

# The Medicaid Managed Care Waiver and Guardianship

Joint Legislative Oversight Committee on HHS  
Subcommittee on Public Guardianship  
February 12, 2014

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# 2001: Mental Health System Reform

An LME, or Local Management Entity, is a public authority established under NC law that is responsible for mental health, substance use, and intellectual and developmental disabilities services.

For more than 30 years, LMEs both provided services directly, and contracted with Provider Agencies.

In 2001, S.L. 2001-437 was passed:

- Privatized the delivery of public-sector mental health services
- LMEs ceased providing services directly
- LMEs became managers of networks of private-sector providers

# 2005: The PBH Pilot

- Built on the 2001 mental health system reform.
- PBH was granted the opportunity to design and operate a Medicaid managed care waiver.
- The pilot combined management of Medicaid and state-funded mental health services.
- PBH became NC's first Medicaid Managed Care Organization (MCO), successfully implementing and managing a Medicaid Managed Care waiver.

# 2011 Medicaid Reform

- **S.L. 2011-264**
- **Expanded the PBH Pilot statewide**
- **Converted all Medicaid mental health, substance use and intellectual and developmental disability services to managed care**
- **The law codified the combined management of Medicaid and state-funded mental health services by LME/MCOs**
- **LME/MCOs now operate as at-risk Medicaid Managed Care Organizations (MCOs) and are responsible for managing the cost of services**

# Public Guardians

- NC G.S. 35A allows for the appointment of “disinterested public agents” as public guardians.
- Historically, as public authorities, LMEs were appointed guardians of adults with mental illness and intellectual/developmental disabilities.
- LMEs never received funding for guardianship responsibilities, except in the case of Thomas S. Class Members.
- Cardinal Innovations provided guardianship services through:
  - Contracts with the Arc of NC Life Guardianship Program
  - Employees who directly served as guardian representatives

# LME/MCOs May Not Serve as Guardians

- NC Superior Court, In the Matter of Christopher Paul Boyd, ordered that LME/MCOs may not serve as guardians:
  - LME/MCOs have “a fiduciary duty to operate as an at-risk managed care organization”
  - LME/MCOs are “required to engage in Utilization Management” and make “decisions regarding the medical necessity of the health care services requested” by recipients
  - LME/MCOs have “an inherent actual or potential conflict of interest” which “prevents the [LME/MCO] from being appointed as the guardian”
  - LME/MCOs are “ineligible in any case, either directly or by contract with third-party entities as successor guardians, to be appointed as guardian”
- Court’s decision and language was upheld in two additional cases:
  - In the Matter of Demetrio Santana
  - In the Matter of the Estate of Bresha Johnson

# NC Changes Public Guardianship Law

- State law, S.L. 2012-151 and S.L. 2013-258, codify the prohibition:

“An individual who contracts with or is employed by an entity that contracts with a local management entity (LME) for the delivery of mental health, developmental disabilities, and substance abuse services may not serve as a guardian for a ward for whom the individual or entity is providing these services, unless the individual is one of the following:

- (1) A parent of that ward.
- (2) A member of the ward's immediate family, a licensed family foster care provider, or a licensed therapeutic foster care provider who is under contract with a local management entity (LME) for the delivery of mental health, developmental disabilities, and substance abuse services and is serving as a guardian as of January 1, 2013. For the purposes of this subsection, the term "immediate family" is defined as a spouse, child, sibling, parent, grandparent, or grandchild. The term also includes stepparents, stepchildren, stepsiblings, and adoptive relationships.
- (3) A biologically unrelated individual who was serving on March 1, 2013, as a guardian without compensation for guardianship services.”

# **Transfer of Public Guardianship Responsibility**

- **In response to the court orders and changes to the statutes, the Department of Health and Human Services transferred guardianship responsibilities historically provided by the LMEs to the Departments of Social Services.**



# **Federal Guidance on Relatives and Guardians as Service Providers**

- **The Federal Government allows states to choose to allow relatives and guardians to be paid to provide Medicaid funded services to Medicaid recipients.**
- **If a state chooses to allow relatives and guardians to be paid to provide services, the state must implement limits to minimize conflicts of interests and procedures to ensure relatives and guardians only provide services that are in a Medicaid recipient's best interests.**



# **Review Criteria**

## **For the Payment of Services Provided by Relatives and Guardians**

### **Centers for Medicare and Medicaid**

- The specific waiver services that a relative or legal guardian may provide.
- The specific circumstances under which the services may be provided and the method of determining that such circumstances apply.
- Specify the limitations on the amount of services that may be furnished by a relative or legal guardian.
- When a legal guardian who exercises decision making authority is paid to provide waiver services, the waiver specifies how it is established that the provision of services by the guardian are in the best interests of the participant.
- The waiver must specify the procedures that are employed to ensure that payment is made only for services rendered and that services are furnished in the best interest of the individual.

