

SAMUEL D. ORBOVICH  
JUDITH R. GARTNER  
FUBAN M. SCHAFFER  
THOMAS L. SKORCZAK

**ORBOVICH & GARTNER**  
**CHARTERED**

BARBARA J. BLUMEN  
OF Counsel

Historic Hamm Building - Suite 417  
408 St. Peter Street  
St. Paul, Minnesota 55102-1187  
Telephone: (651) 224-5074  
Fax: (651) 224-4697

January 21, 2003

Bruce H. Nelson  
Executive Director  
ARRM  
1185 North Concord Street, Suite 424  
South St. Paul, MN 55075

RE: Effort by the Minnesota Department of Human Services ("DHS") to amend the State of Minnesota's federal HCBS waiver plan to authorize budget re-basing for counties

Dear Mr. Nelson:

ARRM engaged Orbovich & Gartner Chartered to ascertain whether the proposed budget re-basing for the MR/MC waiver by DHS will be approved by the Centers for Medicare and Medicaid Services ("CMS") and whether DHS' actions comport with its lawful authority. I understand that ARRM may opt to share this opinion letter with other interested stakeholders, including DHS and other government entities. To that end we have omitted any attorney-client privileged communication or information so that others may review our comments. That means, of course, that we have omitted from this letter any discussion regarding the various legal options and remedies that ARRM, its members, or other interested stakeholders may have to respond to DHS' budget re-basing.<sup>1</sup>

In drawing this opinion, we have reviewed several Memoranda and e-mail correspondence from DHS to ARRM and County Human Services Directors. Those Memoranda describe, in general fashion, DHS' proposed budget re-base plan and describe the factors propelling DHS to

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take this action. We also reviewed DHS' draft amendments to the federal waiver plan, entitled "Proposed MR/MC Waiver Amendment" and "Allocation of Resources to County Agencies," (hereinafter referred to jointly as "Budget Re-Base Amendment") along with the e-mail correspondence from Ms. Shirley Patterson, dated January 14, 2003. In that e-mail, Ms. Patterson allowed County Human Services Directors and ARRM one week, until January 21, 2003, to submit any comments "in order to be considered" before DHS submits the waiver amendment request to the federal government. According to Ms. Patterson, DHS anticipates CMS will issue a "retroactive approval of the amendments to January 1, 2003."

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### Medicaid Waiver Law

As you know, the single state agency administering the Medicaid program must prepare and submit a "State Plan" to the Secretary of Health and Human Services for approval. Federal regulations and statutes prescribe multiple requirements that must be included in each State Plan. See, 42 U.S.C. § 1396a. Under Section 1915(c) of the Social Security Act, a state may request a waiver for "home and community based services" (hereinafter referred to as "HCBS"). An HCBS waiver enables a state to receive Federal Financial Participation despite the fact that the HCBS program would not otherwise satisfy the strict terms of the federal regulatory State Plan requirements. Currently, Minnesota provides HCBS pursuant to a Section 1915(c) waiver for persons with mental retardation or related conditions (MR/MC). This means the State of Minnesota receives Federal Financial Participation to pay providers of in-house support or supported living services. The State of Minnesota allocates Medicaid revenues to counties, who in turn enter into contracts with providers and approve service agreements for individuals receiving services. Those contracts and agreements detail the services required and the payment rates for those services.

A qualifying HCBS waiver must meet the statutory requirements of 42 U.S.C. § 1396n(c) as well as the regulatory provisions of 42 C.F.R. §§ 440.180; 441.300. States must provide CMS with general assurances and information under 42 C.F.R. § 441.302(a)-(f). In addition to specific waiver requirements, states should follow some meaningful process to provide public notice and comment regarding the proposed waiver plan.<sup>2</sup> CMS has articulated guidelines states must follow

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in preparing and submitting Section 1915(c) waivers in the State Medicaid Manual (hereinafter referred to as "SMM").

Since HCBS is an existing and operating waiver program in Minnesota, CMS' predecessor HCFA, reviewed the merits of Minnesota's initial Section 1915(c) HCBS waiver and, after review, found the state's waiver request complied with federal law.

