in which individuals have received drastic reductions in services and supports after new evaluation from MCOs participating in KanCare, despite the use of identical evaluation tools. Such a variance in service recommendations seems suggestive of aberrant implementation or inappropriate external considerations such as MCO profit considerations over quality considerations. With regard to this variance, the Secretary of Disability and Aging testified that the former Medicaid office was previously negligent in consistently implementing evaluative and diagnostic tools, which should have been noted or detected in previous CMS

related quality audits. Such a suggestion needs further investigation by CMS and possible referral to the Department of Justice Office of Civil Rights to determine if Kansas adequately administered its Medicaid program in the past or if the MCOs are using external or variant mechanisms to place cost savings or profit over quality for people with disabilities; and

- NCD approves of the use of medical loss ratios as a means of holding Managed Care Organizations accountable and preventing the profit motive from overtaking the need of people with complex support needs to receive adequate service provision and care. We recommend that CMS carefully review Kansas' medical loss ratio requirement and explore the issuance of technical assistance to other states regarding the applicability of this tool to managed care demonstrations involving complex populations, such as people with disabilities.

Thank you for your ongoing attention to this issue. NCD stands ready to provide our support and research to Kansas and CMS to ensure that the implementation of KanCare, and managed care nationally, is not detrimental to people with disabilities and their families. Please do not hesitate to contact Robyn Powell, NCD's Attorney Advisor, at 202-236-9651 or RPowell@ncd.gov if we can be of further assistance.

Respectfully,



Jeff Rosen
Chairperson

CC:

Cindy Mann, JD
Director of the Center for Medicaid and State Operations
Center for Medicare & Medicaid Services (CMS)

Susan Mosier, MD
Medicaid Director
State of Kansas, Department of Health and Environment

Robert Moser, MD, Secretary
Kansas Department of Health and Environment

Shawn Sullivan, Secretary
Kansas Department for Aging and Disability Services

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