DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Part 441

[CMS–2296–ANPRM]

RIN 0938–AP61

Medicaid Program; Home and Community-Based Services (HCBS) Waivers

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: This advance notice of proposed rulemaking announces the intention of CMS to publish proposed amendments to the regulations implementing Medicaid home and community-based services waivers under section 1915(c) of the Social Security Act and solicits advance public comments on the merits of providing States the option to combine or eliminate the existing three permitted waiver targeting groups, and on the most effective means to define home and community.

DATES: To be assured consideration, comments must be received at one of the addresses provided below, no later than 5 p.m. on August 21, 2009.

ADDRESSES: In commenting, please refer to file code CMS–2296–ANPRM. Because of staff and resource limitations, we cannot accept comments by facsimile (FAX) transmission.

You may submit comments in one of four ways (please choose only one of the ways listed):

1. Electronically. You may submit electronic comments on this regulation to http://www.regulations.gov. Follow the instructions under the “More Search Options” tab.

2. By regular mail. You may mail written comments to the following address only: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–2296–ANPRM, P.O. Box 8016, Baltimore, MD 21244–1850.

Please allow sufficient time for mailed comments to be received before the close of the comment period.

3. By express or overnight mail. You may send written comments to the following address only: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–2296–ANPRM, Mail Stop C4–26–05, 7500 Security Boulevard, Baltimore, MD 21244–1850.

4. By hand or courier. If you prefer, you may deliver (by hand or courier) your written comments before the close of the comment period to either of the following addresses:

a. For delivery in Washington, DC—Centers for Medicare & Medicaid Services, Department of Health and Human Services, Room 445–G, Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201

(Because access to the interior of the Hubert H. Humphrey Building is not readily available to persons without Federal government identification, commenters are encouraged to leave their comments in the CMS drop slots located in the main lobby of the building. A stamp-in clock is available for persons wishing to retain a proof of filing by stamping in and retaining an extra copy of the comments being filed.)

b. For delivery in Baltimore, MD—Centers for Medicare & Medicaid Services, Department of Health and Human Services, 7500 Security Boulevard, Baltimore, MD 21244–1850.

If you intend to deliver your comments to the Baltimore address, please call telephone number (410) 786–7195 in advance to schedule your arrival with one of our staff members. Comments mailed to the addresses indicated as appropriate for hand or courier delivery may be delayed and received after the comment period.

FOR FURTHER INFORMATION CONTACT: Mary Sowers, (410) 786–6814.

SUPPLEMENTARY INFORMATION:

Inspection of Public Comments: All comments received before the close of the comment period are available for viewing by the public, including any personally identifiable or confidential business information that is included in a comment. We post all comments received before the close of the comment period on the following Web site as soon as possible after they have been received: http://www.regulations.gov. Follow the search instructions on that Web site to view public comments.

Comments received timely will also be available for public inspection as they are received, generally beginning approximately 3 weeks after publication of a document, at the headquarters of the Centers for Medicare & Medicaid Services, 7500 Security Boulevard, Baltimore, Maryland 21244, Monday through Friday of each week from 8:30 a.m. to 4 p.m. To schedule an appointment to view public comments, phone 1–800–743–3951.

I. Overview

We are issuing this advance notice of proposed rulemaking (ANPRM) to announce our intention to publish a proposed rule and solicit public comments on the changes necessary to provide States the option to design home and community-based services (HCBS) waiver programs serving more than one target population. We are particularly interested in receiving comments on how removal of the existing regulatory barrier regarding target groups may increase a State’s ability to design service packages based on need, rather than diagnosis or condition. Furthermore, we are interested in receiving comments on how this change may affect the State’s ability to serve individuals requiring an institutional level of care and may facilitate compliance with the Americans with Disabilities Act of 1990 (ADA). Title II of the ADA prohibits discrimination on the basis of disability and the Supreme Court ruled in Olmstead v. L.C., 527 U.S. 581 (1999), that unnecessary institutionalization may constitute discrimination under the ADA. Many States have used the home and community-based services waiver as a component of their Olmstead compliance efforts and we are interested in receiving comments about how this change may affect these efforts. We are intending to propose this change in an effort to remove barriers to person-centered, needs-based service delivery methods. Consequently, we are also hoping to hear from interested parties regarding recommendations to strengthen person-centered principles and practices for the successful operation of any HCBS waiver program, including those that may serve individuals based upon identified needs, rather than diagnosis.

It is also our intention to publish as a part of the proposed rule requirements related to identifying the home and community-based character of the settings in which HCBS participants
to different groups of individuals based
upon diagnosis, rather than the
individuals’ actual need for support.
Because the three target populations
outlined above are typically associated
with a particular institutional level of
care, the necessity to offer multiple
separate waivers, is often framed as an
inability to combine levels of care. For
example, waiver costs for persons with
developmental disabilities are most
frequently compared to costs of
Intermediate Care Facilities for Persons
with Mental Retardation or conditions
closely related to mental retardation
(ICFs/MR), while waiver costs for
persons who are aged or with physical
disabilities are compared to nursing
facility costs. However, the impediment
to serving more than one target group
through an HCBS waiver relates to the
division between the target groups
required in the regulation, not the
associated institutional settings where
those target groups would otherwise
receive services but for the provision of
HCBS. For example, some individuals
with the need for mental health services
may be appropriately served in the
community at the nursing facility level
of care.

