

Kentucky Concerned Family Network (KCFN)
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August 25, 2014

Lawrence Kissner, Commissioner
Department for Medicaid Services
HCB Final Rule Michelle P Waiver Transition Plan
Commissioners Office
275 E. Main Street, 6W-A
Frankfort, Kentucky 40621

Letter Submitted electronically: CMSfinalHCBRule@ky.gov on 8/25/2014 with attachment file named – “KCFN Public Comment - Michelle P - CMS Final Rule - Attachment A - KY HCBS Waiver Table”. Letter and attachment in one PDF file.

(July 30, 2014) - Public Notice - The Cabinet for Health and Family Services Department for Medicaid Services (DMS), in accordance with 42 CFR 441.301, hereby provides a 30-day public notice and comment period for its Transition Plan for the Michelle P Waiver to comply with the requirements set forth in Final Rule - CMS 2249-F - 1915(i) State Plan Home and Community-Based Services, Five-Year Period for Waivers, Provider Payment Reassignment, Setting Requirements for Community First Choice, and CMS 2296-F 1915(c) Home and Community-Based Services Waivers (final rule).

Dear Commissioner Kissner,

Introduction - Kentucky Concerned Family Network (KCFN)

The Kentucky Concerned Family Network (KCFN) is a statewide nonprofit organization advocating for high quality care and human rights for all people with intellectual and developmental disabilities. As the only statewide Kentucky advocacy organization supporting a full spectrum of care options we offer hope and support for individuals and their families, who are working to protect or secure necessary high quality services regardless of where they choose to live.

The primary purpose of KCFN is to provide a single powerful advocacy voice to serve and support the families, family-guardians, friends and residents of all Kentucky Intermediate Care Facilities for Individuals with Intellectual Disabilities (ICFs/IID). Families and family groups from the following Kentucky ICFs/IID are KCFN members – Oakwood, Hazelwood, Bingham Gardens and the Wendell Foster's Campus for Developmental Disabilities.

Due to the past and on-going deinstitutionalization activities in Kentucky at least some of these ICF resident and their families are prime candidates to experience the reality of the Michelle P HCBS waiver. Therefore, KCFN has a responsibility and vested interest in working to address concerns regarding the effectiveness of the Commonwealth in providing high quality, medically comprehensive, safe and secure community-based residential settings with proper oversight through Medicaid and the Medicaid HCBS waiver process, including the Michelle P HCBS 1915(c) waiver. We offer these comments in support of our vested interest.

Executive Summary – Limited Scope

The DMS public notice and comment period noted above was published on July 30, 2014 and ends on August 27, 2014. It allows for public comment on the DMS transition plan which will govern the impact of the CMS Final Rule noted above on the Kentucky Michelle P CMS HCBS 1915(c) waiver. The Michelle P HCBS waiver is summarized below:

KY Michelle P (0475.R01.00)		
Waiver Type: 1915 (c)	Status: Active	
Approval:10/01/2007	Effective:09/01/2011	Expiration:08/31/2016
Provides adult day health, case management, community access, day training, personal assistance, respite, shared living, supported employment, OT, PT, speech therapy, community guide, goods and services, natural supports training, transportation, assessment/reassessment, community transition, consultative clinical and therapeutic service, environmental accessibility adaptation, person centered coaching, positive behavior supports, specialized medical equipment and supplies, vehicle adaptation for individuals w/MR/DD ages 0 - no max age.		

The CMS Final Rule is summarized below.