Comparing federal Medicaid Law to DHS' actions and its Budget Re-Base Amendment raises six specific Comments that ARRM should submit to DHS for response and consideration. Each of these Comments have been formulated in a question format, along with our observations and citations to applicable authority.

### COMMENTS

1. What effort has DHS taken to seek meaningful public and stakeholder comment? Apparently, DHS issued the "Proposed MR/MC Waiver Amendment" and "Allocation of Resources to County Agencies" on January 14, 2003. DHS previously announced its draft would be available by the end of December. It was not. On January 14th, DHS transmitted the drafts by e-mail to all "County Human Services Directors," and certain associations, including ARRM. DHS provided only seven days for comment. Prior to issuing the January 14th drafts, DHS issued four Memoranda to County Human Service Directors dated December 11, 2002, December 16, 2002, December 23, 2002 and December 29, 2002 describing its budget re-basing rationale in general terms, with no specific mathematical allocation detail.<sup>3</sup>
  - a. The issuance of DHS' memoranda and its short comment period are insufficient to provide meaningful comment. Although CMS does not dictate the process that States must use to provide notice and comment on proposed waiver requests, analogous regulations contemplate a more significant and meaningful process than apparently employed by DHS to date. For example, 42 C.F.R. § 447.205 CMS contemplates that the proposing State will have notified the public regarding any changes in benefits, payments, eligibility, responsibilities or provider selection.<sup>4</sup> By analogy, for a meaningful notification process for Section 1115 waivers, CMS' suggestions include publishing announcements in newspapers of general circulation with a comment period no less than thirty days.

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- i. *The comment period is too short.* In our view, the short comment period of one week merely ratifies DHS' proposal through without providing the counties, providers, consumers or public with a meaningful opportunity to comment on the impact of the proposal. In an e-mail to DHS dated January 17, 2003, ARRM sought an extension of the public comment period. DHS denied that request stating "We are under tremendous timeline pressure. We won't be expanding the timeframe for responses. Sorry." DHS cannot circumvent CMS' expectation for a meaningful time period for public comment. CMS should remand the Budget Re-Base Amendment to DHS with instructions to establish a longer period of time for public comments.
- ii. *The information provided by DHS to explain the impact and rationale of the Budget Re-Base Amendment is too vague and ambiguous, omits material facts and fails to announce or explain the financial implications of re-basing.* In our view, DHS' general and vague Memoranda, and the Budget Re-Base Amendment, fail to notify providers, counties, consumers and the public of material events that will likely occur if the Budget Re-Base Amendment is implemented. The core component to the Budget Re-Base Amendment is a re-allocation of Medicaid HCBS revenue among Minnesota's counties. ARRM has requested DHS' workpapers and has engaged experts to evaluate the accuracy and completeness of DHS' mathematical premises underlying the supposed need for the Budget Re-Base Amendment and its financial impact. DHS did not release these workpapers with any of its memoranda or e-mail correspondence prior to the close of the comment period on January 21, 2003. ARRM has ample reason to be concerned that DHS has not fully disclosed, and may not itself understand, the impact of the Budget Re-Base Amendment. For example:
  - (1) ARRM has received anecdotal reports that certain county officials concede they do not know what financial impact the Budget Re-Base Amendment will have on their counties. In January, one county's representatives orally told one ARRM member that implementation of the Budget Re-Base Amendment would require the county to reduce its waiver budgets by over \$500,000. This has triggered a review of the services offered to individuals within that county.
  - (2) Hennepin County issued a memorandum to all staff serving developmentally disabled regarding the anticipated re-basing. Hennepin County stated "[c]urrently there are a lot of unanswered questions. . ." and temporarily stopped any "additions or changes to existing service agreements or those being reviewed, whether or not the new amount is within the client's resource allocation." This directive confirms our concern that services are being impacted, in part, because DHS has not completed, produced or notified the counties or the public regarding the financial impact of the Budget Re-Base Amendment.

