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July 9, 2006

Bruce Darling
Center for Disability Rights
412 State St.
Rochester, NY 14608

Dear Bruce,

This is in response to your request for a legal opinion regarding spousal impoverishment protections as applied to the Nursing Home Transition and Diversion Waiver, which was enacted in New York Social Services Law § 366(6-a). We understand that a 1915(c) waiver request for this program is pending with CMS. You explained that CMS' position was that the community spouse of a person accepted for the waiver will be entitled to keep her own income, but will not be entitled to a community spouse monthly income allowance (CSMIA) from the spouse in the waiver that would bring the community spouse's income up to the minimum monthly maintenance needs allowance (MMMNA). The spouse in the waiver would be required to spend down to the community Medicaid level for one ($692), after the $20 SSI-related disregard is applied. You provided us with a copy of the letter from Betty Rice of the State Department of Health to Sue Kelly of the CMS regional office, dated January 11, 2006, which explains CMS' position as confirmed by the State. A copy of this letter is attached as an appendix.

Having reviewed the issue and applicable law and regulations, it is our opinion that CMS' position violates both federal law implementing the spousal impoverishment protections enacted in the Medicare Catastrophic Coverage Act of 1988, and implementing state law.

1. Under a Federal Option Exercised by New York in the State Medicaid Statute, Spouses of Waiver Participants are Entitled to a Full Community Spouse Monthly Income Allowance

Section 1924 of the Social Security Act enacted in 1988 requires that all community spouses [CS] of institutionalized Medicaid recipients ["institutionalized spouse" or "IS"] be entitled to sufficient income from the IS that would supplement the income of the CS up to the minimum monthly maintenance needs allowance ["MMMNA"]. 42 U.S.C. § 1396r-5. The allowance from the IS is called the "community spouse monthly income allowance" (CSMIA). 42 U.S.C. § 1396r-5(d)(2).

This law gives states the exclusive option of defining an "institutionalized spouse" to include individuals who are enrolled in a home and community based waiver program.

(1) The term "institutionalized spouse" means an individual who--
(A) is in a medical institution or nursing facility or who (at the option of the State) is described in section 1902(a)(10)(A)(ii)(VI) [42 USCS § 1396a(a)(10)(A)(ii)(VI)], and
(B) is married to a spouse who is not in a medical institution or nursing facility …

42 USC §1396r-5(h)(1)(A). The reference in subparagraph (1)(A) is to home and community based waiver programs including 1915(c) waivers, which is the type of waiver used in the New York program at issue here.

In 1989, New York State implemented the federal Medicaid spousal budgeting rules. In the state law implementing these rules, New York State exercised the federal option to apply the spousal impoverishment protections to 1915(c) waivers. New York Social Services Law § 366-c codifies state law on "Treatment of income and resources of institutionalized persons." Section 366-c(2)(a) defines "institutionalized spouse" to include a person who "is receiving care, services and supplies pursuant to a waiver pursuant to subsection (c) of section nineteen hundred fifteen of the federal social security act…." Section 366-c(2) essentially tracks the federal statute cited above, establishing the MMMNA and CSMIA for the community spouse. Since the state has chosen this option, all community spouse protections must apply.

There is nothing in SSL § 366(6-a) -- the state statute authorizing application for the Nursing Home Transition and Diversion program waiver -- that suggests any departure from SSL § 366-c. On the contrary, since 1989, New York has applied, and continues to apply, spousal budgeting rules for married participants in the various waiver programs. We understand that State DOH did not alter this policy in its recent waiver application. Given the existence of SSL § 366-c, this determination by the State was correct.

2. The So-Called Options Set Forth in the Betty Rice Letter Rely on Rules that do not Apply, as They are Superseded by Section 1924.

Betty Rice's letter to Sue Kelly describes two options that CMS has apparently given New York State for providing coverage for married individuals in the waiver. Option 1 -- which would include the medically needy but deny community spouse protections -- would violate the superseding federal requirements of Section 1924 or 42 USC §1396r-5(h) authorizing a state option to use spousal impoverishment protections for waivered services. Option 2 would exclude the medically needy from the program, with no authorization by state legislation.

Option 1 in the letter says that CMS would waive Sec. 1902 (a)(10)(C)(i)(III) [or 42 USC § 1396a (a)(10)(C)(i)(III)] in order to use institutional spousal impoverishment rules and include the medically needy, but that a deduction for a CSMIA would not be allowed. This position would violate section 1924.

