

F. In paragraph (e)(3) introductory text, the words “or HHA” are removed; and in paragraph (e)(3)(ii), the word “similar” is added before each occurrence of the word “services”, and the words “or HHA” are removed.

(Catalog of Federal Domestic Assistance Program No. 93.773 Medicare—Hospital Insurance)

Dated: September 21, 2000.

Brian P. Burns,

Deputy Assistant Secretary for Information Resources Management.

[FR Doc. 00–25497 Filed 10–6–00; 8:45 am]

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DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Care Financing Administration

42 CFR Parts 440 and 441

[HCFA–2010–FC]

RIN 0938–AI67

Medicaid Program; Home and Community-Based Services

AGENCY: Health Care Financing Administration (HCFA), HHS.

ACTION: Final rule with comment period.

SUMMARY: This final rule with comment period expands State flexibility in providing prevocational, educational, and supported employment services under the Medicaid home and community-based services waiver provisions currently found in section 1915(c) of the Social Security Act (the Act); and incorporates the self-implementing provisions of section 4743 of the Balanced Budget Act of 1997 that amends section 1915(c)(5) of the Act to delete the requirement that an individual have prior institutionalization in a nursing facility or intermediate care facility for the mentally retarded before becoming eligible for the expanded habilitation services. In addition, we are making a number of technical changes to update or correct the regulations.

DATES: Effective date: October 1, 1997. We will consider written comments if we receive them at the appropriate address, as provided below, no later than 5 p.m. on or before December 11, 2000.

ADDRESSES: Mail written comments (one original and three copies) to the following address: Health Care Financing Administration, U.S. Department of Health and Human Services, P.O. Box 9010, Attention: HCFA–2010–FC, 7500 Security Boulevard, Baltimore, MD 21244–9010.

If you prefer, you may deliver your written comments (one original and three copies) to one of the following addresses:

Room 443–G, Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201, or Room C5–09–26, 7500 Security Boulevard, Baltimore, MD 21244–1850.

Because of staffing and resource limitations, we cannot accept audio, visual, or facsimile (FAX) copies of comments. In commenting, please refer to file code HCFA–2010–FC. Comments received timely will be available for public inspection as they are received, generally beginning approximately 3 weeks after publication of a document, in room 443–G of the Department’s offices at 200 Independence Avenue, SW., Washington, DC, on Monday through Friday of each week from 8:30 a.m. to 5 p.m. (phone: (202) 690–7890).

FOR FURTHER INFORMATION CONTACT:

Mary Jean Duckett, (410) 786–3294.

SUPPLEMENTARY INFORMATION:

I. Background

The Medicaid program is a Federally supported, State-administered program that provides medical assistance to individuals that meet eligibility criteria. It was established in 1965 as title XIX of the Social Security Act (the Act).

Section 1915(c) was added to title XIX of the Act by the Omnibus Budget Reconciliation Act of 1981 (OBRA 1981) (Public Law 97–35) to encourage the provision of cost-effective services to Medicaid recipients in noninstitutional settings. Before the enactment of OBRA 1981, the Medicaid program provided limited coverage for long-term care services in noninstitutional settings.

Section 1915(c) of the Act authorizes the Secretary to waive certain Medicaid statutory requirements to enable a State to cover a broad array of home and community-based services that are not otherwise available under a State’s Medicaid program. These services must be furnished in accordance with an individually written plan of care that is subject to approval by the State Medicaid agency, and may be furnished only to persons who, but for the provision of the services, would otherwise require the level of care provided in a hospital, nursing facility (NF), or intermediate care facility for the mentally retarded (ICF/MR). Coverage of these services enables elderly, disabled, and chronically ill persons, who would otherwise be institutionalized, to live in the community.

Under section 1915(c) of the Act, a State could receive Federal financial

participation (FFP) for the following services as home and community-based services: case management services, homemaker and home health aide services, personal care services, adult day health services, habilitation services, respite care, and “other” services as requested by the State and approved by HCFA. Section 9502(a) of the Consolidated Omnibus Budget Reconciliation Act of 1985 (Public Law 99–272) revised section 1915(c) of the Act to explicitly include certain prevocational, educational, and supported employment services as expanded habilitation services under home and community-based services for those individuals who receive waiver services after discharge from an NF or ICF/MR. Section 1915(c)(4) of the Act authorizes the provision of habilitation services, and section 1915(c)(5) of the Act defines habilitation services as services to assist individuals in acquiring, retaining, and improving the self-help, socialization, and adaptive skills necessary to reside successfully in home and community-based settings.

