

TBISC Medicaid Waiver Options and Issues

A Webcast for P&As and CAPs
Featuring
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National Health Law Program
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AGENDA

- 2:00 TO 2:15 – Logistics, introduction of speakers and review of agenda
- 2:15 to 2:45 – Presentation by NHeLP Attorneys, including background on TBI & focus on Waivers
- 2:45 to 3:05 – Discussion of Questions already sent in from P&As
- 3:05 to 3:30 – Additional questions from participants



TBI Background

- Injury to head caused by trauma
- Causing amnesia, skull fracture, other neurological problems
- 5.3 million Americans live with TBI
- 1.9 million cases each year



TBI Background

- ⌘ Long term effects: physical, mental, emotional
- ⌘ Approx. ½ severely debilitated
- ⌘ Treating costs: over \$4 billion annually



SCI Background

- ⌘ Injury to spinal cord caused by trauma
- ⌘ Can result in pressure sores, respiratory infection, UTIs, spasticity
- ⌘ Approx. 200,000 live with SCI
- ⌘ Affects 11,000 annually



Medicaid's structure

- ⌘ Entitlement
- ⌘ Cooperative federalism
- ⌘ Statewideness
- ⌘ Comparability
 - Medical assistance cannot be less in amount, duration, or scope among similar eligibility groups



Medicaid's structure

- ✦ “Byzantine construction” makes Medicaid “almost unintelligible to the uninitiated”
- ✦ Medicaid Act is “an aggravated assault on the English language”
- ✦ Medicaid “regulations so drawn they have created a Serbonian bog”



Medicaid: the many state options

- ✦ Eligibility – Mandatory and optional
 - Limited income/resources
 - Citizenship
 - Residency
- ✦ Services – mandatory and optional



Eligibility Categories: Mandatory, e.g.:

- ✦ Pregnant women, children up to 6 years, < 133% FPL
- ✦ Children 6-19 years, < 100% FPL
- ✦ Newborn children of Medicaid-eligible women
- ✦ Individuals receiving SSI *or* qualifying through 209(b)



**Eligibility Categories:
Optional, e.g.:**

- # Children 1-6 > 133% FPL; 6-19 > 100% FPL
- # Medically needy
- # Non-institutionalized children with disabilities
- # Persons with disability, <100% of FPL
- # Persons eligible b/c they qualify for HCBW



**Services (§ 1396d(a)): Mandatory
e.g.:**

- # Physician services
- # Laboratory/x-ray
- # In-patient hospital
- # Outpatient hospital
- # Early and Periodic Screening, Diagnosis and Treatment
- # Certified nurse practitioner services
- # Home health care*



**Services (§ 1396d(a)): Optional
e.g.:**

- # Prescription drugs, prosthetic devices
- # Home health care*
- # Medical and other remedial care recognized by state law, furnished by licensed practitioners
- # Private duty nursing
- # Dental
- # Physical therapy and related services
- # Intermediate care facility services for the mentally retarded
- # Rehabilitative services
- # Case management
- # Personal care services
- # Other services designated by the Secretary of HHS (transportation)



EPSDT

- ✦ Early and Periodic Screening, Diagnosis and Treatment
- ✦ Mandatory service for Medicaid-eligible children and youth up to age 21
- ✦ “T” includes services listed in Medicaid Act (§ 1396d(a)) need to “correct or ameliorate” physical or mental condition



Home and Community-based Waivers—Overview

- ✦ Authorized by 42 USC 1396n(c)
- ✦ Issued by Secretary of DHHS
- ✦ Allows waiver of: statewideness, comparability, financial eligibility requirements
- ✦ Goal: provide services to persons at home or community and avoid institutionalization



Home and community-based waiver: overview

- ✦ Three types:
 - Individuals at risk of institutionalization (e.g. NF, ICF-MR, hospital)
 - Individuals over age 65 who would be in NF
 - Children under age 5 with AIDS/HIV or drug dependency at birth



Home and community-based waivers: services

- # Regular mandatory state plan services*
- # Optional services not otherwise covered in state plan
 - E.g. private duty nursing, case management, personal care
- # Special services not otherwise covered by Medicaid
 - E.g.: respite, homemaker, adult day, home modification



Home and community-based services: Assurances

- # Necessary safeguards to protect health and welfare
- # State will evaluate recipient's need for institutional services
- # Inform choice of waiver or institution
- # Cost neutrality
- # Annual information to DHHS re: impact of waiver



A Word about EPSDT

- # Children receiving HCBW eligible
- # EPSDT can affect cost cap
- # It's important for persons 18-21!



