WEST VIRGINIA LEGISLATIVE AUDITOR

PERFORMANCE EVALUATION & RESEARCH DIVISION

Special Report

In-Home Care

The Decision to Change the A/D Waiver Program Subjected the DHHR to Legal Challenges. This Should Have Been Expected Given a 2004 Federal Court Ruling in a Neighboring State. The Change Caused Numerous Problems for Patients, Families, and the State, but Media Reports Regarding Some Effects of the Changes Were Not as Initially Claimed

January 2008
PE 07-15-420

JOINT COMMITTEE ON GOVERNMENT OPERATIONS

Senate

Edwin J. Bowman
Chair
Billy Wayne Bailey, Jr.
Vice Chair
Walt Helmick
Donna J. Boley
Clark S. Barnes

House Of Delegates

Jim Morgan
Chair
Dale Martin
Vice Chair
Sam J. Argento
Ruth Rowan
Patti E. Schoen
Craig P. Blair
Non-Voting Member
Scott G. Varner
Non-Voting Member

Citizen Members

Dwight Calhoun
John Canfield
W. Joseph McCoy
Kenneth Queen
James Willison

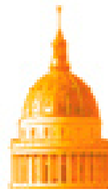
JOINT COMMITTEE ON GOVERNMENT ORGANIZATION

Senate

Edwin J. Bowman
Chair
Billy Wayne Bailey, Jr.
Vice Chair
Dan Foster
Evan H. Jenkins
Jeffrey V. Kessler
Brooks McCabe
Joseph M. Minard
Robert H. Plymale
Ron Stollings
Randy White
Clark S. Barnes
Donna J. Boley
Dave Sypolt
John Yoder

House Of Delegates

Jim Morgan
Chair
Dale Martin
Vice Chair
Sam J. Argento
Robert D. Beach
Mike Caputo
Samuel J. Cann, Sr.
Joe Delong
Jeff Eldridge
William G. Hartman
Barbara Hatfield
David Higgins
Tal Hutchins
Harold Michael
Corey L. Palumbo
Daniel Poling
Margaret A. Staggers
Randy Swartzmiller
Joe Talbott
Troy Andes
Ray Canterbury
Daryl E. Cowles
Carol Miller
Thomas Porter
Ruth Rowan
Patti E. Schoen



OFFICE OF THE LEGISLATIVE AUDITOR

Aaron Allred
Legislative Auditor

John Sylvia
Director

Michael Midkiff
Research Manager

Michael Castle
Research Analyst

Performance Evaluation and Research Division
Building 1, Room W-314
State Capitol Complex
Charleston, West Virginia 25305
(304) 347-4890

WEST VIRGINIA LEGISLATURE

Performance Evaluation and Research Division

Building 1, Room W-314
1900 Kanawha Boulevard, East
Charleston, West Virginia 25305-0610
(304) 347-4890
(304) 347-4939 FAX

John Sylvia
Director

January 7, 2008

The Honorable Edwin J. Bowman
State Senate
129 West Circle Drive
Weirton, West Virginia 26062

The Honorable Jim Morgan
House of Delegates
Building 1, Room E-213
1900 Kanawha Boulevard, East
Charleston, West Virginia 25305-0470

Dear Chairs:

Pursuant to the West Virginia Performance Review Act, we are transmitting a Special Report on In-Home Care, which will be presented to the Joint Committee on Government Operations and Joint Committee on Government Organization on Monday, January 7, 2008. The issue covered herein is *"The Decision to Change the A/D Waiver Program Subjected the DHHR to Legal Challenges. This Should Have Been Expected Given a 2004 Federal Court Ruling in a Neighboring State. The Change Caused Numerous Problems for Patients, Families, and the State, but Media Reports Regarding Some Effects of the Changes Were Not as Initially Claimed."*

We transmitted a draft copy of the report to the Department of Health and Human Resources on December 20, 2007. We held an exit conference with the Department of Health and Human Resources on January 3, 2008. We received the agency response on January 4, 2008.

Let me know if you have any questions.