Section 1915(c)(5) of the Act was further amended by section 4743(a) of the Balanced Budget Act of 1997 (BBA) (Public Law 105–33), which deleted the requirement that an individual have prior institutionalization in either an NF or ICF/MR before becoming eligible for habilitation services. The regulations at § 440.180(c)(1) applied this prior institutionalization requirement to expanded habilitation services. Thus, effective October 1, 1997, if a State chooses to provide these expanded habilitation services under its home and community-based waiver, it may provide these services to all individuals eligible for these services without regard to whether the individuals had a prior institutional stay in an NF or ICF/MR.

II. Provisions of the Final Rule With Comment Period

Before the enactment of the BBA, section 1915(c)(5) of the Act specified that the term “habilitation services” applies to individuals who receive services after discharge from an NF or ICF/MR. Section 4743 of the BBA amended section 1915(c)(5) of the Act, effective October 1, 1997, to remove the requirement that an individual be institutionalized before receiving habilitation services.

To implement the provisions of section 4743 of the BBA, we are revising parts 440 and 441. We are also making a number of technical changes to update or correct the regulations.

In § 440.180, "Home or community-based services," we are revising the heading for paragraph (c) by changing the effective date from April 7, 1986 to October 1, 1997, and in paragraph (c)(1) we are deleting the requirement that recipients must have been discharged from a Medicaid-certified NF or ICF/MR to receive the services.

In § 441.301, "Contents of request for a waiver," our current rules at paragraph (a)(2) state that requests for waivers of the requirements of the Act that concern statewide application of Medicaid, comparability of services, and income and resource rules are applicable to individuals with spouses living in the community. This requirement incorrectly limits the waiver of the requirements of section 1902(a)(10)(C)(i)(III) of the Act to individuals with spouses. We are correcting the requirement by deleting the phrase "with spouses" and adding "medically needy" before the word "individuals." This revision clarifies that the request for a waiver is not limited to medically needy individuals with spouses.

In § 441.302, "State assurances," we are making a number of changes. Section 441.302(c)(1)(i) incorrectly cites hospital regulations at § 440.40, rather than at § 440.10. We are making this technical change. Section 441.302(d) requires States to give assurance that when a recipient is determined to be likely to require the level of care provided in an SNF, ICF, or ICF/MR, the recipient or his or her legal representative will be informed of the alternatives available under the waiver and given the choice of either institutional or home and community-based services. We are updating the terminology in § 441.302(d) by removing the terms "SNF and ICF" and replacing them with "NF," and adding the term "hospital" as a conforming change to the regulations text. Section 441.302(i)(2) also requires State assurances that services are furnished only to individuals who have been deinstitutionalized, regardless of discharge date from a Medicaid-certified NF or ICF/MR. Therefore, to conform the regulation to the BBA changes, we are removing § 441.302(i)(2) and redesignating § 441.302(i)(3) as § 441.302(i)(2). In the redesignated § 441.302(i)(2), we are also removing the phrase "on or after April 7, 1986."

In § 441.307, "Notification of a waiver termination," our regulations at paragraph (a) require that if a State chooses to terminate its waiver before the 3-year period expires, it must notify HCFA in writing 30 days before terminating services to recipients. We

are making a technical correction in paragraph (a) to state that waivers may be terminated during the initial 3-year period or 5-year renewal period.

In § 441.310, "Limits on Federal financial participation (FFP)," we are making a number of changes. Section 441.310(a)(3)(i) states that FFP is not available for prevocational, educational, or supported employment services, or any combination of these services, as part of habilitation services that are provided before April 7, 1986, and § 441.310(a)(3)(iii) requires that habilitation services must be provided to recipients who were never institutionalized in a Medicaid-certified NF or ICF/MR. Section 441.310(b) states that FFP is available for expenditures for expanded habilitation services if the services are included under a waiver or waiver amendment approved by HCFA on or after April 7, 1986. Again, as the BBA eliminated the April 1986 date and also makes services available to medically needy recipients who have not been institutionalized, we are revising § 441.310(a)(3)(i), § 441.310(a)(3)(iii), and § 441.310(b) to conform the regulations to the BBA changes.