- (3) DHS has failed to notify the public that virtually every Provider Contract between all Minnesota counties and HCBS providers contain one or more provisions purporting to authorize counties to *terminate* their provider contracts in the event the state reduces the Medicaid payments to the county. The Budget Re-Base Amendment contains no provision that prevents counties from terminating existing provider contracts or otherwise reducing or modifying services currently provided in approved service agreements. In fact, DHS has affirmatively represented that it is not requiring counties to maintain existing services and rates, and on December 11, 2002, warned County Human Service Directors that they may want to keep re-basing "in mind in cases where you may be renegotiating service agreements or provider rates" in January. DHS should disclose to the public, and to CMS, whether it believes counties will terminate or honor existing provider contracts and service agreements after re-basing, and its basis for DHS' belief.
- (4) In addition to failing to ascertain and disclose whether counties will terminate contracts to reduce rates and services upon receiving reduced Medicaid revenue, DHS has failed to notify the public that providers are not obligated to accept a new replacement contract if terminated due to re-basing, if the provider disagrees with either the revised services or rates. If counties terminate provider contracts to re-negotiate rates, that means the Budget Re-Base Amendment will upset consumers' current relationships with providers. DHS has failed to explain whether, as third party beneficiaries, consumers may be able to sue state and county officials or providers to maintain current service levels and provider relationships.
- (5) DHS admitted in its December 29, 2002 memorandum that it is undertaking the Budget Re-Base Amendment despite not knowing what financial impact the proposal is for each county. DHS stated, "we have *almost* completed a county by county analysis of the rebasing." (emphasis added) It is clear that DHS formulated the substantive provisions of the Budget Re-Base Amendment *before* it had sufficient data to determine whether the rebasing would, or would not, unduly financially impact certain counties. This means DHS could not provide any meaningful notice to the public, or CMS, regarding whether the financial impact of the Budget Re-Base Amendment will unsettle the existing service agreement and provider contracts.

2. What authority does DHS rely on for the proposition that state budgetary considerations form a sufficient lawful basis to amend an existing Section 1915(c) HCBS waiver? DHS' memoranda clearly, unambiguously and expressly explain that the State of Minnesota is motivated to propose the Budget Re-Base Amendment for state fiscal budgetary reasons. For example, DHS notified County Human Service Directors on

December 16, 2002 that "because of the state's budget deficit, it is prudent and necessary to review all current spending trends. Rebased the MR/RC waiver at this time helps to lessen reductions that might have to be taken later because of legislative decisions about the state budget." Federal law outlines precise reasons why a State may request a Section 1915(c) waiver. Those reasons do not include state fiscal constraints.

- a. Federal statutory law mandates that the impact of any approved waiver must be consistent with the purpose of the Medicaid program. That is, the waiver plan should enable the state to "furnish medical assistance on behalf of families with disabled children, and aged, blind and disabled individuals lacking the income and resources to meet the costs of necessary medical services, and to help such families and individuals attain the capability for independence or self-care." SMM2 § 2108. Simply put, a state's waiver program may not substantially impair a recipient's access to services of adequate quality, and DHS must submit to CMS "sufficient documentation" to assure that fact. DHS' current Section 1915(c) HCBS waiver would not have been approved unless DHS included "necessary safeguards...to protect the health and welfare of individuals provided services under the waiver." Those safeguards must include standards for provider participation. 42 U.S.C. §1396n(c).
- b. Where DHS has not generated the county fiscal impact of the Budget Re-Base Amendment at the same time it announced the re-basing initiative, DHS has insufficient basis upon which to provide sufficient documentation to assure CMS that the Budget Re-Base Amendment will not impair access to services of adequate quality.
- c. DHS' Budget Re-Base Amendment places no restrictions on counties from modifying or lessening an individual consumer's current services or a provider's existing rates. Moreover, re-basing may trigger the provider contract termination clauses in any county that receives less Medicaid revenue. Given the uncertainties caused by failing to prohibit counties from reducing services and rates, DHS cannot demonstrate that the Budget Re-Base Amendment will not substantially impair a recipient's access to services nor can DHS credibly assure CMS that provider participation in counties that sustain material revenue decreases will remain at the same sufficient levels.
- d. There is no provision under Section 1915(c) that provides a mechanism for retroactively changing previous estimates of cost neutrality, nor does DHS have any basis for doing so. Section 1915(c) waivers may only be granted if the State demonstrates that the expenditures for HCBS under the waiver plan will not exceed the per capita amount that would be spent on institutional care if no waiver were granted. CMS provides a detailed mathematical formula to demonstrate cost-neutrality, and we presume DHS satisfied that criteria upon submission of the initial waiver request and any subsequent modifications. In fact, as we understand DHS' Budget Re-Base Amendment, DHS concedes that the level of expenditures,

absent re-basing, would *not* exceed the initial cost-neutrality estimates that DHS provided to CMS.