Sincerely,

John Sylvia

John Sylvia

JS/tlc

Joint Committee on Government and Finance

Contents

Executive Summary.. 5

Review Objective, Scope and Methodology.. 7

Issue 1: The Decision to Change the A/D Waiver Program Subjected the DHHR to Legal Challenges. This Should Have Been Expected Given a 2004 Federal Court Ruling in a Neighboring State. The Change Caused Numerous Problems for Patients, Families, and the State, but Media Reports Regarding Some Effects of the Changes Were Not as Initially Claimed..9

List Of Tables

Table 1: Status of Persons Found to be Ineligible for A/D Waiver...................13

Table 2: A/D Waiver and Nursing Home Expenditures...................................15

Table 3: WVMI Contract Values...16

List Of Appendices

Appendix A: Transmittal Letter to Agency...21

Appendix B: Side By Side PAS Comparison 23

Appendix C: Agency Response...25

Issue 1: The Decision to Change the A/D Waiver Program Subjected the DHHR to Legal Challenges. This Should Have Been Expected Given a 2004 Federal Court Ruling in a Neighboring State. The Change Caused Numerous Problems for Patients, Families, and the State, but Media Reports Regarding Some Effects of the Changes Were Not as Initially Claimed.

A total of 718 persons were reevaluated for the A/D Waiver Program and found to be medically ineligible.

Beginning in September 2006, members of the News Media began reporting that numerous elderly and disabled persons were removed from the Home and Community Based Care for Aged, Blind, and Disabled Individuals Waiver Program (A/D Waiver Program) and placed into higher cost nursing home care. Due to these reports, members of the Legislature began to express concerns about the A/D Waiver Program. Members of the Legislature asked the Legislative Auditor to conduct a performance audit of the A/D Waiver Program.

The Legislative Auditor decided to conduct a more detailed review of files for 68 of these 718 individuals including all persons deceased or found to be in nursing home care.

During the course of the audit, the Legislative Auditor found a total of 718 persons were reevaluated for the A/D Waiver Program and found to be medically ineligible. Of the 718 individuals who were found medically ineligible for the A/D Waiver Program, 24 were found to be in nursing homes, 42 were deceased and 72 percent (515) continued to receive A/D Waiver Program services and were reinstated into the program before the settlement of the Fleshman v. Walker lawsuit.

The Legislative Auditor decided to conduct a more detailed review of files for 68 of these 718 individuals including all persons deceased or found to be in nursing home care. The Legislative Auditor found that of the 68 files reviewed, a total of 12 individuals were found ineligible for the A/D Waiver Program and no longer received services. The other 56 individuals remained in the A/D Waiver Program despite being found ineligible and continued to receive services due to appeal hearings. Of the 12 individuals found ineligible for the A/D Waiver Program and who no longer received services, 2 entered into nursing home care at the expense of the State Medicaid Program.

It appears that the Bureau for Medical Services (BMS) instituted a policy change in the administration of the A/D Waiver Program as a cost-savings measure. The policy changes were questionable given a federal judge's ruling in a neighboring state.

Recommendations

1. The Legislature should consider enacting legislation requiring the Bureau for Medical Services to notify it of policy changes in Medicaid programs.

2. The Bureau for Medical Services should take steps to keep the Legislature better informed of Medicaid policy changes before they are implemented.

Review Objective, Scope and Methodology

Objective

The objective of this Special Report on the Department of Health and Human Resources' (DHHR) Aged and Disabled Waiver (A/D Waiver Program) is to answer questions posed by the Legislature involving the implementation of policy changes instituted by the Bureau for Medical Services (BMS).

Scope

The scope of this report is from FY 2004 to November 2007.

Methodology

The Legislative Auditor obtained information from the DHHR BMS and the Bureau of Senior Services (BoSS). The information included year end reports, budget information and information on policies and procedures followed by the BMS, West Virginia Medical Institute (WVMI), and BoSS. The Legislative Auditor reviewed Medicaid billing claims for 68 individuals who were found ineligible for the A/D Waiver Program in the BMS Medicaid billing system. These 68 individuals were all believed to be deceased or currently in Nursing Home care.

Issue 1

The Decision to Change the A/D Waiver Program Subjected the DHHR to Legal Challenges. This Should Have Been Expected Given a 2004 Federal Court Ruling in a Neighboring State. The Change Caused Numerous Problems for Patients, Families, and the State, but Media Reports Regarding Some Effects of the Changes Were Not as Initially Claimed.