III. Collection of Information Requirements

This document does not impose any information collection and recordkeeping requirements subject to the Paperwork Reduction Act of 1995 (PRA). Consequently, it does not need to be reviewed by the Office of Management and Budget (OMB) under the authority of the PRA.

IV. Response to Comments

Because of the large number of comments we receive in response to a **Federal Register** publication, we are not able to respond to them individually. We will, however, consider all comments that we receive by the date and time specified in the "DATES" section of this preamble, and, if we publish a subsequent document, we will respond to the comments in the preamble to that document.

V. Waiver of Notice of Proposed Rulemaking

We ordinarily publish a notice of proposed rulemaking in the **Federal Register** to provide a period for public comment before the provisions of the rule take effect. However, pursuant to 5 U.S.C. 553(b)(B), we may waive a notice of proposed rulemaking if we find good cause that notice and comment are impracticable, unnecessary, or contrary to the public interest. For good cause we find that it was unnecessary to

undertake notice and comment procedures because these self-implementing changes merely conform the regulations to the statutory language or make technical corrections and do not involve any exercise of discretion.

Therefore, we believe it is unnecessary to publish a proposed rule and for good cause waive publication of a proposed regulation. We are, however, providing a 60-day period for public comment.

VI. Waiver of Effective Date

Under section 553(d) of the Administrative Procedure Act, we ordinarily publish a substantive rule at least 30 days before its effective date, unless for good cause we find a delay is impracticable, unnecessary, or contrary to the public interest. For good cause we find it unnecessary to delay the effective date of this rule because the changes are self-implementing or merely reflect technical corrections. Therefore, we are waiving the 30-day delay of the effective date.

VII. Regulatory Impact Analysis

We have examined the impact of this rule as required by Executive Order (E.O.) 12866 and the Regulatory Flexibility Act (RFA) (Public Law 96-354). E.O. 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits, including potential economic, environmental, public health and safety effects, distributive impacts, and equity.

The RFA (5 U.S.C. 601 through 612) requires agencies to analyze options for regulatory relief for small entities. Consistent with the RFA, we prepare a regulatory flexibility analysis unless we certify that a rule will not have a significant economic impact on a substantial number of small entities. For purposes of the RFA, we treat most hospitals and most other providers, physicians, health care suppliers, carriers, and intermediaries as small entities, either by nonprofit status or by having revenues of \$5 million or less annually. Individuals and States are not included in the definition of a small entity.

Also, section 1102(b) of the Act requires us to prepare a regulatory impact analysis if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. That analysis must conform to the provisions of section 604 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside of

a Metropolitan Statistical Area and has fewer than 50 beds.

We are not preparing analyses for either the RFA or section 1102(b) of the Act because we have determined, and we certify, that this rule will not have a significant economic impact on a substantial number of small entities or a significant impact on the operations of a substantial number of small rural hospitals. This rule primarily affects States and individuals by expanding State flexibility and individual eligibility regarding certain services under Medicaid home and community-based waivers. It does not impose any new, direct economic burdens on providers or other health care entities.

Section 202 of the Unfunded Mandates Reform Act of 1995 requires that agencies prepare an assessment of anticipated costs and benefits for any rule that may result in an expenditure by State, local, or tribal governments in the aggregate, or by the private sector, of \$100 million in any one year. This rule has no mandated consequential effect on State, local, or tribal governments, or the private sector, and will not create an unfunded mandate.

We do not believe publication of this rule will have a major impact on Medicaid waiver costs. According to States that have the expanded habilitation services under their waivers, individuals that currently are not receiving the expanded habilitation services because of no prior institutionalization are in day habilitation programs. This rule offers States greater flexibility. As stated above it should not significantly change how they do business because more individuals would shift from day habilitation to expanded habilitation programs.

In accordance with Executive Order 12866, this final rule with comment period was reviewed by OMB.

We have reviewed this rule under the threshold criteria of Executive Order 13132, Federalism. We have determined that this rule does not significantly affect the rights, roles, and responsibilities of States.

List of Subjects

42 CFR Part 440

Grant programs—health, Health facilities, Health maintenance organizations (HMO), Medicaid, Medicare, Reporting and recordkeeping requirements.