- i. Federal law prevents CMS from recapturing Federal Financial Participation if a state's expenditures exceed the estimated costs previously submitted to CMS at the time the HCBS waiver was approved. Federal law provides that the Secretary "may not require, as a condition of approval of a waiver....that the actual total expenditures for home and community based services under the waiver (and a claim for Federal financial participation in expenditures for the services) cannot exceed the approved estimates for these services." 42 U.S.C. § 1396n(c)(6). Clearly, the federal law allowing HCBS waivers exalts the health and welfare of recipients over concerns that the state may spend more than estimated or anticipated. No provision of Section 1915(c) allows DHS to propose a modification of the HCBS waiver on the grounds that the state is spending too much money, or that the state will suffer or aggravate its budgetary deficit if it does not re-base Medicaid expenditures county by county. If the Secretary is without authority to base waiver decisions on actual adherence to financial spending estimates, the law should not be construed to allow the State of Minnesota authority to modify its waiver as a cost control mechanism.
  - ii. CMS will know that the federal judiciary does not allow states to elevate cost savings over the welfare of beneficiaries. States have a duty under 42 U.S.C. § 1396n(c) to adopt necessary safeguards to protect the health and welfare of individuals receiving HCBS waiver services. In *Wood, et al. v. Tompkins*, 33 F.3d 600 (6th Cir. 1994), the United States Court of Appeals for the Sixth Circuit held that family members have a private right of action under 42 U.S.C. § 1983 to challenge a state's refusal to enroll a developmentally disabled child into the waiver program for the "sole reason that [the State] would not accept the number of hours [of skilled nursing services] approved by the program." In that case the Plaintiffs alleged the state agency imposed a statewide cap preventing enrollees from receiving greater than eleven hours of nursing service per day, despite actual need. DHS' own December 11, 2002 warning to counties that they should remember the anticipated re-basing when "renegotiating service agreements," coupled with statements from counties facing re-basing that they are reviewing or temporarily freezing service agreements, indicate to us that CMS should be concerned whether the Budget Re-Base Amendment is driven by the health and welfare of individuals receiving home care, or to save the state money. There is no federal statutory basis to request a Section 1915(c) waiver modification on the grounds of state fiscal deficits.
3. What authority does DHS rely on for the proposition that a State may propose an amendment to an existing Section 1915(c) HCBS waiver without providing a full justification on all material points? It appears to me that DHS hopes to submit a

waiver modification request without completing the comprehensive analysis required to achieve an HCBS waiver under Section 1915(c). Pursuant to 42 C.F.R. § 1396n (c) waivers granted for HCBS "shall be for an initial term of three years and, upon the request of a State, shall be extended for additional five-year periods unless the Secretary determines for the previous waiver period the assurances provided under paragraph (2) have not been met." 42 C.F.R. § 1396n(c)(3). Pursuant to SMM 2 § 2109, states may submit "requests for modification of approved waiver authorities" but CMS explains "a modification must be accompanied by a *full justification and cost data* similar to that required for a new or renewal waiver proposal." SMM2 § 2109 (*emphasis added*). In reviewing waiver renewals, CMS reviews whether past assurances "continue to be met" and considers the "adequacy of the assurance and documentation" submitted in the request. SMM4, § 4444. It is apparent to us that since DHS, counties and providers have not yet fully received, let alone reviewed, the financial impact of the Budget Re-Base Amendment, DHS cannot comply with this federal requirement because it lacks sufficient data to assure that the financial implications will not reduce services to existing consumers, reduce payment rates to existing providers, result in contract terminations or unsettle existing relationships between consumers and their selected providers.