The CMS Regulation Final Rule noted in the public notice above was published in the Federal Register Vol. 79, No. 11, on Thursday, January 16, 2014 under Rules and Regulations on page 2948. The Final Rule became effective on March 17, 2014. As published in the Federal Register it is 93 pages long and may be found at: <http://www.gpo.gov/fdsys/pkg/FR-2014-01-16/pdf/2014-00487.pdf>

A 59 page CMS slide presentation on the CMS Regulation Final Rule titled “Final Rule Medicaid HCBS” may be found at:

<http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Long-Term-Services-and-Supports/Home-and-Community-Based-Services/Downloads/Final-Rule-Slides-01292014.pdf>

Several CMS Final Rule fact sheets may be found at:

- Fact Sheets Regarding Final Regulation CMS-2249-F/CMS-2296-F
 - [Overview of Regulation](#)
 - [1915\(c\): Changes to HCBS Waiver Program](#)
 - [1915\(i\): Key Provisions for HCBS State Plan Option](#)
 - [Summary of Key Provisions of the HCBS Settings Final Rule](#)

Executive Summary – Limited Scope (Transition Plan)

The Kentucky Department of Medicaid Services (DMS) proposed transition plan that will govern how this CMS Final Rule will impact the Kentucky Michelle P 1915(c) waiver may be found at:

[Proposed Transition Plan.](#)

The purpose of this nine page PDF file slide presentation is to present the steps DMS will take to plan for and execute the transition with public engagement.

“The purpose of this transition plan is to outline the key activities that the Kentucky Department for Medicaid Services will facilitate to transition its Michelle P Waiver to become compliant with the recently released final rule pertaining to Home and Community Based Services over the next five years.”

The proposed transition plan outlines at a very high level a five year process beginning in 2015 and ending in 2019 of how the DMS will implement the Final Rule changes in the Michelle P waiver. Years 2015 and 2016 show activities summarized as Assess, Define, Identify and Plan. Years 2017, 2018 and 2019 are summarized as Execute/Monitor.

In each of the steps for 2015 - 2019 (Assess, Define, Identify, Plan, Execute and Monitor) Key Stakeholder Activities are identified. The proposed transition plan offers no suggestion as to the significant impact these CMS mandated changes will have on the Michelle P waiver.

The Kentucky Concerned Family Network (KCFN) respectfully requests inclusion and “a seat at the table” beginning at the earliest possible date as this proposed transition plan and other HCBS waiver transition plans are developed and executed.

Executive Summary – The Larger Picture

The CMS Final Rule is identified through the provided CMS literature links in the preceding sections of this letter. What is not fully identified in these sections is the broad impact the CMS Final Rule will have on the Michelle P 1915(c) HCBS waiver and all other Kentucky HCBS waivers as well.

The CMS Final Rule will have a significant impact on **all** new and existing versions of the following types of CMS waiver authorities:

- HCBS waivers under section 1915(c) of the Social Security Act
- HCBS waivers under section 1915(i) (State Plan) of the Social Security Act
- HCBS waivers under section 1915(k) (Community First Choice) of the Social Security Act

It also allows states to use a five-year renewal cycle to align concurrent waivers and state plan amendments that serve individuals eligible for both Medicaid and Medicare, such as 1915(b) (Managed Care Waivers) and 1915(c).

The Word document titled “KCFN Public Comment - Michelle P - CMS Final Rule - Attachment A - KY HCBS Waiver Table” is an attachment to this letter. It includes summary details of the seven currently active Kentucky 1915(c) CMS waivers and the two currently active Kentucky 1915(b) CMS waivers. These waivers will be impacted by the CMS Final Rule. It is assumed that the proposed transition plan for Michelle P or some other transition similar plan will be necessary for each Kentucky HCBS waiver also.

The Kentucky Concerned Family Network (KCFN) respectfully requests inclusion and “a seat at the table” beginning at the earliest possible date as this proposed transition plan and other HCBS waiver transition plans are developed and executed.

Final Rule Waiver Changes Overview

Shown below are some of the Final Rule intentions, highlights, requirements and conditions for 1915(c), 1915(i) and 1915(k) Medicaid waiver authorities. The purpose in providing this information is to give the reader who has not followed the several year development process of the Final Rule some sense of the complexity and “reach” of the Final Rule. For those intimately familiar with the Final Rule this section can be skipped.