42 CFR Part 441

Family planning, Grant programs—health, Infants and children, Medicaid, Penalties, Reporting and recordkeeping requirements.

42 CFR chapter IV is amended as set forth below:

PART 440—SERVICES: GENERAL PROVISIONS

A. Part 440 is amended as follows:

1. The authority citation for part 440 continues to read as follows:

Authority: Sec. 1102 of the Social Security Act (42 U.S.C. 1302).

2. In § 440.180, the heading for paragraph (c) and paragraph (c)(1) are revised to read as follows:

§ 440.180 Home or community-based services.

(c) *Expanded habilitation services, effective October 1, 1997—* (1) *General rule.* Expanded habilitation services are those services specified in paragraph (c)(2) of this section.

PART 441—SERVICES: REQUIREMENTS AND LIMITS APPLICABLE TO SPECIFIC SERVICES

B. Part 441 is amended as follows:

1. The authority citation for part 441 continues to read as follows:

Authority: Sec. 1102 of the Social Security Act (42 U.S.C. 1302).

2. In § 441.301, the introductory text of paragraph (a) is republished and paragraph (a)(2) is revised to read as follows:

§ 441.301 Contents of request for a waiver.

(a) A request for a waiver under this section must consist of the following:

(2) When applicable, requests for waivers of the requirements of section 1902(a)(1), section 1902(a)(10)(B), or section 1902(a)(10)(C)(i)(III) of the Act, which concern respectively, statewide application of Medicaid, comparability of services, and income and resource rules applicable to medically needy individuals living in the community.

§ 441.302 [Amended]

3. In § 441.302, the following changes are made:

a. Paragraph (c)(1)(i) is amended by removing the citation “§ 440.40” and adding “§ 440.10” in its place.

b. The introductory text of paragraph (d) is revised, paragraph (i)(2) is removed, and paragraph (i)(3) is redesignated as paragraph (i)(2) and revised to read as follows:

§ 441.302 State assurances.

(d) *Alternatives*—Assurance that when a recipient is determined to be likely to require the level of care provided in a hospital, NF, or ICF/MR, the recipient or his or her legal representative will be—

* * * * *

(i) * * *

(2) Furnished as part of expanded habilitation services, if the State has requested and received HCFA's approval under a waiver or an amendment to a waiver.

* * * * *

4. In § 441.307, paragraph (a) is revised to read as follows:

§ 441.307 Notification of a waiver termination.

(a) If a State chooses to terminate its waiver before the initial 3-year period or 5-year renewal period expires, it must notify HCFA in writing 30 days before terminating services to recipients.

* * * * *

5. In § 441.310, the introductory text of paragraph (a) is republished, and paragraphs (a)(3) and (b) are revised to read as follows:

§ 441.310 Limits on Federal financial participation (FFP).

(a) FFP for home and community-based services listed in § 440.180 of this chapter is not available in expenditures for the following:

* * * * *

(3) Prevocational, educational, or supported employment services, or any combination of these services, as part of habilitation services that are—

(i) Provided in approved waivers that include a definition of “habilitation services” but which have not included prevocational, educational, and supported employment services in that definition; or

(ii) Otherwise available to the recipient under either special education and related services as defined in section 602(16) and (17) of the Education of the Handicapped Act (20 U.S.C. 1401(16) and (17)) or vocational rehabilitation services available to the individual through a program funded under section 110 of the Rehabilitation Act of 1973 (29 U.S.C. 730).

* * * * *

(b) FFP is available for expenditures for expanded habilitation services, as described in § 440.180 of this chapter, if the services are included under a waiver or waiver amendment approved by HCFA.

(Catalog of Federal Domestic Assistance Program No. 93.778, Medical Assistance Program).

Dated: December 28, 1999.

Nancy-Ann DeParle,

Administrator, Health Care Financing Administration.

Dated: March 28, 2000.

Donna E. Shalala,

Secretary.

Editorial Note: This document was received at the Office of the Federal Register September 29, 2000.

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 2 and 87

[ET Docket No. 98-197; FCC 00-353]

Radionavigation Service at 31.8-32.3 GHz

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document amends the Commission's Rules to delete the unused radionavigation service allocation from the band 31.8-32.3 GHz in the Non-Federal Government Table of Frequency Allocations and removes this band from the list of available frequencies set forth in the rules for the Aviation Services. This action will obviate concerns for interference to the reception of deep space radiocommunications in the band 31.8-32.3 GHz from co-channel, non-Federal Government radionavigation transmissions that could otherwise occur in the future.

