



**CONSORTIUM FOR CITIZENS
WITH DISABILITIES**

November 16, 2010

Center for Medicaid, CHIP, and Survey and Certification
U.S. Department of Health and Human Services
7500 Security Blvd.
Baltimore, MD 21244

**Re: File Code: CMS-2325-P: Medicaid Program; Review and Approval Process
for Section 1115 Demonstrations RIN 0938-AQ46**

Submitted Electronically

Dear Sir or Madam:

The undersigned national organizations are members of the Health and Long -Term Services and Supports Task Forces of the Consortium for Citizens with Disabilities (CCD). The CCD is a coalition of approximately 100 national disability organizations working together to advocate for national public policy that ensures the self determination, independence, empowerment, integration and inclusion of children and adults with disabilities in all aspects of society.

We appreciate the opportunity to comment on the proposed rule on the review and approval process for Section 1115 demonstration projects that was published on September 17, 2010. Individuals with disabilities of all ages are particularly vulnerable to state decisions regarding substantive and fiscal changes to the Medicaid and CHIP programs—especially when state and federal decisions regarding 115 demonstrations have failed to include appropriate input by individuals with disabilities, their families, providers that support them, and other state and national advocates.

The changes to state health programs can significantly affect access to vital health and long-term services and supports. We are concerned that state fiscal environments and changes brought about by health reform will spur more states to submit applications for 1115 demonstrations. Consequently, the improvements to the 1115 demonstration processes are all the more timely and important.

CCD's Health and Long-Term Services and Supports Task Forces were concerned for years over the lack of state and federal transparency regarding both the 1115 processes as well as decisions reached by states and CMS. We were also very concerned about the lack of opportunity for public input and the lack of formal evaluations of the 1115 demonstrations. These concerns resulted in multi-year efforts with other national organizations to amend the authorization for 1115 demonstrations.

We were pleased that many of our concerns were addressed in The Affordable Care Act (ACA) which requires regulations to improve the process for approving Section 1115 demonstration projects for both Medicaid and the Children's Health Insurance Program (CHIP). Demonstrations can significantly affect access to vital health care services as well as long-term services and supports of millions of individuals with disabilities of all ages.

The CCD Health and Long-Term Services and Supports Task Forces provide the attached comments that are the same as those submitted by a large group of other national organizations. We submit these same comments separately, however, to highlight CCD's strong concurrence and that of the broader disability community.

Should you have any questions regarding our comments, please contact CCD Long-Term Services and Supports Task Force Co-Chair Suellen Galbraith (sgalbraith@ancor.org) of Health Task Force Co-Chair Julie Ward (jward@ucp.org).

Sincerely,

ACCSSES

American Association of People with Disabilities

American Network of Community Options and Resources

American Occupational Therapy Association

American Therapeutic Recreation Association

Association of University Centers on Disability

Bazelon Center for Mental Health Law

Brain Injury Association of America

Center for Disability Issues and the Health Professions

Children and Adults with Attention-Deficit/Hyperactivity Disorder

Community Access National Network

Disability Rights Education and Defense Fund

Epilepsy Foundation

Easter Seals

Family Voices

Harris Family Center for Disability and Health Policy

Lutheran Services in America Disability Network

National Alliance on Mental Illness

National Association of Councils on Developmental Disabilities

National Association of County Behavioral Health and Developmental Disability Directors

National Association for the Advancement of Orthotics and Prosthetics

National Association of State Head Injury Administrators

National Disability Rights Network

National Down Syndrome Congress

National Multiple Sclerosis Society

National Respite Coalition

National Spinal Cord Injury Association

Paralyzed Veterans of America

The Arc of the United States

United Cerebral Palsy

United Spinal Association

VetsFirst

World Institute on Disability

**CCD Comments Regarding Proposed CMS Regulation: Medicaid Program;
Review and Approval Process for Section 1115 Demonstrations:**

CMS-2325-P

State experience with section 1115 demonstrations underscores that these projects often have enormous programmatic and budgetary consequences. Despite the significance of these changes, negotiations are often conducted largely behind closed doors. Multiple reports by the Government Accountability Office have documented the need for improved public participation in the process, and we are pleased that the ACA directed the Department of Health and Human Services to promulgate regulations to reinvigorate the process of public participation in the development of section 1115 demonstration projects.

The proposed rule is a welcome and important contribution to efforts to develop transparency and accountability in government at both the state and federal level. In general, the proposed rule does a thorough and clear job in establishing workable processes that strike the right balance in improving the ability of consumers and health care providers affected by the proposed changes to have a voice in the process, and at the same time avoiding undue burdens for state and federal officials. We applaud the agency's efforts to develop clear guidance in a timely fashion.

We do want to note, however, that in the period prior to these regulations being finalized, it would be helpful for the Centers for Medicare and Medicaid Services to provide the public with more information on its website about Section 1115 demonstrations that are currently being considered for extensions and new Section 1115 demonstrations that have been submitted. At the moment it is difficult to obtain consistent and reliable information on the status of pending Section 1115 demonstrations.