- To ensure that individuals receiving long-term services and supports through home and community based service (HCBS) programs under the 1915(c), 1915(i) and 1915(k) Medicaid authorities have full access to benefits of community living and the opportunity to receive services in the most integrated setting appropriate
- Defines, describes, and aligns home and community-based setting requirements across three Medicaid authorities
- Defines person-centered planning requirements for persons in HCBS settings under 1915(c) HCBS waiver and 1915(i) HCBS State Plan authorities
- Implements regulations for 1915(i) HCBS State Plan benefit

- **Provides option to combine multiple target populations within one 1915(c) waiver: combination includes intellectually disabled, mentally ill with elderly** (emphasis added)
- Provides CMS with additional compliance options for 1915(c) waiver programs beyond waiver termination
- Establishes five-year renewal cycle to align concurrent authorities for certain demonstration projects or waivers for individuals who are dual eligible
- Includes a provider payment reassignment provision to facilitate certain state initiatives
- The home and community-based setting requirements establish an outcome oriented definition that focuses on the nature and quality of individuals' experiences
- The requirements maximize opportunities for individuals to have access to the benefits of community living and the opportunity to receive services in the most integrated setting
- The final rule defines, describes, and aligns setting requirements for home and community-based services provided under three Medicaid authorities: 1915(c)-HCBS Waivers, 1915(i)- State Plan HCBS, 1915(k)-Community First Choice

The final rule establishes:

- Mandatory requirements for the qualities of home and community-based settings including discretion for the Secretary to determine other appropriate qualities
- Settings that are not home and community-based
- Settings presumed not to be home and community-based
- State compliance and transition requirements

Settings that are NOT Home and Community-Based

- Nursing facility
- Institution for mental diseases (IMD)
- Intermediate care facility for individuals with intellectual disabilities (ICF/IID)
- Hospital

Settings PRESUMED NOT to Be Home and Community-Based

- Settings in a publicly or privately-owned facility providing inpatient treatment
- Settings on grounds of, or adjacent to, a public institution
- **Settings with the effect of isolating individuals from the broader community of individuals not receiving Medicaid HCBS** (emphasis added)

These "Presumed Not" settings above may NOT be included in states' 1915(c), 1915(i) or 1915(k) HCBS programs unless:

A state submits evidence (including public input) demonstrating that the setting does have the qualities of a home and community-based setting and NOT the qualities of an institution; AND The Secretary finds, based on a heightened scrutiny review of the evidence, that the setting meets the requirements for home and community-based settings and does NOT have the qualities of an institution.

Person-centered Planning

- The person-centered planning process is driven by the individual
- **Includes people chosen by the individual** (emphasis added)
- Provides necessary information and support to the individual to ensure that the individual directs the process to the maximum extent possible
- Is timely and occurs at times/locations of convenience to the individual
- Reflects cultural considerations/uses plain language

- Includes strategies for solving disagreement
- Offers choices to the individual regarding services and supports the individual receives and from whom
- Provides method to request updates
- Conducted to reflect what is important to the individual to ensure delivery of services in a manner reflecting personal preferences and ensuring health and welfare
- Identifies the strengths, preferences, needs (clinical and support), and desired outcomes of the individual
- May include whether and what services are self-directed
- Includes individually identified goals and preferences related to relationships, community participation, employment, income and savings, healthcare and wellness, education and others

For additional Final Rule intentions, highlights, requirements and conditions and other information see: <http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Long-Term-Services-and-Supports/Home-and-Community-Based-Services/Downloads/Final-Rule-Slides-01292014.pdf>

Summary of Additional Key Provisions of the Final Rule for 1915(i) (HCBS) State Plan Option

Section 6086 of the Deficit Reduction Act of 2005 (DRA) added section 1915(i) to the Social Security Act (the Act) providing states the option to offer home and community-based services, previously available only through a 1915(c) HCBS waiver, through the state's Medicaid state plan. As originally enacted, states could only serve individuals eligible under the State plan with incomes at or below 150 percent of the Federal poverty level (FPL) or below and could offer some, but not all, HCBS services and supports available through 1915(c) HCBS waivers. In addition, states were not able to target 1915(i) state plan HCBS to particular populations within the state.

