

# Legal Counsel for the Elderly

July 21, 2009

Suzanne Bostick  
Director, Division of Community and Institutional Services  
Centers for Medicare & Medicaid Services (CMS)  
7500 Security Boulevard  
Baltimore, MD 21244

**RE: Request for formal policy clarification regarding the District of Columbia Home and Community Based Services.**

Dear Ms. Bostick:

This letter is to request a formal policy clarification from the Centers for Medicare and Medicaid Services (CMS) regarding whether the District of Columbia may impose a strict income cap in its Elderly and Physically Disabled (hereafter EPD Waiver) even though individuals who are "Medically Needy" are included as an eligibility group covered in the EPD Waiver.

The District of Columbia's Department of Health Care Finance (hereafter DHCF) received approval from the Centers for Medicare and Medicaid Services in 2007 to continue operation of its EPD Waiver. In the version approved by CMS, DHCF indicated in Appendix B-4 ("Medicaid Eligibility Groups Served in the Waiver") that individuals in the special home and community-based waiver group referred to in 42 C.F.R. § 435.217 are eligible under the waiver (up to the maximum income limit of 300% of the Supplemental Security Income Federal Benefit Rate (SSI FBR)). Additionally, DHCF indicated that the Medically Needy are served by the waiver. It is our understanding that, because individuals who are medically needy are included as an eligibility group served by the waiver, individuals with incomes above 300% of the SSI FBR may be eligible for the waiver if they meet their spend-down.

DHCF has informed advocates, however, that individuals with incomes above 300% of the SSI FBR may not qualify through a spend-down. In a conversation with DHCF, its staff stated that the coverage for individuals who are medically needy, as indicated in the waiver, refers only to those with incomes over 100% of the Federal Poverty Level (FPL), but not to individuals with incomes over 300% of the SSI FBR. There are two problems with this position. First, individuals with incomes in this range (i.e., between 100% of the FPL and 300% of the SSI FBR) are the exact individuals included in the special income category authorized by 42 C.F.R. §435.217, so these individuals are per se *not* Medically Needy. Second, had the DHCF not extended coverage to individuals in the special income category, the Medically Needy coverage

specified in the waiver would have extended to all individuals over 100% of FPL, including those whose incomes exceed 300% of the SSI FBR.

Given the Medically Needy designation in the EPD Waiver document, DCHF is required to extend eligibility to individuals with incomes over the 300% SSI FBR who meet their spend-down.

Instead of allowing these individuals to qualify through a spend-down, however, DCHF has indicated that they may possibly qualify through the creation of Miller Trusts. We are not certain that this is true. First, again, because DCHF has included individuals who are medically needy as an eligibility category in the EPD waiver, the creation of a Miller Trust should not be necessary for EPD Waiver applicants with incomes above the 300% SSI FBR limit. Second, even assuming that DCHF has properly implemented an income cap in the EDP Waiver, it is not clear to us that the creation of a Miller Trust is a potential eligibility method for individuals with incomes over the cap, given that DCHF allows individuals who are medically needy to attain coverage for nursing facility services. Certainly, if individuals may attain coverage for an income-capped waiver approved under 42 U.S.C. §1396n through the creation of a Miller Trust where their state allows individuals who are medically needy to qualify for nursing facility services, we would appreciate CMS's confirmation of this.

However, this would appear not to matter, given that DCHF has selected individuals who are medically needy as an eligibility group covered in the EPD Waiver. The selection of the "Medically Needy" box on the Waiver application cannot be minimized as a simple "mistake" by the District. The §1915c Waivers filed by the states of Florida<sup>1</sup> and Iowa<sup>2</sup>, for instance, assert that they are "income cap" states, and Iowa's Waiver document explicitly states that it is a Miller Trust state. As neither Florida nor Iowa provides Medically Needy coverage, their respective applications reflect this by their failure to check off the "Medically Needy" box on the Waiver application. Furthermore, Florida specifically covers the issue of Miller or "Income" Trusts in its Medicaid policy manual<sup>3</sup>. In Chapter 1800, § 1840.0110, located on page 26 of the manual, the state clarifies their income limit for their HCBS program, and the specific eligibility of an HCBS applicant who completes a Miller Trust. In other words, States need to take affirmative steps to identify, both in their EPD Waivers and Medicaid policy manuals, that they are Miller or "Income" Trust States. By comparison, Virginia<sup>4</sup> and New York<sup>5</sup>, which do offer Medically

