

DHS file

**EXECUTIVE DIRECTOR**  
Jeremy Lane

**LEGAL DIRECTOR**  
Patricia S. Moepes

**ADMINISTRATOR**  
Brenda Jurvik

**SUPERVISING ATTORNEYS**  
Rodentic J. Macpherson III  
Steven P. Elliot

## MINNESOTA DISABILITY LAW CENTER

THE PROTECTION & ADVOCACY  
SYSTEM FOR MINNESOTA

430 FIRST AVENUE NORTH, SUITE 300  
MINNEAPOLIS, MN 55401-1780

(612) 332-1441  
(TDD) 332-4668  
Toll Free 1-800-292-4150  
FAX (612) 334-5755

[www.mn.dhs.gov/services/era/mdlc](http://www.mn.dhs.gov/services/era/mdlc)

**ATTORNEYS**  
Jennifer E. Olson  
Luther Grunquist  
Kathleen Hagen  
Anne L. Henry  
Bonita Kallalaad (Willmar)  
Kathy S. Kozloff  
Barbara J. Kuhn  
Anne M. Robertson  
Barnett J. Rosenfield  
Patricia M. Siebert

**ADVOCATES**  
Linda Bonney (Grand Rapids)  
Cynthia M. Jervi (Minneapolis)  
Sandra M. Moore (Duluth)  
Jana Peterson (Moorhead)  
Rochelle Roehrich (Minneapolis)  
Sharon Sanders (Duluth)

March 7, 2003

Mr. David DuPre  
Acting Regional Administrator  
Centers for Medicare and Medicaid Services, Region 5  
233 North Michigan Avenue, Ste. 600  
Chicago, IL 60601

**RE: Current Problems with the Administration and Funding of Minnesota's 1915(c) Waiver**

Dear Mr. DuPre:

The Minnesota Disability Law Center is designated as the protection and advocacy system for person with disabilities in the state of Minnesota. As part of our work on behalf of clients, our office is involved in ongoing discussions with the state's Medicaid agency, the Minnesota Department of Human Services (DHS), about waiver services under Minnesota's 1915(c) waiver for persons with mental retardation and related conditions (MR/RC waiver). We also work with the individual counties that administer the MR/RC waiver on a local level.

In response to Minnesota's current state budget deficit, DHS has taken administrative action to reduce the money allocated to counties to spend on MR/RC waiver services. We understand that DHS has submitted a waiver amendment to your agency seeking authorization to change its allocation methodology. However, rather than wait for approval of its waiver amendment request, DHS has proceeded to implement its new allocation formula. DHS has informed counties of their new waiver allocations. In many counties, these new allocations - made in the middle of the waiver's fiscal year - have drastically reduced the money available for the remainder of the service year. Making matters worse, DHS has made its new allocations retroactive to January 1 of this year, leaving counties with fewer than five months remaining in the current waiver year to implement the cuts imposed on their waiver budgets.

Given such retroactive reductions, many counties have begun drastically cutting clients' waiver budgets. Because these actions have proceeded in an inappropriate and unlawful manner, and because this process threatens the health and welfare and possible institutionalization of many people

Mr. David DuPre  
March 7, 2003  
Page 2

using the waiver, we are submitting this letter to request that CMS deny DHS's pending waiver amendment request to permit a new allocation formula for rebasing. We also ask that CMS require that DHS restore service levels to all waiver recipients.

#### 1. "Rebasing" background

In the course of ongoing, informal discussions with DHS in December 2002 regarding the status of a pending MR/RC waiver amendment to expand "consumer directed community supports" services (CDCS), DHS informed the MDLC and various other stakeholders of its intention to "rebase" its waiver allocations to counties. Such rebasing – or reconfiguration of the amount allocated to each county to serve its clients on or eligible for the MR/RC waiver – was necessary, we were told, to address the faster-than-expected growth in the program. DHS explained that its rebasing was *not* intended to reduce total expenditures in the program below the prior year's level or, more important, to result in service cuts to existing waiver recipients.

In early January, when DHS began to finalize its methodology for rebasing, DHS revealed that it was considering a fundamental change to its allocation methodology, using paid claims data from fiscal year 2002, with slight increases to cover a legislatively mandated cost of living increase and a small increase to account for persons who were not fully in service during the year.<sup>1</sup>

Our office as well as county officials promptly voiced concerns with DHS once the nature of its new rebasing methodology was explained. It became quite clear that some counties' budgets, including the larger counties in the state, would suffer far greater cuts than others. It also became clear that, at the level of cuts proposed by DHS, those counties most affected would have to cut established waiver recipients' budgets, notwithstanding DHS's prior assurances and notwithstanding the clients' undisputed needs for the services provided under those budgets.

---

<sup>1</sup>As CMS is aware, Minnesota's current MR/RC waiver provides for county-by-county allocations to be made based on a statewide "profile" system. The current profile system creates four allocation categories with increasing dollar amounts assigned to each based on recipient characteristics and historical cost of serving persons with those identified characteristics and needs. The new rebasing formula departs dramatically from this system and focuses only on a single year's paid claims data. Such an approach is inherently problematic because it is not directly linked to recipient characteristics or needs. Moreover, the new rebasing formula is flawed because it uses paid claims data from an unusual waiver year in which a huge number of new waiver recipients were brought into the program at varying times and at initial service levels far below what they actually and presently require.

Mr. David DuPre  
March 7, 2003  
Page 3

Thus, it was not until mid-January that DHS began to inform counties and advocates that it was planning to (1) implement a rebasing formula that would result in certain clients suffering cuts to their services due solely to the circumstances that happened to exist in their county; and (2) implement the new methodology retroactively to January 1.

This plan raised serious statewide concerns.<sup>2</sup> It also raised serious health, safety, and welfare concerns for those clients in the most affected counties. These concerns were clearly expressed to DHS in meetings held in late January and early February.

In spite of these clear problems, DHS proceeded to implement its rebasing. Beginning in mid-to-late January, DHS notified counties of their budget allocations for the remainder of the year and indicated that the rebasing was retroactive to January 1.

DHS took this action prior to publishing notice to all affected stakeholders. More important, it apparently did so before submitting its waiver amendment request to CMS and obviously before getting your agency's approval of its waiver amendment.

In response to DHS's rebasing, counties throughout Minnesota have been trying to determine what the new funding limitations imposed upon them mean to the administration of the waiver and what reductions in the services for current waiver recipients will be required to stay within their overall county waiver allocations. The counties most severely affected have begun to notify waiver recipients and providers of cuts to their service authorizations and rates, including the following:

- In Ramsey County, the state's second largest county, budgeted amounts available for many persons under the waiver have been reduced by over 50% of the amount allocated for the remainder of the current fiscal year ending June 30. Copies of notices sent February 14 (with cuts as high as 77%) are attached.
- In Carver County, specific budget reductions will not be sent to recipients until April 1 (covering the rest of the calendar year). However, the County has told families that families with waiver recipients at home will suffer the largest and disproportionate cuts. Carver County is so concerned about the size and impact of DHS's cut to its waiver allocation that it wrote to DHS warning them that the County could not assure that its clients' health and safety needs will be met. A copy of this letter dated February 26, 2003, is attached.

---

<sup>2</sup> Exacerbating the statewide problem is that fact that some smaller counties under DHS's new rebasing formula have actually received increased allocation amounts.

Mr. David DuPre

March 7, 2003

Page 4

- In Dakota County, service providers have had their rates reduced by 7%. In addition, waiver recipients using the CDCS option have had their budgeted amounts reduced across the board by 20% for recipients under age 18 and 15% for recipients over age 18.
- In Rock County, persons receiving day training and habilitation services under the waiver have had their authorized service days reduced across the board, an action that will have an obvious impact on the need for additional residential services.

Other counties have yet to take specific action. However, like Carver County, Lac qui Parle County (a smaller outstate county) has written to DHS to complain about DHS's "refusal to provide an adequate and appropriate financial base" for serving the county's waiver clients. A copy of that letter is also attached.

As many of the counties and individual waiver recipients would agree, DHS's actions have resulted in great inequity throughout the state's MR/RC waiver program. The rebasing, and the counties' rushed response to it, threatens the health and welfare of potentially hundreds of current waiver recipients. DHS's rebasing also violates recipients' recognized due process rights. For these reasons, explained more fully below, we ask that CMS reject DHS's current amendment request and instruct the state that it must rescind its recent unauthorized and improper cuts to county waiver allocations.

2. Minnesota's request that the waiver amendment be effective retroactive to January 1, 2002 is inconsistent with federal policy.

Minnesota's proposed waiver amendment provides that it would be effective retroactive to January 1, 2003, although the explicit provisions of that waiver were not published until February 18, 2003. Given the retroactive date, various counties have been notifying clients of substantial cuts to their authorized service budgets.

The impact of these cuts on individual recipients will be severe and exacerbated by the fact that most persons have an annual budget starting in July of each year. Many of these individuals will, if the amendment is approved and the proposed reductions are implemented, have nothing left for the balance of the waiver year.

These actions and these results are inconsistent with federal policy. *Olmstead Update No. 4* (January 10, 2001) at pages 4-5 permits a waiver amendment to be retroactive to the first day of the waiver

Mr. David DuPre  
March 7, 2003  
Page 5

year in which the request was submitted. However, that statement is made in the context of a state seeking an amendment to increase the number of approved participants.

Minnesota's proposed amendment does not increase the number of participants or increase the scope of services available to them. It arbitrarily harms many current waiver participants. Such action is inconsistent with limitations on waiver amendments stated in *Olmstead Update No: 4*, at page 8:

**Any reduction in the number of potential waiver recipients must be accomplished in a manner that continues to assure the health, welfare, and rights of all individuals already enrolled in the waiver.**

To that end, *Olmstead Update No: 4* states (page 8) that, to be approved, the "State may provide an assurance and methodology demonstrating how individuals currently served by the waiver will not be adversely affected by the proposed amendment." Other than reiterating to counties that they must assure health and safety to current waiver recipients, DHS has provided no other standards, criteria, or guidelines to explain how counties are to make such assurances. DHS has included no such "assurance and methodology" in the waiver amendment published for public comment. To our knowledge, DHS has not made any such submission to CMS. In fact, it would be hard for DHS to do so, because it has left the responsibility for making such assurances entirely to the counties, most of which are just now developing their reductions and notifying clients of cuts to their budgets.

**3. Retroactive application of Minnesota's proposed waiver amendment compromises the fair hearing rights of current participants in the waiver program.**

A fundamental component of the Medicaid program for both state plan services and home- and community-based services is the participant's right to a fair hearing prior to reduction or termination of benefits. Minnesota's MR/RC waiver necessarily includes specific due process protection for participants. The right to a hearing in the context of proposed reductions that anticipate the effective date of the proposed amendment cannot be disputed.

Included in participants' due process rights is the right to receive advance notice of the proposed adverse action at least 10 days before the effective date. 42 C.F.R. § 431.211.

Federal policy also dictates that the waiver participant's "right to receive a service is dependent on a finding that the individual needs the service, based on appropriate assessment criteria that the State develops and applies fairly to all waiver enrollees." *Olmstead Update No: 4*, at 6. In the current rebasing context and resulting service cuts, a fair hearing process to address these questions of fact – whether proposed cuts comport with client needs, meet basic care requirements, etc. – must be provided before the cuts are implemented.

Mr. David DuPre  
March 7, 2003  
Page 6

A related component of the fair hearing process is the participant's right to continue assistance at the present level pending the hearing and determination of the appeal. 42 C.F.R. § 431.230. The proposed amendment compromises this fundamental right because it is to be retroactive to January 1, 2003.

For example, a waiver participant in Ramsey County may challenge a proposed 50% reduction in the amount budgeted for her waiver year. If that participant requests that benefits continue at the present level pending the appeal, and if the reduction proposed by the county agency is upheld in whole or in part and applied retroactive to January 1, 2003, the recipient may very well be left with no remaining funds for the remainder of the waiver budget year. This result is inconsistent with the federal policy quoted above from *Olmstead Update No. 4* that any reductions in service may only be made if rights of the participants are protected.

4. **The proposed reductions in service for persons presently participating in the home and community-based waiver program demonstrate that Minnesota's proposed amendment is inconsistent with the amount, duration and scope requirements of 42 C.F.R. § 440.230(b).**

*Olmstead Update No. 4* emphasizes (page 4) that section 1915(c) does not authorize waiver of the sufficiency of amount, duration, and scope requirement of 42 C.F.R. § 440.230(b). That letter also states that this regulation will apply to the entire waiver. The relevant test is stated in these terms (page 7):

... whether the amount, duration and scope of all the services offered through the waiver (together with the State's Medicaid plan and other services available to waiver enrollees) is sufficient to achieve the purpose of the waiver to service as a community alternative to institutionalization and assure the health and welfare of the individuals who enroll.

The results of the proposed amendment can already be seen. In several counties in the state, the proposed funding allocation which lies at the heart of the amendment will cause substantial reduction in the amount of services already found to be needed to meet the purpose of the program. These undisputed needs have been identified in proposed plans of care approved by county case managers. These services are needed to avoid institutionalization and to provide for the health and welfare of the individual. The fact that the cuts noted above are being made in counties around the state regardless of, and contrary to, identified client needs demonstrates that the proposed amendment is inconsistent with the amount, duration and scope requirement.

Mr. David DuPre  
March 7, 2003  
Page 7

**5. Minnesota's proposed amendment is also inconsistent with the statewideness requirement of 42 U.S.C. § 1396a(a)(1) and 42 C.F.R. § 431.50.**

Medical Assistance services must be provided "statewide." See 42 U.S.C. § 1396a(a)(1); 42 C.F.R. § 431.50. States can, through waivers, "waive" certain federal MA requirements, including "statewideness." However, Minnesota has never sought such a waiver. Neither Minnesota's current waiver nor the proposed amendment waive the statewideness requirement.

Nevertheless, the rebasing methodology currently being implemented by DHS creates widespread and fundamental disparities among the levels of service available to clients, depending on where they happen to live. Thus, in Dakota County, one of the counties most affected by DHS's rebasing, service providers' rates are being cut. The rates for those same services being provided by those same providers working across the county line in Hennepin County are not presently being cut.

Similarly, individuals whose budgets have been cut by 50% or more in some counties are being denied the ability to access critically needed service, solely because they happen to live in a county where waiver spending per person was relatively low in fiscal year 2002. Many waiver clients with similar needs and similar budgets in other counties are not being subjected to similar cuts. Some waiver recipients in "lucky" counties unaffected by rebasing are not being cut at all.

Such a situation arbitrarily creates geographic disparities in the access to services that are indefensible in a statewide waiver program. As your agency has emphasized to the states in *Olmstead Update No. 4* (January 10, 2001) at page 5, "the State is obliged to provide all people enrolled in the waiver with the opportunity for access to all needed services covered by the waiver and the Medicaid State plan." DHS's rebasing and the county-by-county response to the rebasing cuts violate this basic waiver requirement.

**6. Request for Assistance**

DHS's recent rebasing actions have been driven solely by budget concerns. They have been rash, inexpertly designed, and poorly implemented. They threaten the stability of the waiver program overall. More important, they threaten the health and welfare of numerous waiver recipients.

We ask that CMS act expeditiously and instruct DHS to reverse its administrative decision to rebase the allocations made for the remainder of the current fiscal year (ending June 30). To the extent some form of rebasing is warranted, we ask that CMS instruct DHS to reconsider its methodology and focus on a reduction of the "profile" amounts currently used as the base methodology. We ask that CMS reject DHS's current waiver amendment request. We also ask that CMS insist that any future reduction in service amounts be prospective only and be supported by a showing that such cuts