# North Carolina Permits Relatives and Guardians to Provide Services

- NC G.S. 35A gives guardians the authority to make healthcare and mental health service decisions.
- NC S.L. 2012-151 and S.L. 2013-258 allow relatives and guardians who are paid providers to also serve as guardians for the recipient.
- NC allows relatives and guardians to be paid to provide Medicaid services for adults, but not for children.
- In accordance with Federal guidelines, the Innovations Medicaid Waiver limits the services provided by Guardians to: Personal Care, In-Home Skill Building, Intensive In-Home Support, and Residential Supports.

# Benefits of Relatives and Guardians as Service Providers

- Relatives that are guardians have many reasons for wanting to provide paid services to their adult child or ward. Examples include:
  - Some relatives and guardians have had negative experiences with outside staff providing care
  - The recipient may have complex health conditions limiting activities outside the home
  - It is difficult to recruit qualified staff in the area where the recipient lives
  - Guardians believe they can provide the best care for their family member
  - Reliability of outside staff is sometimes poor; this is especially problematic when guardians work outside the home
- Hiring a relative or guardian can also benefit provider agencies:
  - Reliable employee already in the home
  - Less training required
  - Guardian understands the needs of the recipient
  - Low staff turn-over
  - Most often there is full support for treatment decisions by the relative or guardian, who is also the employee

# Disadvantages of Relatives and Guardians as Service Providers

- Too many in-home services can restrict the recipient's experiences with other people or peer groups outside the home.
- Many relatives and guardians provide many hours of unpaid care for recipients; when they are also the primary paid caregiver, they may not have a break from providing care.
- Relatives and guardians may lose perspective on the needs of the recipient, especially as related to readiness to move to less restrictive or less intensive services.
- Relatives and guardians are responsible for all aspects of the Medicaid recipient's care: requesting, consenting to, and providing services.
- A conflict of interest exists when the relative or guardian requests additional services that they will then be paid to provide.

# Cardinal Innovations Process

- The provider agency is responsible when a relative or guardian is the provider of services, therefore:
  - The provider agency must submit a request for approval to Cardinal Innovations when they intend to employ a relative or guardian to provide services
- The provider agency must ensure that the relative or guardian meets all requirements for employment, including necessary licensures and/or certifications.
- Cardinal Innovations limits paid services to 40 hours per week, except for special circumstances:
  - Cardinal Innovations must authorize any relative or guardian to provide more than 40 hours per week
- The guardian must live in the home with the Medicaid recipient
- Cardinal Innovations conducts an annual recertification to ensure the provider agency continues to meet all requirements of the 1915(b)/(c) waiver

# **Cardinal Innovations Process Cont'd**

- **Other criteria include:**
  - **The guardian must live in the home with the Medicaid recipient**
  - **Back up staffing other than the guardian must be identified and regularly provide services to the recipient**
- **Cardinal Innovations conducts an annual recertification to ensure the provider agency continues to meet all requirements of the waiver**
- **Only providers may request a reconsideration of the decision made by Cardinal Innovations; Guardians may not appeal the decision.**

# Summary

- LMEs were historically guardians of people with mental and developmental disabilities.
- The courts found guardianship to be a conflict of interest in three separate cases due to the LME/MCO's role in operating the Medicaid waivers and in authorizing services for Medicaid recipients.
- The court found the conflict exists whether the LME/MCO is directly providing the guardianship services or contracting for them.
- NC allows guardians to provide direct services to adults but only as employees of provider agencies.
- The Centers for Medicare and Medicaid have specific requirements that must be met when guardians provide services.
- Cardinal Innovations has a process that has been in place for seven years to review and approve provider agency requests to employ guardians, which has worked well.