4. What basis does DHS have to believe CMS will approve a modification that raises serious constitutional problems? The Budget Re-Base Amendment will result in a decrease of Medicaid revenue to some counties, and that will set in motion efforts to unsettle or disrupt existing private contractual relationships. These contractual relationships include not only contracts between counties and providers, but also service agreements with consumers. If counties freeze or reduce program services they may also impact and jeopardize leases or construction contracts that providers obtained in reliance on county approvals for waiver applicants waiting for services. The Court of Appeals for the Eighth Circuit held that the State of Minnesota may not impose retroactive changes in payment for Medicaid services if those changes upset or impair existing private contracts that were lawful when entered. *Minnesota Ass'n. of Health Care Facilities v. Perpich*.
5. What authority does DHS rely on for the proposition that CMS will approve its Budget Re-Base Amendment retroactively to January 1, 2003? In the cover e-mail transmitting the Budget Re-Base Amendment, DHS stated it "will be asking the federal government for retroactive approval of the amendments to January 1, 2003." We find no basis in federal law to authorize a retroactive approval. Under 42 C.F.R. § 430.25, subd. (h), waivers "receive a *prospective effective date determined, with State input, by the Administrator.*" (*emphasis added*). HCBS Waiver Amendments "must be approved [by CMS] *prior to the implementation of the proposed change.*" SMM4 § 4445. (*emphasis added*)
6. Has DHS reported to the Minnesota Legislature that its Budget Re-Base Amendment may unsettle the current state law's obligation to decrease the waiver waiting list and jeopardize compensation increases provided Direct Service Professionals? DHS has failed to explain how existing services and payment rates can be maintained when some counties experience Medicaid revenue reductions. DHS is aware



that counties, at the urging of the state, have recently brought down the HCBS waiver waiting lists and that the Legislature has mandated compensation increases to Direct Service Professionals. DHS provides no plan or explanation how expected services can be maintained, compensation increases honored, despite reduced payments to counties.

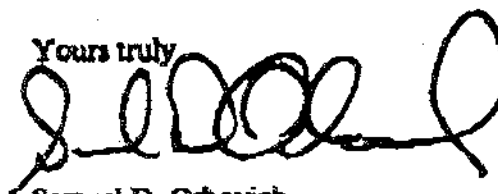
- a. Bringing down the HCBS waiver lists was a prudent instruction to counties. States are required by federal law to provide HCBS waiver services with "reasonable promptness." Section 1902(a)(8) of the Social Security Act. Inpatient Medicaid recipients disgruntled with lengthy HCBS waiver lists have a judicially enforceable claim under 42 U.S.C. § 1983 to enforce this "reasonable promptness" standard. *Lewis v. New Mexico Department of Health*, 2001 U.S. App. LEXIS 18510 (10th Cir. Aug. 16, 2001). Given the unavailable financial data regarding the Budget Re-Base Amendment, DHS cannot assure CMS that it will continue to meet the "reasonable promptness" standard for HCBS waiver services.

Hopefully, DHS will review these Comments with the Office of the Attorney General for the State of Minnesota. We trust that DHS will not attempt to impose, unilaterally, the Budget Re-Base Amendment prior to CMS' review and approval. DHS should remember that unilateral amendments to a State Plan or waiver could jeopardize its ongoing obligations to CMS.

Unilateral reduction in payments to levels less than contemplated by the current approved State Plan or existing waiver may also result in DHS liability to providers for underpayments. In 1993, Orbovich & Gartner represented 53 hospitals in federal and state court actions alleging that DHS and HCFA officials paid hospitals Medicaid rates for dually eligible patients at amounts less than required by the approved State Plan. DHS conceded that its Medicaid payments for dually eligible beneficiaries were less than its State Plan representations to HCFA, and settled that litigation for \$4.2 million. DHS subsequently paid all other Minnesota hospitals the correct amounts.

Please do not hesitate to contact me if you have any questions or concerns regarding this opinion.