According to the minutes of the Medicaid Medical Services Fund Advisory Council, one goal of the Bureau for Medical Services (BMS) changes in eligibility requirements for the A/D Waiver Program was an attempt to generate cost-savings.

Issue Summary

The Legislative Auditor found that reports of numerous individuals being found ineligible for the Aged and Disabled Waiver Program (A/D Waiver Program) and being placed into more expenssive nursing home facilities at State expense were exaggerated. The Legislative Auditor reviewed detailed Medicaid claims files for 68 individuals who were found to be ineligible for the A/D Waiver Program. The 68 individuals chosen were deceased or in nursing home care per report from WVMI. Of these 68, 12 no long received services from the A/D Waiver Program while the other 56 continued to receive A/D Waiver Program services despite being found ineligible for them. Of the 12 ineligibles who no longer received A/D Waiver Program services, 2 went into nursing home care at a later date at State expense. One individual who no longer received A/D Waiver Program services entered into nursing home care by private pay or private insurance. According to the minutes of the Medicaid Medical Services Fund Advisory Council, one goal of the Bureau for Medical Services (BMS) changes in eligibility requirements for the A/D Waiver Program was an attempt to generate cost-savings. The policy changes were questionable given a federal judge's ruling in a neighboring state.

Beginning in September 2006, members of the News Media began reporting numerous elderly and disabled persons were removed from the Home and Community Based Care for Aged, Blind, and Disabled Individuals Waiver Program (A/D Waiver Program) and placed into more expensive nursing home care at the State's expense.

Various Media Outlets Reported Individuals Were Removed from the A/D Waiver Program and Placed into Nursing Home Care

Beginning in September 2006, members of the News Media began reporting numerous elderly and disabled persons were removed from the Home and Community Based Care for Aged, Blind, and Disabled Individuals Waiver Program (A/D Waiver Program) and placed into more expensive nursing home care at the State's expense. The press inaccurately reported the following:

A lawsuit was filed by a former recipient of the A/D Waiver Program in July 2006.

The suit stemmed from changes the BMS instituted in the assessment form used to conduct evaluations of A/D Waiver Program applicants.

Legislators and the public were given accounts of needy elderly and disabled persons being denied A/D Waiver Program services and eventually being found in more expensive nursing home care at State expense.

- The A/D Waiver Program's number of enrollees was cut by 37 percent; as a result, hundreds of persons no longer received A/D Waiver Services.
- Numerous Persons were removed from the A/D Waiver Program and placed into higher cost nursing home care at the expense of the State.
- As many as seven persons in a single county were removed from the A/D Waiver Program and placed into a nursing home.

Due to these reports, members of the Legislature began to express concerns about the A/D Waiver Program.

The Legislature Had Questions About the Changes in the A/D Waiver Program

Members of the Legislature asked the Legislative Auditor to conduct an audit of the BMS A/D Waiver Program. Members had several questions that they wanted the Legislative Auditor's Office to attempt to answer.

A lawsuit was filed by a former recipient of the A/D Waiver Program in July 2006. This suit was against Martha Yeager Walker in her capacity as Secretary of the West Virginia Department of Health and Human Resources (DHHR). The suit stemmed from changes the BMS instituted in the assessment form used to conduct evaluations of A/D Waiver Program applicants. The Personal Assessment Survey 2005 (PAS 2005) form was created to replace the previously used PAS 2000 form. The PAS surveys are administered by West Virginia Medical Institute (WVMI) via contract with the BMS. The PAS 2005 form went into effect on November 1, 2005.[1] Changes in the PAS 2000 resulted in 718 reevaluated persons being found ineligible for the A/D Waiver Program.

Following the implementation of the PAS 2005, members of the news media and various constituent groups became alarmed and told members of the Legislature how the changes in the administration of the A/D Waiver Program were adversely affecting the populace of West Virginia. Legislators and the public were given accounts of needy elderly and disabled persons being denied A/D Waiver Program services and eventually being found in more expensive nursing home care at State expense. The Legislature was not informed of changes in the PAS form; there are no federal requirements for state Medicaid agencies to inform

[1]For information about the differences between the PAS 2000 and the PAS 2005 see Appendix B.

their respective Legislature of Medicaid policy changes. As a result, Legislatures from other states have passed legislation requiring the

Medicaid agency to notify the Legislature of program and policy changes.

