

April 30, 2009

Terry Pratt  
Acting Director  
Disabled and Elderly Health Programs Group  
Centers for Medicare and Medicaid Services

Thomas Hamilton  
Director  
Survey and Certification Group  
Center for Medicare and Medicaid Services

Re: Pandemic Flu and Medicaid Services and Provider Payments

Dear Terry and Thomas:

As the spread of and concern over the H1N1 Influenza A virus increases, ANCOR providers of long-term living and employment supports through Medicaid home and community-based waiver services, other HCBS services, and ICFs/MR services nationwide are contacting our headquarters with many questions. ANCOR providers are dedicated to providing quality Medicaid supports and services and have the responsibility and liability of assuring the health and welfare of many of the nation's most vulnerable citizens—individuals with disabilities of all ages including individuals with intellectual and developmental, mental illness, physical, sensory, and combinations of multiple disabilities.

ANCOR began providing information to its nationwide provider network on Monday on H1N1 based on HHS and CDC guidance. Although ANCOR providers currently have emergency plans for a range of emergencies, including pandemic flu, we believe that specific CMS guidance and clarification of Medicaid policies and payment issues—not only to states but directly to providers of Medicaid services and supports—are warranted under public health emergency circumstances.

Recession-driven state budget gaps are rapidly changing the capacity of providers to maintain the level of supports and services that they believe are necessary to meet the individualized needs of individuals with disabilities. ANCOR members are reporting that state cuts are forcing providers to reduce the number of direct support professionals and related positions, close group homes, reduce hours of support, and/or eliminate supports and services. The added challenge of a pandemic flu emergency places even greater burdens on an already strained delivery system, compromising not only the financial viability of providers, but their capacity to support individuals safely in the community. ANCOR believes that the combination of these two challenges warrants CMS review and necessary adjustment of Medicaid requirements.

### **General Recommendations**

ANCOR and its nationwide provider network, as stakeholders in preparing for and directly addressing this pandemic emergency, offer the following recommendations in the hopes of not only helping to mitigate the spread of the H1N1 virus, but in fulfilling our obligations to protect the health and welfare of very vulnerable Medicaid beneficiaries.

First, ANCOR encourages **CMS' State Medicaid and State Operations** to sponsor a nationwide **webinar or conference call(s) that include providers** regarding protection of Medicaid

beneficiaries, guidance to providers, and CMS clarification, waiving, or suspension of any Medicaid programmatic and payment requirements. While hospital and medical facilities may be receiving specific information, guidance, and resources, ANCOR urges CMS to address other provider groups. You may want to hold a series of webinars or calls targeting different provider types—but inclusive of providers who support individuals with disabilities through Medicaid HCBS waivers, other HCBS state plan optional services, and ICFs/MR services. Alternatively, ANCOR recommends that CMS/CMSO convene such a webinar or conference call with national organizations that could then disseminate CMS guidance and clarification. ANCOR would certainly join in helping with such an important CMS/CMSO undertaking.

Secondly, ANCOR encourages CMS' **State Medicaid and State Operations** to establish a **public and devoted website** to the H1N1 Influenza A virus that includes an interactive Question and Answer section, CMS guidance to Medicaid providers, and any CMS clarification affecting Medicaid HCBS and ICF/MR services. This strategy offers CMS/CMSO the opportunity to continually update guidance and clarification throughout the pandemic emergency.

Thirdly, ANCOR encourages CMS/CMSO to **include ANCOR in notice of and dissemination of any information** forwarded to state Medicaid agencies, national and state MR/DD agencies, and national and state units on aging. This direct communication will ensure that information is both communicated to and received by ANCOR providers who are important stakeholders in protecting the health and welfare of nearly 500,000 Medicaid beneficiaries with significant disabilities of all ages. It will ensure appropriate guidance and information to nearly as many direct support professionals as well as informing and educating individuals with disabilities and their families, and/or representatives.