Yours truly



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- (3) DHS has failed to notify the public that virtually every Provider Contract between all Minnesota counties and HCBS providers contain one or more provisions purporting to authorize counties to *terminate* their provider contracts in the event the state reduces the Medicaid payments to the county. The Budget Re-Base Amendment contains no provision that prevents counties from terminating existing provider contracts or otherwise reducing or modifying services currently provided in approved service agreements. In fact, DHS has affirmatively represented that it is not requiring counties to maintain existing services and rates, and on December 11, 2002, warned County Human Service Directors that they may want to keep re-basing "in mind in cases where you may be renegotiating service agreements or provider rates" in January. DHS should disclose to the public, and to CMS, whether it believes counties will terminate or honor existing provider contracts and service agreements after re-basing, and its basis for DHS' belief.
- (4) In addition to failing to ascertain and disclose whether counties will terminate contracts to reduce rates and services upon receiving reduced Medicaid revenue, DHS has failed to notify the public that providers are not obligated to accept a new replacement contract if terminated due to re-basing, if the provider disagrees with either the revised services or rates. If counties terminate provider contracts to re-negotiate rates, that means the Budget Re-Base Amendment will upset consumers' current relationships with providers. DHS has failed to explain whether, as third party beneficiaries, consumers may be able to sue state and county officials or providers to maintain current service levels and provider relationships.
- (5) DHS admitted in its December 29, 2002 memorandum that it is undertaking the Budget Re-Base Amendment despite not knowing what financial impact the proposal is for each county. DHS stated, "we have *almost* completed a county by county analysis of the rebasing." (emphasis added) It is clear that DHS formulated the substantive provisions of the Budget Re-Base Amendment *before* it had sufficient data to determine whether the rebasing would, or would not, unduly financially impact certain counties. This means DHS could not provide any meaningful notice to the public, or CMS, regarding whether the financial impact of the Budget Re-Base Amendment will unsettle the existing service agreement and provider contracts.

2. What authority does DHS rely on for the proposition that state budgetary considerations form a sufficient lawful basis to amend an existing Section 1915(c) HCBS waiver? DHS' memoranda clearly, unambiguously and expressly explain that the State of Minnesota is motivated to propose the Budget Re-Base Amendment for state fiscal budgetary reasons. For example, DHS notified County Human Service Directors on

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December 16, 2002 that "because of the state's budget deficit, it is prudent and necessary to review all current spending trends. Releasing the M/R/R/C waiver at this time helps to lessen reductions that might have to be taken later because of legislative decisions about the state budget." Federal law outlines precise reasons why a State may request a Section 1915(c) waiver. Those reasons do not include state fiscal constraints.

- a. Federal statutory law mandates that the impact of any approved waiver must be consistent with the purpose of the Medicaid program. That is, the waiver plan should enable the state to "furnish medical assistance on behalf of families with disabled children, and aged, blind and disabled individuals lacking the income and resources to meet the costs of necessary medical services, and to help such families and individuals attain the capability for independence or self-care." SSM/2 § 2108. Simply put, a state's waiver program may not substantially impair a recipient's access to services of adequate quality, and DHS must submit to CMS "sufficient documentation" to assure that fact. DHS' current Section 1915(c) HCBS waiver would not have been approved unless DHS included "necessary safeguards...to protect the health and welfare of individuals provided services under the waiver." Those safeguards must include standards for provider participation. 42 U.S.C. §1396n(c).

- b. Where DHS has not generated the county fiscal impact of the Budget Re-Base Amendment at the same time it announced the re-basing initiative, DHS has insufficient basis upon which to provide sufficient documentation to assure CMS that the Budget Re-Base Amendment will not impair access to services of adequate quality.

- c. DHS' Budget Re-Base Amendment places no restrictions on counties from modifying or lessening an individual consumer's current services or a provider's existing rates. Moreover, re-basing may trigger the provider contract termination clauses in any county that receives less Medicaid revenue. Given the uncertainties caused by failing to prohibit counties from reducing services and rates, DHS cannot demonstrate that the Budget Re-Base Amendment will not substantially impair a recipient's access to services nor can DHS credibly assure CMS that provider participation in counties that sustain material revenue decreases will remain at the same sufficient levels.