The DHHR and BMS refused to answer questions posed by the Legislature while the Fleshman v. Walker case was ongoing.

The DHHR and BMS refused to answer questions posed by the Legislature while the Fleshman v. Walker case was ongoing. Questions that members of the Legislature sought answers to that this report addresses are the following:

- What is the total number of persons denied A/D Waiver Program services and how many were later found in a nursing home at State expense?
- What happened to those individuals who were found ineligible for the A/D Waiver Program?
- Why was the A/D Waiver Program singled out for such drastic cuts and who designed the PAS 2005?
- Did the A/D Waiver Program changes generate a cost-savings?
- What is the total amount being paid to WVMI to administer the evaluations for entry into the A/D Waiver Program?
- How much has this cost the State in terms of legal fees, training, and staff time?

In October 2006, the Fleshman case was settled and all persons found ineligible from the A/D Waiver by the PAS 2005 were ordered to be reinstated.

In October 2006, the Fleshman case was settled and all persons found ineligible for the A/D Waiver by the PAS 2005 were ordered to be reinstated.

The Purpose of the A/D Waiver Program

The Home and Community Based Aged and Disabled Waiver Program offers an in-home long-term care alternative to individuals who meet the medical and financial eligibility criteria for admission into a nursing home facility, but choose to remain in their own residence. The Medicaid Home and Community-Based Services (HCBS) Waiver Program is authorized under section 1915(c) of the Social Security Act and allows states to use HCBS waiver programs to serve a wide variety of populations including seniors, the disabled, mentally retarded, and others. HCBS programs permit states to provide HCBS to individuals who require the level of care provided in institutional settings due to the widely held belief that HCBS care is cheaper than institutional care. Currently, 48 states

and the District of Columbia offer services through HCBS waivers while Arizona operates a similar program. There are approximately 287 active HCBS waiver programs in operation throughout the United States.

Services offered by the A/D Waiver Program include homemaker, case management, adult day care, and RN assessment and review services.

According to the BMS provider manual, the A/D Waiver Program is defined as "a long-term care alternative that provides services that enable an individual to remain at or return home rather than receiving nursing facility care." Services offered by the A/D Waiver Program include homemaker, case management, adult day care, and RN assessment and review services. In order to qualify for the A/D Waiver Program a person must be found medically and financially eligible. An applicant's monthly income may not exceed 300 percent of the current maximum SSI payment to be found financially eligible. Medical eligibility is determined by a Medical assessment by WVMI using the PAS form.

Medical eligibility is determined by a Medical assessment by WVMI using the PAS form.

In order to demonstrate medical eligibility, applicants for the A/D Waiver Program must show deficiencies in 5 areas of daily living (ADL's) among a list of 14 to attain or maintain eligibility. A deficiency is demonstrated by showing a need for physical assistance with an ADL.

Seven-Hundred and Eighteen Individuals Were Found to Be Ineligible for the A/D Waiver Program

The Legislative Auditor requested that the BMS provide WVMI's records created from the attempts of the Bureau of Senior Services (BoSS) to contact all persons found ineligible. **In total, 718 persons were reevaluated and judged to be medically ineligible for the A/D Waiver using the PAS 2005 between November 2005 and the settlement of Fleshman v. Walker in October 2006.** Table 1 provides information about where these individuals were found during the time the WVMI was scheduling reassessments. All status numbers are per report from WVMI.

Table 1 Status of Persons Found to be Ineligible for A/D Waiver	
Status	**Totals**
Nursing Home	24
Deceased	42
Potentially Discontinued Services Not Deceased on in NH	51
Re-instated Into Program	515
Declined Services	25
Moved to Another State	4
Personal Care Home	1
Potential Denial	8
Unable to Contact	16
Up for Reassessment	32
Total Reassessments	**718**

Of these 718 individuals, 72 percent (515) continued to receive A/D Waiver Program services and were reinstated into the program before the settlement of the Fleshman lawsuit.