The Affordable Care Act expanded coverable services under 1915(i) to include any of the HCBS permitted under section 1915(c) HCBS waivers, certain services for individuals with mental health and substance use disorders and other services requested by a state and approved by the Secretary of Health and Human Services. In addition, the changes support ensuring the quality of HCBS, require states to offer the benefit statewide and enable states to target 1915(i) State Plan HCBS to particular groups of participants but not limit the number of participants who may receive the benefit. CMS published a proposed rule on May 4, 2012 for these 1915(i) provisions. This final rule responds to the public comments received on those proposed rules.

In addition to the above provisions, the final rule also establishes a set of requirements for home and community-based settings under the 1915(i), 1915(c) and 1915(k) Medicaid authorities, and a set of person-centered planning requirements for Medicaid HCBS participants under 1915(c) and 1915(i).

KCFN Concerns

The proposed transition plan for the Michelle P waiver is the very tip of a very large regulation and waiver iceberg.

The Kentucky Concerned Family Network (KCFN) respectfully requests inclusion and "a seat at the table" beginning at the earliest possible date as this proposed transition plan and other HCBS waiver transition plans are developed and executed.

Every existing and every new 1915(b) MCO waiver, 1915(c) waiver, 1915(i) State Plan waiver, and any new 1915(k) Community First Choice waiver will have to consider and implement this Final Rule. Every existing waiver of these authorities will have a five year transition plan. The possibility for unintended consequences is significant. The Cabinet and DMS work load increase is significant.

1. Will stakeholders play a timely and significant “long-haul” part in shaping the Michelle P and other future Kentucky HCBS waivers?
2. Will the Legislature have an opportunity to express their concerns in a timely manner, and not just be asked to vote on multiple pages of waiver associated regulations? Legitimate concerns might arise in the areas of court appointed family guardianship versus “persons chosen by the consumer”.
3. The Legislature (and advocates) may have concerns regarding any actions which might undermine existing public safety net programs which do not have a profit - driven motive, which have historically proven successful in providing specialized care to vulnerable citizens with on- going challenging health care needs. Will the Legislature (and advocates) have an opportunity to express these possible concerns in a timely manner during the planning process?
4. Will the Michelle P waiver and each Kentucky waiver modified by the Final Rule be cost neutral?
5. Will DMS provide the Legislature and the public an annual audit of Final Rule compliant waivers showing all costs of care including medical care as well as room and board?
6. Will DMS provide the Legislature and the public more specificity for the plans for future state waiver services and how these waivers will provide services for persons who require long term residential care and 1) are medically fragile, 2) are mobile adults with cognitive deficits and, 3) are intellectually disabled adults of all ages with specialized medical needs whose families can no longer care for them?
7. When the Michelle P waiver is compliant with the CMS Final Rule it is reasonable to assume that more vulnerable persons with more complex disability combinations will be disbursed over broad geographic areas. Will DMS provide the medical communities across the state in various districts, both rural and metropolitan, the opportunity to review and comment for the Legislature and the public regarding DMS plans for using local community medical resources like emergency rooms, pharmacies, doctors, occupational therapist, physical therapist, and other medical providers to care for more complex persons with intellectual and/or developmental disabilities combined with other complex medical conditions?
8. When the Michelle P waiver is compliant with the CMS Final Rule it is reasonable to assume that more vulnerable persons will be disbursed over broad geographic areas. How will medical training, oversight and support be provided for those at risk for choking, bed sores, tube complications, seizures, pneumonia, and bowel impaction? Note: due to turn over the training need is on-going.
9. What are the current action and/or response plans plus training plans for current Michelle P residential settings which support persons with intense behavior support needs? Is data collected for the number of calls to 911 or emergency room visits? How will this change for the Final Rule compliant Michelle P waiver?