In light of these ongoing challenges, we believe that the proposed regulations are an essential step forward in this area especially in light of full implementation of the ACA in 2014 and the subsequent companion process for waivers of ACA requirements as outlined in Section 1332 of the law that becomes effective in 2017. To the extent possible, we recommend that the Department of Health and Human Services align procedures for public notice and comment as required by ACA's Section 1332 (a)(4)(B) with public notice and comment procedures required for Section 1115 demonstrations.

The implementation of ACA may precipitate an upturn in the number of states applying for approval of section 1115 demonstrations. Because the stakes for a vital public

process are likely to grow, we recommend strengthening and clarifying the proposed regulations in the following ways:

§431.408 State public notice process:

- The proposed regulation at paragraph (a) establishes a 30-day comment period prior to submission of an application for a demonstration project or for an extension of an existing demonstration project. Because of the far-reaching changes to state Medicaid and CHIP programs that demonstrations often allow, we recommend that the state public comment period be extended to 60 or at least 45 days to allow the public adequate time to develop comments.
- Paragraph (a)(1) describes the information that must be provided to the public to ensure a meaningful opportunity for public comment. This section is very important as in the past the public has often been unable to provide meaningful input, because few details of proposals for demonstration projects were shared. To ensure that adequate information is provided to the public, we recommend that an additional sub-paragraph (E) be added that explicitly requires that the information provided to the public include: “The types of waivers and expenditure authorities that the State believes is necessary to authorize the demonstration.” The proposed rule requires that this information be included in the application when it is submitted to CMS. Therefore, making it available to the public during the comment period should not burden states.
- Paragraph (a)(3) requires that the state hold at least two public hearings at least 20 days before submission of the application for a demonstration and lists the types of hearings that would satisfy the requirement including meetings of the Medical Care Advisory Committee, a state commission, or legislative process. While we support the public hearing requirement, we suggest that the proposed rule be strengthened by making it clear that members of the public would actually have meaningful opportunity to speak at the hearings. As currently drafted, the rule appears to allow an open commission meeting to satisfy the public hearing requirement. Members of the public may have limited opportunities to speak at legislative hearings or at the meetings of the Medical Care Advisory Committee. We suggest that the language of this section be strengthened to read “. . .the State must have conducted at least two public hearings regarding the State’s demonstration application *at which members of the public have an opportunity to provide comments*, using at least two of the following public forums.”

§431.412 Application procedures:

- At (a)(1)(viii) we strongly support the requirement that states must submit with their applications a report of the key issues raised during the public comment period and how the state considered them.

- At (b)(3), which states the CMS will publish on its website the status of all State submissions, we assume that this includes the publication of all materials that the state has submitted as part of the application process.

§431.416 Federal public notice and approval process: This section, which establishes the federal process for notice and comment, could be strengthened in the following ways:

- Paragraph (d), which requires CMS to publish the public comments received, states that CMS must review and consider all comments but need not provide written responses. The preceding paragraph (c)(2) notes that CMS will provide on its website a “listing of the issues raised through the public notice process.” While we do not believe that CMS should have to provide an individualized written response to every comment, we do believe that CMS should provide a summary report of public comments received and how they have been addressed. This would be similar to the process used in responding to public comments on proposed regulations and would also establish an analogous requirement to that created for States at §431.412 (a)(1)(viii).
- We support the establishment at (e) of a 45-day period for CMS to consider public comments before rendering a final decision on a demonstration application.
- Paragraph (g) establishes an exception to the normal public notice process in the case of a proposed demonstration or demonstration renewal that “addresses a natural, social, economic or similar disaster.” We understand the need to establish such an exception but believe that it should be limited to natural or man-made disasters such as earthquakes, floods, or terrorist attacks or a public health disaster and not extend beyond these events. The language at paragraph (g) is overly broad in this regard, and we recommend that you delete the word “economic”.
- In addition, to ensure that this exception is not too broad and/or used inappropriately, we recommend that the criteria described at (g)(3)(iv) be revised to add a new paragraph (v) which reads: “Waiver requests which restrict eligibility and/or reduce benefits or increase cost-sharing for beneficiaries would not normally be eligible for the exception to the public process requirements.”

§431.420 Monitoring and Compliance: We strongly support the requirement for a post-decision public forum six months after implementation and annually thereafter. As noted in our comment on the initial public hearings, the requirement for a public forum should be clarified to make it clear that members of the public have a meaningful opportunity to comment at the forum.

§431.424 Evaluation requirements: We applaud the inclusion of a robust evaluation requirement in the proposed rule, as many far-reaching section 1115 demonstration projects have not been thoroughly evaluated.

- To ensure that the privacy of beneficiaries is protected we recommend that the following language be added to (a)(2): “The evaluation process must minimize burden on beneficiaries *and protect their privacy* in terms of implementing and operating the policy approach ...”
- Paragraph (c) establishes an evaluation design plan that includes a number of specific components. This section could be strengthened by incorporating some of the components referenced in the following section that governs the annual reports that states must submit. In particular, evaluation designs should ensure evaluation of how the demonstration will impact the outcomes of care, quality of care, cost of care, and access to care for demonstration populations where appropriate.

§431.428 Reporting requirements: We very much support the specifics detailed as necessary in state annual reports. We recommend that these annual reports be posted on the CMS website as well as the State’s public website as described in (b)(2).