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<sup>1</sup> Florida's Waiver for aged and disabled adults may be found at:

<http://www.cms.hhs.gov/MedicaidStWaivProgDemoPGI/MWDL/itemdetail.asp?filterType=dual,%20data&filterValue=Florida&filterByDID=2&sortByDID=2&sortOrder=ascending&itemID=CMS1216618&intNumPerPage=10>.

<sup>2</sup> Iowa's Waiver application can also be found at

[:http://www.cms.hhs.gov/MedicaidStWaivProgDemoPGI/MWDL/itemdetail.asp?filterType=dual,%20data&filterValue=Iowa&filterByDID=2&sortByDID=2&sortOrder=ascending&itemID=CMS1217513&intNumPerPage=10](http://www.cms.hhs.gov/MedicaidStWaivProgDemoPGI/MWDL/itemdetail.asp?filterType=dual,%20data&filterValue=Iowa&filterByDID=2&sortByDID=2&sortOrder=ascending&itemID=CMS1217513&intNumPerPage=10).

<sup>3</sup> See <http://www.dcf.state.fl.us/publications/esspolicymanual/>

<sup>4</sup>, Virginia's application may be found at:

<http://www.cms.hhs.gov/MedicaidStWaivProgDemoPGI/MWDL/itemdetail.asp?filterType=dual,%20data&filterValue=Virginia&filterByDID=2&sortByDID=2&sortOrder=ascending&itemID=CMS1216574&intNumPerPage=10>.

<sup>5</sup> New York's application may be found at:

<http://www.cms.hhs.gov/MedicaidStWaivProgDemoPGI/MWDL/itemdetail.asp?filterType=dual,%20data&filterValue=New%20York&filterByDID=2&sortByDID=2&sortOrder=ascending&itemID=CMS1216540&intNumPerPage=10>.

Needy coverage to the elderly and disabled under their Waivers, both checked off the "Medically Needy" box in Appendix B-4: 1 of their Waiver applications.

Put simply, the Waiver application is the central governing document of State EPD Waiver coverage. The District has considerable discretion in choosing the categories of individuals who will receive services under the Waiver, but the Waiver obligates the District to provide Medicaid to individuals who fall within the categories the District creates.

An expedited policy clarification is necessary because some of us have clients with incomes above the 300% SSI FBR who are seeking EPD Waiver coverage and are being informed that they are not eligible for the waiver. DCHF's recommendation that these individuals create Miller Trusts, without confirming that this is an available eligibility method for these individuals (given DCHF's coverage of individuals who are medically needy for nursing facility services), may force the District to repay federal funds incorrectly disbursed on behalf of those beneficiaries. Moreover, the beneficiaries themselves may be subject to transfer-of-asset penalties. We therefore seek a formal opinion from the Center for Medicare & Medicaid Services (CMS) to answer the following questions:

1. Whether the District is required to offer spend-down under its current EPD Waiver to afford eligibility to individuals whose incomes exceed 300% of the individual SSI benefit rate (\$2022 per month in 2009);
2. If the District has effectively imposed an income cap in its EDP Waiver, whether individuals with incomes over the income cap may qualify through the creation of Miller Trusts.

An opinion from CMS will protect the District and consumers who are seeking to qualify for the Home and Community Based Services Elderly and Physically Disabled Waiver. Thank you for devoting the time to ensure that the District provides Home and Community Based Services for the Elderly and Physically Disabled in a manner consistent with federal law.

Sincerely,



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