Of the 718 individuals who were found medically ineligible for the A/D Waiver Program, 24 were found to be in nursing homes, 42 were deceased, and 16 persons were unable to be contacted and their status could not be determined. These 16 persons were not active in the Medicaid claims system so they could not be in a nursing home at State expense or still receiving A/D Waiver services. Of these 718 individuals, 72 percent (515) continued to receive A/D Waiver Program services and were reinstated into the program before the settlement of the Fleshman lawsuit.

In order to determine who paid for nursing home facility care and what occurred of the 42 deceased prior to their death, staff from the Legislative Auditor's Office reviewed files from the Medicaid claims billing system.

The Legislative Auditor, along with BMS staff, decided to conduct a more detailed review of files for 68 of these 718 individuals. These 68 included the 24 persons found in nursing home facilities as well as the 42 who were deceased per report from WVMI. There were an additional two persons added to the review that the BoSS believed may have entered a nursing home facility. In order to determine who paid for nursing home facility care and what occurred of the 42 deceased prior to their death, staff from the Legislative Auditor's Office reviewed files from the Medicaid claims billing system. The Legislative Auditor found that of the 68 files reviewed, a total of 12 individuals were found ineligible for the A/D Waiver Program and no longer received services. The other 56 individuals remained in the A/D Waiver Program despite being found ineligible and continued to receive services due to appeal hearings. These 56 entered into nursing home care or became deceased due to a severe change in medical condition.

Of the 12 individuals found ineligible for the A/D Waiver Program and who no longer received services, 2 entered into nursing home care at the expense of the State Medicaid Program. One person cost the State a total of $34,211 for his nursing home stay and passed away in the nursing home nearly a year later. This individual no longer received services from the A/D Waiver Program following March 22, 2006 and entered into nursing home care in June 2006. The Legislative Auditor is unable to determine to what extent this person experienced changes in medical condition during his time not in the A/D Waiver Program from the Medicaid claims files. Nearly 10 percent of A/D Waiver Program reciepients enter into a nursing home every year.

The Legislative Auditor is unable to determine to what extent this person experienced changes in medical condition during his time not in the A/D Waiver Program from the Medicaid claims files.

The second individual cost the State $16,734 for her nursing home stay and entered into nursing home care six months after her A/D Waiver Program services were discontinued. Both individuals were eligible for reassessments following the Fleshman lawsuit but were not reassessed. There are several possible explanations for this, ranging from the individuals refusing their right to a reevaluation to WVMI being unable to reassess them before their time of death. Or, their condition could have worsened to such a state that a nursing home was a better fit for them. It is impossible to determine why they were not reassessed from the Medicaid claims data. In addition, one individual who no longer received services from the A/D Waiver Program went into a nursing home at his own expense or through secondary insurance.

The DHHR stated that its goal in modifying the PAS form was "to make it more objective." The DHHR denied removing people from the program in an effort to save money. However, evidence suggests that cutting costs was a motive in changing the eligibility criteria.

Cutting Costs Appears to Have Been a Motive in Modifying Eligibility Criteria

In September 2006, the DHHR stated that its goal in modifying the PAS form was "to make it more objective." In January 2007, the DHHR publically denied removing people from the A/D Waiver Program in an effort to save money. However, in the minutes of the April 2005 meeting of the Medicaid Medical Services Fund Advisory Council, BMS staff stated they would be **"reducing the number of slots (on the A/D Waiver Program) significantly, and that's how we're going to save money."** The minutes also state that "(the) waiver is contributing about $10 million to the reductions that are proposed," and that "we knew we were probably going to have the budget deficit to address…." **The minutes also acknowledge that the BMS had decided to live within its appropriations and that "the only way to realistically do that is to reduce the number of people served in the (A/D Waiver) program."** The July 2005 minutes stated that, "We've been spending several

million more than that $51 million to serve 5,400 people, so we're ratcheting that down at the secretary's request to try to live within the lottery appropriation."[2]

WVMI is under contract with the BMS to conduct the medical eligibility exams using the PAS form.