### **Specific Concerns and/or Questions**

- **Hospital Stays and Reimbursement Rates:** Although CMS (then HCFA) clarified many years ago Medicaid regulatory authority to include a vacancy factor into provider reimbursement rates for ICFs/MR and 1915(c) HCBS waivers when Medicaid beneficiaries are hospitalized or away from their homes and/or Medicaid facilities for a limited period of time, we urge CMS to revisit and reissue guidance to states.
- **Hospital Stays and Prohibition Against Payment for Agency Direct Support Under the 1915(c) HCBS Waiver:** A long-standing issue that ANCOR has raised with CMS is Medicaid state prohibition against reimbursement of provider direct support staff/personal assistance to hospitalized individuals. Although ADA and section 504 would require hospitals to provide necessary support services to individuals with significant disabilities (i.e., interpreters, support with assistive technologies, and other individualized means of “communication”) who desire or require familiar support staff with ADLs and IADLs, providers report failure of hospitals to fulfill this obligation and we fear the situation would become worse in the event of a pandemic. Naturally, the best assistance could be readily provided by the provider agency direct support staff who are already familiar with and to whom the individual with a disability(ies) has formed a relationship. This is particularly of concern given individuals with intellectual and developmental disabilities. We urge CMS to clarify this issue and provide guidance to states and providers.
- **Hospital Stays and Multiple Individuals with Disabilities Supported by the Same Agency:** Both issues raised above are even more challenging, and of greater concern, to providers when, during a public health pandemic emergency there may be several individuals hospitalized that are supported by the same provider, from the same “home.” Therefore, there may be layoffs unless CMS clarifies the rate and scope of staff following the person with disability into the hospital setting.

- **ICFs/MR Considered 24-Hour Healthcare Facility and Prohibition Against Admission of Individuals to a Hospital During a Pandemic:** ANCOR providers have reported that they were “considered a health-care facility,” required to provide 24-hour nursing services, and therefore could not admit individuals to a hospital in a pandemic. If this is, in fact, a Medicaid requirement, we urge CMS to revisit and reassess the requirement so that there might be a “waiver” or “suspension” during a pandemic emergency. If this is misinformation, we urge CMS to clarify the issue.
- **School Closures and Local and State Emergency Coordination with Service Providers:** One provider reports that their school districts are temporarily closing schools; however, there is no similar communication to providers of day and community work programs. We urge CMS to help public health, education, and local officials to coordinate communications with providers of all public services. As we have seen during other regional emergencies, frequently local and state officials do not communicate with providers of services and supports to individuals with disabilities. Since Katrina, federal efforts were stepped up to recognize local and state efforts to assist individuals with disabilities during emergencies. We urge CMS to bring their federal partners together, including the Interagency Coordinating Council on Emergency Preparedness and Individuals with Disabilities, to ensure that guidance and coordinated efforts are linked to service providers and individuals with disabilities.
- **Temporary Suspension of Community Activities Will Required Increased In-Home and Waiver Supports.** If local areas suspend community and public activities, individuals with disabilities may require supports/services in excess of hours as well as range of services as those approved by the states or counties. The services in excess of approved utilization rates will affect approved-costs and may place additional financial burden on providers. ANCOR urges CMS to develop guidance to address higher utilization rates and increased costs to providers. CMS may also want to consider waiving applicable state plan requirements that currently disallow Medicaid-funded day program employees from working in homes and/or Medicaid facilities.
- **Vulnerable Population’s Access to and Coordination with Public Health Resources:** Given that some individuals with disabilities, especially those with medical complications or comprised immune systems, are more vulnerable to a public health pandemic emergency, we urge CMS to ensure that public health systems coordinate fair access to medical and drug resources on behalf of individuals with disabilities. We want to ensure that individuals with disabilities are not discriminated against in obtaining necessary medical care and treatment.

This is a rapidly evolving and challenging issue, not only for state and local governments, but for providers. We recognize that the same is true for CMS. In this fourth day of the emergency, ANCOR members are just beginning to forward questions. ANCOR will provide additional commentary as the need arises.

We are aware of Congressional efforts to provide additional appropriations for the H1N1 flu emergency. We know that this issue is of great concern to CMS and that you join in the administration’s concerns over the containment of this flu, providing best information regarding mitigation efforts, and deploying anti-viral drugs and medical resources to public health services, states and large metropolitan areas.

Sincerely,  
 Suellen Galbraith  
 Director for Government Relations

cc: Suzanne Bosstick  
 Peggye Wilkerson