The section of the law that the letter says that CMS would waive is one that refers to income and resource rules applicable in the community. This is one of the three federal provisions that may be waived in a 1915(c) waiver, the others being statewideness and comparability. Waiver of the income and resource rules applicable in the community, however, is not necessary in order to use spousal impoverishment budgeting, since that budgeting is specifically authorized for waiver recipients under section 1924 or 42 USC §1396r at state's option. Since New York State has exercised this option, spousal impoverishment budgeting must be used.

CMS has no discretion to disallow a deduction for the community spouse monthly income allowance. The spousal protections in section 1396r expressly supersede other provisions in the Medicaid Act:

> In determining the eligibility for medical assistance of an institutionalized spouse (as defined in subsection (h)(1) of this section), the provisions of this section *supersede any other provision of this subchapter* (including sections 1396a(a)(17) and 1396a(f) of this title) which is inconsistent with them.

42 U.S.C. § 1396r-5(a)(1)(emphasis added).

Moreover, the Betty Rice letter states that "post-eligibility would not apply, which means that a deduction for a community spouse income allowance is not allowed." This statement is in conflict with the express language of Section 1924, which provides that the spousal impoverishment income rules *are* post-eligibility rules that apply after the institutionalized spouse has been found eligible for Medicaid.

> … In determining the income of an institutionalized spouse or community spouse for purposes of the *post-eligibility income* determination described in subsection (d) of this section, except as otherwise provided in this section . . . the following rules apply.

42 U.S.C. § 1396r-5(b)(2)(emphasis added). Additionally, the federal statute further provides,

> *After* an institutionalized spouse is determined or redetermined to be eligible for medical assistance, in determining the amount of the spouse's income that is to be applied monthly to payment for the costs of care in the institution, there shall be deducted from the spouse's monthly income the following amounts. . . .

42 U.S.C. § 1396r-5(d)(1).

Option 2 in the Betty Rice letter would have the state exclude the medically needy from the waiver, but allow deduction for a community spouse monthly income allowance. If the medically needy are excluded, no individual would be eligible for the Medicaid waiver unless his or her income were below the applicable Medicaid level, since no spend-down would be permitted. A married individual would be denied Medicaid eligibility for the waiver if his total income exceeded the amount needed to bring his spouse up to the MMMNA plus the Medicaid community income level for one for himself. He would not be permitted to contribute his excess income to the cost of his care.

Exclusion of the medically needy from the waiver is not authorized by state Medicaid law. New York State has long included the medically needy in both community and institutional settings and waivered services. There is nothing in the law authorizing the Nursing Home Transition and Diversion Waiver that would authorize departure from this state statutory policy.

For these reasons, there is no basis for the CMS position that would require the State to deny spousal impoverishment protections for the waiver as a condition for including the medically needy population.

Very truly yours,

/S/

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ADDENDUM

Letter from Betty Rice, State DOH to Sue Kelly, Regional CMS, dated January 11, 2006
(reformatted)

This is to confirm our understanding of the two options available to NYS that would allow the use of spousal impoverishment budgeting in a regular 1915(c) waiver. During the 11/21/05 and 11/29/05 conference calls … CMS outlined the following 2 options that would enable the State to use spousal impoverishment budgeting.

Option 1: Include the medically needy as a Medicaid eligibility group served under the waiver and waive section 1902(a)(10)(c)(i)(III) in order to use institutional income and resource rules for the medically needy.

- Community eligibility rules would apply to single individuals. Spend down would apply.
- A waiver of section 1902(a)(10)(c)(i)(III) would permit the use of institutional rather than community deeming rules. For spousal impoverishment cases, eligibility would be determined using spousal rules, but post-eligibility would not apply, which means that a deduction for a community spouse income allowance is not allowed. Spend down would apply.
- For couples without a community spouse (both receiving waiver services), institutional eligibility rules would apply and the couple would be budgeted as two separate households of one.

Option 2: Do not include the medically needy as a Medicaid eligibility group served under the waiver and elect to cover the special home and community-based wiaver group, under 42 CFR section 435.217.

- Singles and couples without a community spouse are not allowed to spend down to become eligible in the post-eligibility calculation.
- Spousal impoverishment budgeting would be used, including post-eligibility, which permits a deduction for a community spouse income allowance. The waiver participant cannot spend down to become eligible in the post- eligibility calculation."

Please confirm whether our understanding of the 2 options is accurate. If you have any questions regarding the above descriptions, please contact Wendy Butz 518-474-0955.

Sincerely,

Betty Rice
Director, Division of Consumer and Local District Relations