In November 2005, PAS 2005 Form went into effect. **According to the BMS, the PAS 2005 form was designed by "a group of professionals (administrators, registered nurses and social workers) from BMS, BoSS and WVMI."** WVMI is under contract with the BMS to conduct the medical eligibility exams using the PAS form. The Centers for Medicare and Medicaid Studies, the federal agency responsible for administering the Medicaid program, has recommended that all states have independent assessment of waiver applicants.

Implementation of the PAS 2005 Did Not Generate a Cost-Savings

Members of the Legislature also wanted to know if the changes in A/D Waiver had generated any form of cost-savings. The following table illustrates that the implementation of the PAS 2005 did not generate a cost-savings and provides the average cost per recipient of both the A/D Waiver as well as nursing home care.

Table 2
A/D Waiver and Nursing Home Expenditures

	FY 2004		FY 2005		FY 2006	
	Recipients	**Dollars**	**Recipients**	**Dollars**	**Recipients**	**Dollars**
A/D Waiver Services	5,210	$58,541,524	4,942	$60,452,237	4,537	$59,034,117
Acute Care Services		$54,320,473		$39,343,518		$27,825,973
Total Cost for A/D		$112,961,997		$99,795,755		$86,860,090
AVG Total Cost for A/D Per Recipient		**$21,682**		**$20,193**		**$19,145**
Total Cost for Nursing Homes (NH)	11,336	$332,894,140	11,338	$366,755,569	11,142	$385,166,233
AVG Total Cost for NH Per Recipient		**$29,366**		**$32,347**		**$34,569**
Source: BMS 372 Waiver Reports						

[2]The A/D Waiver Program was funded by money supplied by profits from the Lottery Commission. The lottery money contributed $13 million to the A/D Waiver Program each year. With the federal match, the money allotted for the A/D Waiver Program totaled $51 million.

In FY 2004, spending for A/D Waiver services was $59 million with an average cost of $21,682 per recipient. That year acute care spending accounted for an additional $54 million in spending on A/D waiver recipients. By FY 2006, A/D Waiver services totaled $59 million with acute care services falling to $28 million. Changes in acute care spending can be traced to a Medicaid policy change in prescription drug coverage.

The number of individuals in nursing home care fell during this period of time also but the Nursing Home Program still saw an increase in cost.

The number of individuals in nursing home care fell during this period of time also but the Nursing Home Program still saw an increase in cost. In FY 2004 there were 11,336 persons in nursing home care at a cost of $330 million. By FY 2006 enrollment dropped to 11,142 while cost increased to $385 million.

The Value of WVMI's Contract to Administer the PAS Has Remained Relatively Constant

Beginning in September 2003 WVMI began administering the PAS form under contract with the BMS. The initial contract value was $1.1 million. After the trial year the contract value increased to $2.3 million and has continued to remain relatively constant. The BMS contract with WVMI begins on September 1 and ends on August 31 each year. Table 3 shows the value of WVMI's contract to administer the PAS form each year that the contract has been in effect.

Table 3
WVMI Contract Values

Date of Effect	Increase over Previous Year	WVMI Contract Value
September 2003	NA	$1,143,549
2004	$1,140,950	$2,284,499
2005	$52,796	$2,337,295
2006	$63,335	$2,400,630
2007 (through August 2007)	NA	$402,759
Total Value of WVMI Contract 2003-2008	NA	**$8,568,732.00**

Source: WV Department of Administration Purchasing Division Purchasing Orders

As of August 2007, the BMS has paid WVMI a total of $8.5 million to administer the PAS. Budget figures detailing the money paid to WVMI for the remainder of CY 2007 were not available at the time of this report.

Costs of the Change from PAS 2000 to PAS 2005

In implementing the PAS 2005, the DHHR and BoSS incurred costs.

In implementing the PAS 2005, the DHHR and BoSS incurred costs. Nine State employees, seven from BoSS and two from BMS, were involved in conducting training sessions for WVMI nurses who were responsible for conducting the assessments. **The related lodging and travel expenses for these nine employees totaled $1,356.59. The BoSS rented two conference rooms at a total cost of $5,064.**

Following the Fleshman case several State employees in the BoSS and BMS were diverted from their normal duties to reschedule evaluations for the 718 individuals who were found ineligible for the waiver. Valuable time was spent requiring DHHR administration to attend legislative meetings and some were required to have involvement with the court case. **The DHHR did not hire private attorneys to deal with hearings related to the AD Waiver Program but did use two attorneys assigned from the office of the Attorney General. As a result of the Fleshman case, the DHRR was ordered to pay the plaintiff's legal fees and other related court costs. However, no motion for Plaintiff's attorney fees or costs has been filed.**

In September of 2006, the lawsuit was settled and the plaintiff was reinstated into the A/D Waiver Program and the DHHR was ordered to reinstatement all individuals who had been denied medical eligibility under the PAS 2005.