- d. There is no provision under Section 1915(c) that provides a mechanism for retroactively changing previous estimates of cost neutrality, nor does DHS have any basis for doing so. Section 1915(c) waivers may only be granted if the State demonstrates that the expenditures for HCBS under the waiver plan will not exceed the per capita amount that would be spent on institutional care if no waiver were granted. CMS provides a detailed mathematical formula to demonstrate cost-neutrality, and we presume DHS satisfied that criteria upon submission of the initial waiver request and any subsequent modifications. In fact, as we understand DHS' Budget Re-Base Amendment, DHS concedes that the level of expenditures,

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against re-basing, would not exceed the initial cost-neutrality estimates that DHS provided to CMS.

i. Federal law prevents CMS from recapturing Federal Financial Participation if a state's expenditures exceed the estimated costs previously submitted to CMS at the time the HCBS waiver was approved. Federal law provides that the Secretary "may not require, as a condition of approval of a waiver.... that the actual total expenditures for home and community based services under the waiver (and a claim for Federal financial participation in expenditures for the services) cannot exceed the approved estimates for those services." 42 U.S.C. § 1396d(c)(6). Clearly, the federal law allowing HCBS waivers enables the health and welfare of recipients over concerns that the state may spend more than estimated or anticipated. No provision of Section 1915(c) allows DHS to propose a modification of the HCBS waiver on the grounds that the state is spending too much money, or that the state will suffer or aggravate its budgetary deficit if it does not re-base Medicaid expenditures county by county. If the Secretary is without authority to base waiver decisions on actual adherence to financial spending estimates, the law should not be construed to allow the State of Minnesota authority to modify its waiver as a cost control mechanism.

ii. CMS will know that the federal judiciary does not allow states to elevate cost savings over the welfare of beneficiaries. States have a duty under 42 U.S.C. § 1396a(c) to adopt necessary safeguards to protect the health and welfare of individuals receiving HCBS waiver services. In *Wood*, *et al. v. Tompkins*, 33 F.3d 600 (6th Cir. 1994), the United States Court of Appeals for the Sixth Circuit held that family members have a private right of action under 42 U.S.C. § 1983 to challenge a state's refusal to enroll a developmentally disabled child into the waiver program for the "sole reason that [the State] would not accept the number of hours [of skilled nursing services] approved by the program." In that case the Plaintiffs alleged the state agency imposed a statewide cap preventing enrollees from receiving greater than eleven hours of nursing service per day, despite actual need. DHS' own December 11, 2002 warning to counties that they should remember the anticipated re-basing when "renegotiating service agreements," coupled with statements from counties facing re-basing that they are reviewing or temporarily freezing service agreements, indicate to us that CMS should be concerned whether the Budget Re-Base Amendment is driven by the health and welfare of individuals receiving home care, or to save the state money. There is no federal statutory basis to request a Section 1915(c) waiver modification on the grounds of state fiscal deficits.

3. What authority does DHS rely on for the proposition that a State may propose an amendment to an existing Section 1915(c) HCBS waiver without providing a full justification on all material points? It appears to me that DHS hopes to submit a



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waiver modification request without completing the comprehensive analysis required to achieve an HCBS waiver under Section 1915(c). Pursuant to 42 C.F.R. § 1396n (c) waivers granted for HCBS "shall be for an initial term of three years and, upon the request of a State, shall be extended for additional five-year periods unless the Secretary determines for the previous waiver period the assurances provided under paragraph (2) have not been met." 42 C.F.R. § 1396n(c)(3). Pursuant to SMM2 § 2109, states may submit "requests for modification of approved waiver authorities" but CMS explains "a modification must be accompanied by a full justification and cost data similar to that required for a new or renewal waiver proposal." SMM2 § 2109 (emphasis added). In reviewing waiver renewals, CMS reviews whether past assurances "continue to be met" and considers the "adequacy of the assurance and documentation" submitted in the request. SMM4, § 4444. It is apparent to us that since DHS, counties and providers have not yet fully received, let alone reviewed, the financial impact of the Budget Re-Base Amendment, DHS cannot comply with this federal requirement because it lacks sufficient data to assure that the financial implications will not reduce services to existing consumers, reduce payment rates to existing providers, result in contract terminations or unsettle existing relationships between consumers and their selected providers.