HCBW-TBI/SCI

- ✦ 27 states target TBI &/or SCI specifically
- ✦ Usually limited in number (e.g. ND-21; VT-50)
- ✦ Usually serve individuals aged 18-64



HCBW-TBI/SCI

- ✦ Services:
 - Case management
 - Personal care
 - Respite
 - Medical equipment
- Personal emergency response systems (e.g. DE)
- Crisis management (e.g. ID)
- Sleep cycle support (e.g. KS)
- Vehicle modifications (e.g. MN)



HCBW TBI/SC Waivers: The Florida Example

- ✦ BSCI Waiver
- ✦ 300 slots annually
- ✦ Initial approval: 1999



TBI/SC Waiver: Florida

- Eligibility criteria:
 - Must be medically stable
 - Meet state definition of SC or moderate to severe BI
 - Populations covered:
 - categorically eligible
 - aged or disabled < 90% FPL
 - individuals with incomes < 300% SSI benefit level



HCBW TBI/SC – Florida

- Services covered:
 - Adaptive health and wellness
 - Rehabilitation engineering eval.
 - Attendant care and companion services
 - Assistive technologies
 - Life skills training
 - Community service coordination



Florida Waivers

- 1115 demonstration waiver (42 USC 1315)
 - Independence Plus Waiver
 - Includes 39 BSCIW participants and others
 - Exchanges waiver services for cash to purchase services (cash and counseling)



HCBW TBI and/or SCI litigation

- # Bryson v. Shumway (NH)
- # DuBois v. Medows (FL)
- # Williams v. Wasserman (MD)
- # TN P&A v. Wells (TN)



Litigation – Bryson (NH)

- # 42 USC 1396a(a)(3) – due process
- # 42 USC 1396a(a)(8) – reasonable promptness
- # 42 USC 1396a(a)(17) – reasonable standards
- # 42 USC 1396a(a)(19) – best interests
- # 42 CFR 440.230(b) – amount, duration, scope
- # American with Disabilities Act
- # Section 504 of the Rehabilitation Act
- # Constitutional due process



Litigation – Bryson holdings

- # Sovereign immunity no bar
- # Section 1983 right to enforce most claims recognized
- # Medicaid: eligibility up to number of slots
- # ADA: Fundamental alteration defense the crucial issue

- # Trial: expected in 2005



Litigation – DuBois (FL)

- ✦ 42 USC 1396a(a)(3) – due process
- ✦ 42 USC 1396a(a)(8) – reasonable promptness
- ✦ 42 USC 1396n(c) – freedom of choice
- ✦ ADA/504
- ✦ Constitutional due process



Litigation – DuBois decisions

- ✦ Sovereign immunity no bar
- ✦ Class certified: “all individuals with TBI or SCI whom the state has determined or will determine to be eligible to receive waiver services”
- ✦ Settlement negotiations underway



Litigation– Williams (MD) & TN P&A (TN)

- ✦ Williams: Important ADA case, post *Olmstead*
 - Fundamental alteration defense prevailed
- ✦ TN P&A: Important P&A access case
 - Acquired injuries also qualify for DD



Questions Received

- In states that have a specific TBI waiver, what have advocates done to encourage states to increase funding? Has anyone done legislative work to obtain or increase TBI waivers? What worked? On average how many waiver slots are available for people with TBI in designated waiver states?



Questions Received

- In those states with trust funds, how do the funds interact with the waiver? For example, how do they prevent the trust fund from supplanting the waiver funding? Our state has been looking at creating a trust fund, but the state seems eager to see it as an alternative source of funding, instead of an additional resource for people who don't qualify for the waiver.



Questions Received

- Have people had difficulty finding competent service providers when they do have the waiver funds available? What have states and advocates done to create a competent infrastructure (i.e. housing providers with TBI experience)



Questions Received

- Our state agency has incorrectly told individuals, currently receiving home health services under the state Medicaid plan, that they must choose between receiving home health only under our traditional MA plan or only through the TBI waiver –Individuals can not receive services under both. This is not true. I am wondering if folks in other states have run into this problem?



Questions Received

- How are states coordinating the employment services that are available through the TBI waiver with traditional vocational rehabilitation services?