Fleshman v. Walker alleged that the new criteria discriminated against individuals with mental disabilities and violated West Virginia's Human Rights Acts while violating the State Constitution by denying individuals with mental disabilities equal protection. In addition, the lawsuit also claimed because the agency had not published its policy, Mr. Fleshman was denied due process of law in violation of the State Constitution. In September of 2006, the lawsuit was settled and the plaintiff was reinstated into the A/D Waiver Program and the DHHR was ordered to reinstatement all individuals who had been denied medical eligibility under the PAS 2005. In addition, all further evaluations for entry into the program were to be based on the PAS 2000 form and all individuals who are found to be medically and financially eligible were to be placed in the program eliminating the waiting list. **As a result, at least 177 additional persons qualified for the A/D Waiver Program.** Using the A/D Waiver Program's average cost per recipient for FY 2006, the addition of these177 and the elimination of the waiting list is estimated to increase program cost by more than $3.3 million.

Conclusion

The number of persons found ineligible for the A/D Waiver Program, denied services through implementation of the PAS 2005, and placed into nursing home care at higher costs to the State appears to have been exaggerated.

The number of persons found ineligible for the A/D Waiver Program, denied services through implementation of the PAS 2005, and placed into nursing home care at higher costs to the State appears to have been exaggerated. According to the Medicaid claims system, 24 individuals were placed into nursing home care; 21 of these individuals continued to receive A/D Waiver Program services. These 21 entered into a nursing home facility due to a change in medical condition. The BMS implemented changes in the A/D Waiver Program did not generate a cost-savings during the period they were in effect.

Past cost-saving measures, much like those taken by the BMS, were overturned in a neighboring state by a federal court. In 2003, when Kentucky made changes to its in-home care program by adopting more strict criteria, legal action soon followed. In Kerr v. Holsinger, Kentucky officials were ordered to abandon the more strict criteria and reinstate those persons found ineligible for its in-home care program.

Past cost-saving measures, much like those taken by the BMS, were overturned in a neighboring state by a federal court.

In the case the court found that "NF (nursing facility) services are a mandatory service under Medicaid," and that "the state Medicaid program must also provide, similarly, for long-term care services under the HCBS waiver program available to those who would otherwise require the level of care provided in a hospital, nursing facility, or intermediate care facility…." In the federal court ruling, the judge wrote, "manipulating eligibility standards in order to make up for budget deficits is unreasonable and inconsistent with Medicaid objectives…." It appears that in 2005, the West Virginia BMS began to use more strict standards in determining eligibility for the A/D Waiver Program in much the same way Kentucky did despite the implications of Kerr v. Holsinger. It is not clear if the BMS had knowledge of the Kentucky case; however, the case was reported in Medicaid publications. Therefore, the Legislative Auditor believes the DHHR should have known that these actions were of questionable legality given the federal judge's ruling in Kentucky. If the DHHR believed its actions on this matter were significantly different from the action of the State of Kentucky, DHHR should have advised the Legislature not only of the Kentucky case, but also the DHHR's legal reasoning prior to implementing the A/D Waiver Program changes.

In the federal court ruling, the judge wrote, "manipulating eligibility standards in order to make up for budget deficits is unreasonable and inconsistent with Medicaid objectives.

Consideration should be given to amending West Virginia's Code to require the DHHR to inform the Legislature of major changes to the Medicaid State Plan to prior to implementation. Draft legislation was introduced in the 2007 legislative session requiring the Medicaid Medical Services Fund Advisory Council to inform the

Legislature of planned changes to the Medicaid State Plan. This legislation passed the House but did not pass in the Senate. Plans are for the legislation to be introduced again in the 2008 legislative session.