DATES: Effective November 9, 2000.

FOR FURTHER INFORMATION CONTACT: Tom Mooring, Office of Engineering and Technology, (202) 418-2450.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Report and Order*, ET Docket No. 98-197, FCC 00-353, adopted September 22, 2000, and released September 26, 2000. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Reference Information Center, Room CY-A257, 445 12th Street, SW., Washington, DC, and also may be purchased from the Commission's duplication contractor, International Transcription Service, (202) 857-3800, 1231 20th Street, NW Washington, DC 20036.

Summary of the Report and Order

1. This Report and Order amends part 2 of the Commission's Rules to delete

the unused radionavigation service allocation from the band 31.8-32.3 GHz in the Non-Federal Government Table of Frequency Allocations. Consequently, we also amend part 87 to remove this sub-band from the list of available frequencies set forth in the rules for the Aviation Services. We take this action in response to a request from the National Telecommunications and Information Administration. This action will obviate concerns for interference to the reception of deep space radiocommunications in the band 31.8-32.3 GHz from co-channel, non-Federal Government radionavigation transmissions that could otherwise occur in the future. This action will also provide adequate spectrum for future applications of the non-Federal Government radionavigation service in the remaining 1.1 gigahertz at 32.3-33.4 GHz.

2. We adopt our proposal (63 FR 65726, November 30, 1998) to delete the non-Federal Government radionavigation service allocation from the band 31.8-32.3 GHz. This action reduces the amount of spectrum available to the non-Federal Government radionavigation service in this frequency range by approximately 30%. By limiting future non-Federal Government radionavigation services to the band 32.3-33.4 GHz, NASA's deep space operations in the band 31.8-32.3 GHz will be protected and sufficient spectrum will be available to accommodate such commercial and private radionavigation services as may develop in the future. As a consequence of this action, we also will delete the band 31.8-32.3 GHz from the list of frequencies that are available for use by the aeronautical radionavigation service under § 87.173 of the rules for the Aviation Services. Since the band 32.3-33.4 GHz has previously been added to the § 87.173, we are adding a rule part cross-reference to part 87 in the Table of Frequency Allocations.

3. *Final Regulatory Flexibility Certification.* The Regulatory Flexibility Act ("RFA")¹ requires that a regulatory flexibility analysis be prepared for notice-and-comment rulemaking proceedings, unless the agency certifies that "the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities." The RFA generally defines "small entity" as having the same meaning as the terms "small business," "small

organization," and "small governmental jurisdiction." In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act. A small business concern is one which: (1) Independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration ("SBA").

4. In the *Notice of Proposed Rulemaking*, we concluded that the proposed rules "[would] not have a significant economic impact on a substantial number of small entities." Although no separate comments were received concerning this certification, the only commenter to the proceeding, Mr. Lyman C. Welch, did express concern that this rule change would prohibit commercial use. In this *Report and Order*, we have clarified that commercial entities may continue to make use of the Federal Government's facility at Goldstone, and we therefore find that no small entities will be impacted by the rule change. Accordingly, we hereby certify that the deletion of the non-Federal Government radionavigation allocation at 31.8-32.3 GHz will not have a significant economic impact on a substantial number of small entities.

5. *Report to Congress:* The Commission will send a copy of this *Report and Order*, including this final certification, in a report to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, see 5 U.S.C. 801(a)(1)(A). In addition, the *Report and Order* and this certification will be sent to the Chief Counsel for Advocacy of the Small Business Administration. See 5 U.S.C. 605(b).

6. Pursuant to the authority contained in Sections 4(i), 7(a), 303(c), 303(f), 303(g), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 157(a), 303(c), 303(f), 303(g), and 303(r), parts 2 and 87 of the Commission's Rules are amended; effective November 9, 2000.

List of Subjects

47 CFR Part 2

Communications equipment, Radio.

47 CFR Part 87

Air transportation, Communications equipment, Radio.

¹ 5 U.S.C. 601 et seq. The RFA has been amended by the Contract With America Advancement Act of 1996, Public Law 104-121, 110 Stat. 847 (1996) ("CWAAA"). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA").