DEPARTMENT OF HEALTH AND HUMAN SERVICES
OFFICE OF DIRECTOR

ACTION REFERRAL

TO	DATE
Waldrep	7-20-12

DIRECTOR'S USE ONLY	ACTION REQUESTED
1. LOG NUMBER 10-033	[ ] Prepare reply for the Director's signature DATE DUE _____
2. DATE SIGNED BY DIRECTOR CC: Mr. Keck, Singleton, Deps, CMS files Cleared 8/14/12, letter attached.	[X] Prepare reply for appropriate signature DATE DUE 8-24-12
	[ ] FOIA DATE DUE _____
	[ ] Necessary Action

APPROVALS (Only when prepared for director's signature)	APPROVE	* DISAPPROVE (Note reason for disapproval and return to preparer.)	COMMENT
1.			
2.			
3.			
4.			

DEPARTMENT OF HEALTH & HUMAN SERVICES
Centers for Medicare & Medicaid Services
Atlanta Regional Office
61 Forsyth Street, Suite 4T20
Atlanta, Georgia 30303

CENTERS FOR MEDICARE & MEDICAID SERVICES

DIVISION OF MEDICAID & CHILDREN'S HEALTH OPERATIONS

July 17, 2012

Mr. Anthony E. Keck, Director
South Carolina Department of Health and Human Services
1801 Main Street
Columbia, SC 29201

Dear Mr. Keck:

This is in response to your Medicaid State Technical Assistance Team (MSTAT) request to engage the Centers for Medicare & Medicaid Services (CMS) in assisting South Carolina in reorganizing its care delivery and coordination system for Medicaid beneficiaries who receive long-term care services and supports (LTSS). Specifically, you requested assistance in bringing South Carolina's Integrated Personal Care (IPC) Services program into compliance with federal Medicaid requirements. Recently, you requested that we focus on the authority under section 1915(i) of the Social Security Act (Act) and explore whether this authority could be used to target Personal Care Services (PCS) to specific eligibility groups such as the Optional State Supplementation (OSS) eligibility group based on needs-based criteria.

South Carolina's IPC program currently limits the coverage of PCS as an optional Medicaid service under section 1905(a)(24) of the Act to Medicaid eligible individuals residing in Community Residential Care Facilities (CRCFs). Medicaid eligible beneficiaries that require PCS and live in their homes are unable to receive the service. By limiting the service based on setting, South Carolina is in violation of the comparability requirement in 1902(a)(10)(B) of the Act. As we have discussed, the State can bring the IPC program into compliance with federal law by also offering services to individuals who reside in their own homes and otherwise meet the requirements for service eligibility.

CMS convened a team of subject matter experts who reviewed and discussed the available Medicaid authorities with State staff. The team prepared an options chart for the State detailing the pros, cons, and program changes that would be required to permit the State to come into compliance under the following authorities: 1915(c) HCBS; 1915(i) State plan service; Money Follows the Person (MFP) Demonstration; 1115 Demonstration; and Section 1937 Benchmark.

Additional information about this analysis is attached as an appendix. As you know, our review has confirmed that there is no Medicaid authority that permits South Carolina to operate its IPC program without changes. Offering services only to individuals living in CRCFs is not consistent with federal Medicaid law and also raises issues under the Olmstead decision.

We encourage South Carolina to pursue the provision of PCS to individuals who need such services, regardless of the home and community-based setting in which those individuals live. We hope the analysis of options is a helpful guide in terms of the choices available to South Carolina. If the State decides to terminate coverage of PCS under its Medicaid State Plan, the State will need to submit a State Plan Amendment to terminate such coverage. Prior to denying claims for services for beneficiaries, the State must comply with the *fair hearings* provisions in 42 CFR 431.200 through 431.246. Importantly, we note that, even if South Carolina does decide to terminate the provision of PCS to Medicaid beneficiaries over the age of 21, the State is obligated to continue the provision of medically necessary PCS to Medicaid beneficiaries under the age of 21. This is due to the Early and Periodic Screening, Diagnosis and Treatment (EPSDT) provision that assures children receive necessary care even if it is not otherwise available under the state plan for adults. PCS must be available to beneficiaries under the age of 21 without regard to setting (and must include PCS in beneficiaries' private residences when medically necessary).

This guidance relates solely to bringing South Carolina's IPC program into compliance with Medicaid provisions and does not in any way address the State's independent obligations under the Americans with Disabilities Act or the Supreme Court's *Olmstead* decision. We hope this information is helpful as you continue to explore opportunities to reorganize South Carolina's care delivery and coordination system for Medicaid beneficiaries LTSS. If you have additional questions, please contact Joyce Wilkerson of my staff at 404-562-7426 or via email at Joyce.Wilkerson@cms.hhs.gov.

Sincerely,

Irina Roberts for

Jackie Glaze
Associate Regional Administrator
Division of Medicaid & Children's Health Operations

APPENDIX

- 1915(c) HCBS – Under a waiver authorized under section 1915(c) of the Act, a State may cover home and community-based services for individuals who would otherwise be institutionalized in a hospital or nursing home. The State reports that only 25% of CRCF residents meet nursing home level of care criteria to qualify for HCBS. Additionally, there are already extensive waiting lists for the State's HCBS waivers.

- 1915(i) State plan service –The 1915(i) population cannot have target criteria that have the effect of limiting the benefit only to individuals living in a CRCF, nor can the only 1915(i) service offered be a residential service when there is not a comparable Medicaid service available to individuals residing in their own homes.

  CMS staff reviewed South Carolina's recent proposal to use the 1915(i) authority to target PCS to people who are eligible for Medicaid under the OSS category. The State cannot use the 1915(i) authority to restrict access to PCS to individuals living in a particular residential setting to the exclusion of those residing in private homes.

- Money Follows the Person (MFP) Demonstration – We considered whether MFP might provide support to transition individuals from CRCFs in order to assist the state in moving individuals into alternative settings that meet the criteria for HCBS and allow the individual options regarding where s/he receives services. However, CRCFs do not meet the definition of a qualified institution under MFP. A "qualified institution" is defined as a nursing facility, hospital, intermediate care facility for the mentally retarded (ICF/MR), psychiatric residential treatment facility (PRTF), or institution for mental disease (IMD). In addition, MFP can only support LTSS delivered in community care settings which have 4 or fewer beds.

- 1115 Demonstration – This authority under section 1115 of the Act, which requires Secretary approval, provides broad flexibility to conduct experimental, pilot, or demonstration projects that assist in promoting the objectives of Title XIX of the Social Security Act. The State could not identify a valid research or demonstration hypothesis consistent with the objectives of Title XIX for coverage of PCS limited to the CRCF population.

- Section 1937 Benchmark – This authority does permit States to target a specific set of benefits to a specific population, provided the targeting criteria are within the scope of section 1937 of the Act and do not violate federal antidiscrimination laws. Under section 1937 of the Act and implementing regulations, States may limit individuals who can be provided Medical assistance through a benchmark benefit plan by geographic area, by an eligibility group listed under 1905(a) and or by medical condition; however, the State must make the benchmark benefit plan available to all individuals within the category covered. Congregate living arrangements do not meet the definition of an eligibility group, a geographic area or a medical condition. Therefore, congregate living arrangements are not an allowable targeting criterion under section 1937, and the State may not provide PCS to individuals living in a congregate arrangement, to the exclusion of individuals residing in private residences.

Log #33

South Carolina Department of Health & Human Services

Anthony E. Keck, Director
Nikki R. Haley, Governor

September 14, 2012

Ms. Cindy Mann
Deputy Administrator and Director
Center for Medicaid, CHIP and Survey & Certification
Centers for Medicare & Medicaid Services
7500 Security Boulevard
Baltimore, MD 21244-1850

Re: South Carolina Integrated Personal Care (IPC) Program

Dear Ms. Mann:

I appreciate your talking with me in April about the future continuation of South Carolina's IPC Program. Since our discussion, we have received the formal response from the Centers for Medicare and Medicaid Services (CMS) dated July 17, 2012, concerning our Medicaid State Technical Assistance Team (MSTAT) options for bringing IPC into compliance with federal Medicaid requirements. As you are aware, the South Carolina Department of Health and Human Services (SCDHHS) has been engaged with staff in both the regional and central offices of the CMS for over two years about coverage issues with IPC as an optional Medicaid State Plan service. Concerns about this service were originally identified as a "same page" issue. I would like to address some of the issues raised in this CMS letter.

CMS stated in its letter that there is no Medicaid authority to operate its IPC program without changes and that "By limiting the service based on setting, South Carolina is in violation of the comparability requirement in 1902(a)(10)(b) of the Act." However, 1915(i)(3) of the Social Security Act (SSA) provides States an option to develop a program in which comparability does not apply ("A State may elect in the State plan amendment approved under this section to not comply with the requirements of section 1902(a)(10)(B) (relating to comparability)"). While CMS noted we have explored all options, we request the opportunity to continue to evaluate the 1915(i) authority.

On May 3, 2012 CMS published a proposed rule and requested public comment regarding many of the provisions with respect to the 1915(i) service. One of the provisions on which comment was requested and which is not yet finalized is the characteristics of a home and community setting. As noted in the regulations, CMS has attempted to develop criteria since 2008, but they continue to evolve. While not finalized, CMS has noted its goal to issue consistent guidance so that requirements apply uniformly to programs authorized in 1915(i), 1915(c), and 1915(k) of the SSA. It is important that the final regulation continue to afford states the opportunity to provide services in an assisted living setting similar to what has historically been authorized under 1915(c) waivers. Since the regulations are not yet finalized and continue to evolve, we believe it is important that CMS finalize the regulations regarding setting prior to initiating any action that is based on the premise that Section 1915(i) is not available.

Furthermore, CMS has informed South Carolina that if we submit a State Plan Amendment terminating Personal Care Services (PCS), we "must comply with the *fair hearing* provisions in 42 CFR 431.200 through 431.246" prior to denying claims for services for beneficiaries. Of course, we certainly intend to comply with the fair hearing

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provisions in 42 CFR 431.200 through 431.246. However, in this case, the services would not be covered under the State Plan; therefore, there would be no requirement for a fair hearing.

If CMS insists that we must terminate the service even before the 1915(i) service regulations are finalized, we request an effective date of June 30, 2013 to terminate the service and to work with providers to assure that consumers' care needs can be met as best as we are able to in the absence of Medicaid funding.

Sincerely,

Anthony E. Keck
Director

cc: Jackie Glaze
Maria Drake
Joyce Wilkerson