10. Will the DMS and Cabinet provide the Legislature and the public plans for the objective scrutiny of the death of consumers in the Michelle P waiver and all Kentucky HCBS waivers?
11. Will DMS and the Cabinet publish quarterly totals of deaths and near deaths of persons with a disability using the Michelle P waiver and the other HCBS waivers?
12. Will the DMS and the Cabinet establish the requirement for autopsies in the deaths of persons with a disability using the Michelle P waiver and the other HCBS waivers?
13. For individuals receiving residential services, will DMS and the Cabinet provide a comparison of the job descriptions between 1) the direct care staff under Final Rule compliant waivers and 2) the same information under the current pre-compliant waver? Use the Michelle P waiver for the initial comparison. In this comparison include a list of daily and hourly responsibilities.
14. For individuals receiving residential services, will DMS and the Cabinet provide a comparison of the ways in which the Cabinet monitors the home between 1) the Final Rule compliant waivers and 2) the same information under the current pre-compliant waver? Use the Michelle P waiver for the initial comparison. Provide the minimum number of required on-site visits.
15. How will the features of the Final Rule compliant Michelle P waiver compare to the current pre-compliant waver? Will DMS and the Cabinet provide a side by side chart showing features of both?
16. Will (or has) the DMS and the Cabinet establish a set of standards for a safe and health-appropriate residential home for people with disabilities? How will this change for a Final Rule compliant Michelle P waiver home?
17. What are the consequences to a family or a provider using the Michelle P waiver when Cabinet inspectors find inappropriate or dangerous homes? May it continue in operation? What are the penalties assessed against the family or providers? How will this change under a Final Rule compliant Michelle P waiver?
18. Are current Michelle P waiver providers required to carry liability insurance now? Will this change under a Final Rule compliant Michelle P waiver?

In Closing

The Final Rule published by CMS affecting several HCBS waiver authorities was effective on March 17, 2014. The Final Rule did not originate in Kentucky. However, the Kentucky Cabinet for Health and Family Services (CHFS) through the Department of Medicaid Services (DMS) and other departments is responsible for adopting and implementing the Final Rule in the state. This represents a major undertaking and a major refinement of Kentucky HCBS waivers.

Certainly the Final Rule changes will bring improvements in the delivery of HCBS services and supports for thousands of Commonwealth citizens with intellectual and developmental disabilities that can benefit from the HCBS waivers and choose to use them. The amount of Commonwealth cost increases attributable to these changes remains to be seen over the next 5-10 years.

We urge the CHFS and DMS to deliver these HCBS service and support improvements without undermining existing public safety net programs which do not have a profit - driven motive, which have historically proven successful in providing specialized care to vulnerable citizens with on- going challenging and complex health care needs.

The Kentucky Concerned Family Network (KCFN) urges a planning and implementation approach known for its extreme caution, for adopting a step-by-step process, and for embracing a transparent posture with key stakeholders and the Legislature.

On a recent webinar, a CMS official confirmed that any comment period for a transition work plan, or for an interim transition plan, does not lessen a state's obligation to solicit and accept public comment on a final substantive transition plan. We request timely notification of the public comment period required by the public comment rules to comment on the substance of Kentucky's plans.

The Kentucky Concerned Family Network (KCFN) respectfully requests inclusion and "a seat at the table" beginning at the earliest possible date as this proposed transition plan and other HCBS waiver transition plans are developed and executed.

Thank you for the opportunity to submit these public comments.

Sincerely,

Don Putnam

Founder & Board Member, Kentucky Concerned Family Network (KCFN)
Member, Kentucky Commission on Services and Supports for Individuals with Intellectual and Other
Developmental Disabilities

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cc KCFN Board of Directors
Secretary Audrey Haynes
Deputy Secretary Eric Friedlander
Commissioner Mary Begley
Director Tonya Crouch
IJC Health & Welfare
Representative Jimmie Lee
House Speaker Greg Stumbo

Kentucky Approved Home and Community Based Services (HCBS)
1915 (c); 1915 (b1); and 1915 (b4) Waivers
August 13, 2014

KY Acquired Brain Injury (ABI) (0333.R03.00)		
Waiver Type: 1915 (c)	Status: Active	
Approval:01/01/1999	Effective:01/01/2012	Expiration:12/31/2016
Provides adult day training, case management, respite, supported employment, behavioral services, counseling, group counseling, OT, specialized medical equipment, speech therapy, community guide, FMS, goods and services, assessment/reassessment, community living supports, environmental and minor home mods, supervised residential care level I, supervised residential care level II, supervised residential care level III for individuals w/brain injury ages 18 - no max age.		