Historically, in many cases pre-dating
the 1915(c) HCBS waiver program,
States have utilized a targeted approach
to funding and budgeting for services for
various populations. The CMS
regulations published in the mid-1990s
were modeled after those practices; the
regulations reflect the funding
approaches common in some State
budgets. As the number of HCBS
waivers across the country has grown to
more than 350 waivers serving more than
1 million individuals, some States,
with concurrence from stakeholder
groups and individuals, have expressed
a desire for the flexibility to combine
these target groups in order to provide
services based upon needs rather than
diagnosis or condition, and for
administrative relief from operating and
managing multiple 1915(c) waiver
programs.

We have considered these issues and
intend to propose to change the
regulations in 42 CFR subpart G to allow
States the flexibility to combine any of
the three target groups in one HCBS
waiver, or possibly to choose to offer
waiver services to groups defined
differently from the pre-defined
targeting groups. The intended proposed
regulatory change would not mandate
any change in State criteria for targeting
HCBS waivers, it would provide
additional State flexibility. We expect
that States would continue to appreciate
the narrow targeting permitted under
section 1915(c) of the Act, particularly
for populations with high needs or
receiving unique services. Under the
change we are planning to propose,
States would still have to determine that
without the waiver, participants would
require institutional level of care, in
accordance with section 1915(c) of the
Act. Likewise, the intended proposal to
provide additional targeting flexibility
for States will not affect the cost-
neutrality requirement inherent in
section 1915(c) waivers.

In order to assure that individuals
served by waivers targeting a broad
range of conditions receive
individualized care, we further plan to
propose to require that: (1) The service
planning process be person-centered,
and (2) the services specified in the plan
care be based upon the needs of the
individual, not an average need among
one target group. In addition, we intend
to update the language in the regulation
related to the target groups to reflect
more contemporary, person-first
language.

We intend to propose this change to
provide States with one additional tool
to better serve their citizens, with
person-centered delivery systems driven
by need, not diagnosis or existing
dedicated funding streams. A Federal
regulatory change that permits
combining targeted groups within one
waiver, while optional for States and
not an instantaneous change in State
structures, would remove one barrier for
States wishing to design waivers across
various populations. We encourage
comments on all aspects of the change
we contemplate proposing, including its
possible utility in enhancing State
flexibility, minimizing administrative
burden, facilitating compliance with the
ADA, and facilitating a more needs-
based service system.

B. Home and Community-Based
Characteristics

We are also intending to propose
adjusting the regulations at 42 CFR
subpart G to describe expectations with
regard to waiver participants being
served in the home and community. We
believe such proposed requirements
would increase choice by providing
waiver participants with notice of
housing alternatives, and would create
greater demand and market incentive for
person-centered residential settings. Our
intended proposed changes would
include methods that States may follow
to identify appropriate financing
mechanisms for reducing the size of
existing larger residencies, divesting
themselves or helping their providers
divest themselves of sizable properties,
and assisting providers’ transition to
smaller, more individualized settings.
We invite commenters to suggest other

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forms of technical assistance that CMS might provide to assist States in enhancing their efforts for optimal choice, control, and community integration for persons with disabilities and individuals who are aging.

Since the inception of the 1915(c) HCBS waiver program in the 1981, the Centers for Medicare & Medicaid Services (CMS) (formerly known as Health Care Finance Administration (HCFA)) has supported State efforts to serve individuals in the least restrictive setting possible. However, home and community have not been explicitly defined, and as a consequence, some individuals who receive HCBS in a residential setting managed or operated by a service provider have experienced a provider-centered and institution-like living arrangement, instead of a person-centered and home-like environment with the freedoms that should be characteristic of any home and community-based setting. For some years, we have attempted to address this problem indirectly through our review of State service definitions for HCBS, with limited success. Through this ANPRM, we are announcing our intention to propose to affirmatively identify expectations for characteristics of home and community-based settings.

The Deficit Reduction Act of 2005 created a new section 1915(i) of the Social Security Act. Section 1915(i) permits States to offer the HCBS specifically identified in section 1915(c)(4)(b) of the Act as a State plan option without requiring States to submit a waiver application. In addition to making HCBS available under the State plan, Congress expressed interest in assuring small, community-based home-like environments through statutory requirements in section 6071 of the DRA of 2005 for the Money Follows the Person Demonstration Program. This program authorized grants to States to increase the use of HCBS, rather than institutional services, and required that community-based residential settings include no more than a specific limited number of residents.