4. What basis does DHS have to believe CMS will approve a modification that raises serious constitutional problems? The Budget Re-Base Amendment will result in a decrease of Medicaid revenue to some counties, and that will set in motion efforts to unsettle or disrupt existing private contractual relationships. These contractual relationships include not only contracts between counties and providers, but also service agreements with consumers. If counties freeze or reduce program services they may also impact and jeopardize leases or construction contracts that providers obtained in reliance on county approvals for waiver applicants waiting for services. The Court of Appeals for the Eighth Circuit held that the State of Minnesota may not impose retroactive changes in payment for Medicaid services if those changes upset or impair existing private contracts that were lawful when entered. *Minnesota Ass'n. of Health Care Facilities v. Perpetich*.
5. What authority does DHS rely on for the proposition that CMS will approve its Budget Re-Base Amendment retroactively to January 1, 2003? In the cover e-mail transmitting the Budget Re-Base Amendment, DHS stated it "will be asking the federal government for retroactive approval of the amendments to January 1, 2003." We find no basis in federal law to authorize a retroactive approval. Under 42 C.F.R. § 430.25, subd. (h), waivers "receive a prospective effective date determined, with State input, by the Administrator." (emphasis added). HCBS Waiver Amendments "must be approved [by CMS] prior to the implementation of the proposed change." SMM4 § 4445. (emphasis added)
6. Has DHS reported to the Minnesota Legislature that its Budget Re-Base Amendment may unsettle the current state law's obligation to decrease the waiver waiting list and jeopardize compensation increases provided Direct Service Professionals? DHS has failed to explain how existing services and payment rates can be maintained when some counties experience Medicaid revenue reductions. DHS is aware

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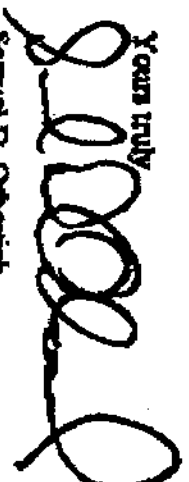
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that counties, at the urging of the state, have recently brought down the HCBS waiver waiting lists and that the Legislature has mandated compensation increases to Direct Service Professionals. DHS provides no plan or explanation how expected services can be maintained, compensation increases honored, despite reduced payments to counties.

- a. Bringing down the HCBS waiver lists was a prudent instruction to counties. States are required by federal law to provide HCBS waiver services with "reasonable promptness." Section 1902(a)(8) of the Social Security Act. Impatient Medicaid recipients disgruntled with lengthy HCBS waiver lists have a judicially enforceable claim under 42 U.S.C. § 1983 to enforce this "reasonable promptness" standard. *Lewis v. New Mexico Department of Health*, 2001 U.S. App. LEXIS 18510 (10th Cir. Aug. 16, 2001). Given the unavailable financial data regarding the Budget Re-Base Amendment, DHS cannot assure CMS that it will continue to meet the "reasonable promptness" standard for HCBS waiver services.

Hopefully, DHS will review these Comments with the Office of the Attorney General for the State of Minnesota. We trust that DHS will not attempt to impose, unilaterally, the Budget Re-Base Amendment prior to CMS' review and approval. DHS should remember that unilateral amendments to a State Plan or waiver could jeopardize its ongoing obligations to CMS. Unilateral reduction in payments to levels less than contemplated by the current approved State Plan or existing waiver may also result in DHS liability to providers for underpayments. In 1993, Orthovich & Gartner represented 53 hospitals in federal and state court actions alleging that DHS and HCFRA officials paid hospitals Medicaid rates for dually eligible patients at amounts less than required by the approved State Plan. DHS conceded that its Medicaid payments for dually eligible beneficiaries were less than its State Plan representations to HCFRA, and settled that litigation for \$4.2 million. DHS subsequently paid all other Minnesota hospitals the correct amounts.

Please do not hesitate to contact me if you have any questions or concerns regarding this opinion.

Yours truly  
  
Samuel D. Orthovich