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KY HCBS (0144.R05.00)		
Waiver Type: 1915 (c)	Status: Active	
Approval:01/01/1987	Effective:07/01/2010	Expiration:06/30/2015
Provides adult day health, case management, homemaker, personal care, respite, OT, PT, speech therapy, financial management services, goods and services, home and community supports, support broker, assessment/reassessment, attendant care, environmental and minor home adaptation for aged individuals ages 65 - no max age.		

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KY Supports for Community Living (SCL) (0314.R03.00)		
Waiver Type: 1915 (c)	Status: Active	
Approval:09/01/1997	Effective:09/01/2010	Expiration:08/31/2015
Provides case management, community access, day training, personal assistance, residential support level I, respite, shared living, supported employment, OT, PT, speech therapy, community guide, FMS, goods and services, natural supports training, transportation, community transition, consultative clinical and therapeutic service, environmental accessibility adaptation, person centered coaching, positive behavior supports, residential support level II, specialized medical equipment and supplies, technology assisted level I residential support, vehicle adaptation for individuals w ID/DD individuals ages 3 - no max age.		

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KY Model Waiver II (40146.R05.00)		
Waiver Type: 1915 (c)	Status: Active	
Approval:10/01/1987	Effective:10/01/2010	Expiration:09/30/2015
Provides skilled services by LPN, skilled services by RN, skilled services by a respiratory therapist for technology dependent individuals ages 0 - no max age.		

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KY Michelle P (0475.R01.00)		
Waiver Type: 1915 (c)	Status: Active	
Approval:10/01/2007	Effective:09/01/2011	Expiration:08/31/2016
Provides adult day health, case management, community access, day training, personal assistance, respite, shared living, supported employment, OT, PT, speech therapy, community guide, goods and services, natural supports training, transportation, assessment/reassessment, community transition, consultative clinical and therapeutic service, environmental accessibility adaptation, person centered coaching, positive behavior supports, specialized medical equipment and supplies, vehicle adaptation for individuals w/MR/DD ages 0 - no max age.		

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KY Acquired Brain Injury, Long Term Care (0477.R01.00)		
Waiver Type:1915 (c)	Status: Approved	
Approval:10/01/2007	Effective:07/01/2011	Expiration: 06/30/2016
Provides adult day health, adult day training, case management, respite, supported employment, behavioral services, counseling, group counseling, nursing supports, OT, PT, specialized medical equipment, speech therapy, community guide, FMS, goods and services, assessment/reassessment, community living supports, environmental and minor home mods, family training, supervised residential care level I, supervised residential care level II, supervised residential care level III for individuals w/BI ages 18 - no max age.		

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KY HCBS Transitions (0967.R00.00)		
Waiver Type: 1915 (c)	Status: Active	
Approval:12/17/2012	Effective:02/15/2013	Expiration:02/14/2018
Provides adult day health, case management, homemaker, personal care, respite, supported employment, specialized medical equipment, OT, PT, speech therapy, S/D community guide, FMS, S/D goods and services, attendant care, environmental and minor home adaptations, family training, supervised residential care level I, supervised residential care level II, supervised residential care level III for aged individuals 65 - no max age and physically disabled/other disabilities ages 18-64.		

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Kentucky MCO (KY-07)		
Waiver Type:1915 (b1)	Status: Approved	
Approval:09/08/2011	Effective:10/01/2011	Expiration:10/31/2014
Kentucky Managed Care Organization		

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Kentucky HSTD (NEMT) (KY-06)		
Waiver Type:1915 (b4)	Status: Approved	
Approval:10/21/2010	Effective:11/01/2010	Expiration: 09/30/2014
The name of the waiver program is Non-Emergency Transportation (NEMT).		

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Source:

Replace All States check box with only Kentucky

http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/Waivers_faceted.html

Click on Waiver Description in any waiver for selected state

<http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-State/Waiver-Description-Factsheet/KY-Waiver-Factsheet.html#KY0333>