A regulatory change articulating CMS requirements for the nature of home and community-based residence under section 1915(c) HCBS waivers is necessary to ensure that the expectations for home and community characteristics are consistent across section 1915(c) of the Act and section 1915(i) authorities, and to ensure, most importantly, that individuals receiving HCBS have meaningful alternatives to institutional care regardless of the section of the statute authorizing their services. Therefore, we are planning to propose adding to 42 CFR subpart G a requirement that individuals receiving HCBS waiver services must reside in the home or community, in accordance with either of two criteria enumerated below:

- Resides in a home or apartment not owned, leased or controlled by a provider of any health-related treatment or support services; or
- Resides in a home or apartment that is owned, leased or controlled by a provider of one or more health-related treatment or support services, and that meets standards for community living, as defined by the State and approved by the Secretary.

We believe that this wording takes into account the variety of living situations that should be exempt from evaluation, and avoids indirect indicators such as number of residents. Only living situations in which a paid provider of services has opportunity to affect the degree of independence and choice will trigger application of additional State-defined and CMS-approved standards for community living. Standards for community living are to optimize participant independence and community integration, promote initiative and choice in daily living, and facilitate full access to community services. To ensure that these goals are met, standards must be developed through strong stakeholder input. We would be interested in receiving comments regarding strategies that States could employ to solicit and incorporate strong stakeholder input in their efforts to define standards for community living. We do not contemplate specifying criteria for home and community standards in the proposed regulation. We do solicit stakeholder interest in working with CMS to develop policy guidelines for State definitions. The intent of these guidelines is to create the necessary conditions so that individuals are able to reside in person-centered, home-like environments where they can enjoy all of the liberties of community living. We recognize that it is difficult for a State to develop and monitor standards related to the individual’s standing in a landlord/tenant relationship or in homeownership without inadvertently omitting an arrangement that could be ideal for a particular individual. Furthermore, we recognize that the criteria listed above may not address the possibility that some providers may undertake efforts to avert state-established standards. In light of the complexity of this matter, the long-standing HCBS waivers operating in the country currently, and the many existing efforts to ensure that individuals are provided services in the setting where they have maximum choice, control and individual liberties, CMS solicits public input on strategies to address this issue of maximum individual choice and control for the 1915(c) waiver participants. We solicit comments on pathways that States may take to improve their systems to ensure that the settings where services are rendered are truly home and community-based in nature, and that individuals are offered meaningful opportunities for community living. In addition, we solicit input on the potential impact of this issue on federally recognized tribes. We recognize that States will require assistance and technical guidance as they make changes, and also solicit comments on the nature of guidance and assistance that may be needed.

III. Intentions of This Notice

We encourage comments that assist us in determining all implications of our contemplated proposed regulatory changes, and to assist us in constructing the regulations in a manner that provides appropriate guidance and incentives to result in meaningful, positive change for the nearly one million individuals currently served through 1915(c) HCBS waivers.

IV. Response to Comments

Because of the large number of comments we normally receive on a proposed rule, we are not able to acknowledge or respond to them individually. However, we will consider all comments we receive by the date and time specified in the DATES section of this advance notice of proposed rulemaking, and will address these comments in any proposed regulation that results from this advance notice.

V. Collection of Information Requirements

This document does not impose information collection and recordkeeping requirements. Consequently, it need not be reviewed by the Office of Management and Budget under the authority of the Paperwork Reduction Act of 1995.

Authority: Secs. 1102 and 1871 of the Social Security Act (42 U.S.C. 1302 and 1395hh).
DEPARTMENT OF TRANSPORTATION

Program Registration and Fee Assessment

Miscellaneous Revisions to
Registration and Fee Assessment Program

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: Withdrawal of notice of proposed rulemaking.

SUMMARY: The Pipeline and Hazardous Materials Safety Administration (PHMSA) is withdrawing the notice of proposed rulemaking published under this docket on May 5, 2008 (73 FR 24519). Our revised estimates of unexpended balances from previous years and revenues expected to be generated at current registration fee levels indicate that an increase in registration fees is not necessary to fund the national Hazardous Materials Emergency Preparedness (HMEP) grants program at its authorized level of $28,300,000 in support of HMEP the HMEP fund, and the Administration’s fiscal year 2009 (covering July 1, 2008 to June 30, 2009) and 2009–2010 (covering July 1, 2009 to June 30, 2010) at current registration fee levels. Based on this analysis, we have concluded that we will be able to fund the HMEP grants program at the $28.3 million level in Fiscal Year 2009 without an increase in registration fees. Accordingly, PHMSA is withdrawing the May 5, 2008, NPRM and terminating this rulemaking proceeding. Depending on appropriated and available funding for Fiscal Year 2010, we may initiate a future rulemaking to adjust registration fees for future registration years.

Issued in Washington, DC, on June 9, 2009 under authority delegated in 49 CFR part 106.

Theodore L. Willke,
Associate Administrator for Hazardous Materials Safety.

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; 90-Day Finding on a Petition To Revise Critical Habitat for Eriogonum pelinophilum (Clay-Loving Wild Buckwheat)

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of 90-day petition finding and initiation of critical habitat review.

SUMMARY: We, the U.S. Fish and Wildlife Service (USFWS), announce a 90-day finding on a petition to revise critical habitat for Eriogonum pelinophilum (clay-loving wild buckwheat) under the Endangered...