Recommendations

1. *The Legislature should consider enacting legislation requiring the Bureau for Medical Services to notify it of policy changes in Medicaid programs.*

2. *The Bureau for Medical Services should take steps to keep the Legislature better informed of Medicaid policy changes before they are implemented.*

Appendix A: Transmittal Letter

WEST VIRGINIA LEGISLATURE

Performance Evaluation and Research Division

Building 1, Room W-314
1900 Kanawha Boulevard, East
Charleston, West Virginia 25305-0610
(304) 347-4890
(304) 347-4939 FAX

John Sylvia
Director

December 20, 2007

Martha Yeager Walker, Cabinet Secretary
Office of the Secretary
West Virginia Department of Health & Human Resources
State Capitol Complex, Building 3 Room 206
Charleston, WV 25305

Dear Secretary Walker:

The purpose of this letter is to transmit a draft copy of the Special Report on In-Home Care. This report is scheduled to be presented during the January 6th-8th interim meeting of the Joint Committee on Government Operations. We will inform you of the exact time and location once the information becomes available. It is expected that a representative from your agency be present at the meeting to orally respond to the report and answer any questions the committee may have.

We would like to schedule an exit conference on December 27th or December 28th to discuss any concerns you may have with the report. Please notify us to schedule an exact time. In addition, we need your written response by noon on Friday, December 28th in order for it to be included in the final report. If your agency intends to distribute additional material to committee members at the meeting, please contact the House Government Organization staff at 340-3192 by Thursday, January 3th to make arrangements.

We request that your personnel not disclose the report to anyone not affiliated with your agency. Thank you for your cooperation.

Sincerely,

Michael Midkiff,
Research Manager

Enclosure

C: Marsha Morris

Joint Committee on Government and Finance

Appendix B: Side By Side PAS Comparison

SIDE BY SIDE OF WAIVER CHANGES FROM PAS 2000 to PAS 2005

PAS SECTION	PAS 2000	PAS 2005
Introduction – Reason for Screening (Check Only One)	PAS 200 stated Nursing Home Only, Nursing Home waiving, A/D Waiver Only and Personal Care	PAS 2005 stated Medicaid Nursing Home Review, Medicare Nursing Home review, A/D waiver only. Personal Care was removed on the PAS 2005.
Release of Medical Information and Applicant Representative	PAS 2000 Box 18 pertained to release of medical information and Box 19 pertained to Applicant Representative	PAS 2005 Box 18 pertains to Applicant Representative and Box 19 pertains to release of medical information
Vital Signs	PAS 2000 had six areas, height, weight, blood pressure, temperature, pulse and respiratory rate –	PAS 2005 reduced to two areas height and weight
Medical Conditions/ Symptoms	PAS 2000 Box has Please grade as mild, moderate, and severe.	PAS 2005 Please check all that apply and have been diagnosed by a physician and/or treated with prescription medication.
Vacating the Building	PAS 2000 – Box 25 In the event of an emergency, the individual can vacate the building (check one) independently, with supervision; mentally unable, physically unable. Mentally Unable and Physically Unable were the criteria for a deficit.	PAS 2005 Box 25 deleted will be linked to 25g and 25i – vacating will become a deficit if individual meets criteria of Mentally Unable if Level 3 or higher in orientation with a diagnosis of Dementia, Alzheimer's or related conditions and will meet Physically Unable criteria if Level 3 or higher in walking. An individual has to be physically unable at all times at Level 3 or higher in walking. *(PAS 2005 has no location for vacating the building. This is evaluated by Box 25 g and 25i)*
Functional ability in the home	PAS 2000 Box 26 stated Indicate Individual's functional ability in the home for each item with the level number 1, 2, 3, or 4 Nursing care plan must reflect functional abilities of the client in the home - 26e bladder 26f bowel criterion for a deficit was the individual had to be incontinent 3 or more times a week.	PAS 2005 Box 25 again states indicate individual's functional ability in the home for each item with the level number 1, 2, 3, or 4, Nursing care plan must reflect functional abilities of the client in the home Box 25 e bladder 25 f bowel in PAS 2005 changed criteria to total incontinence. *(all stayed the same except incontinence)*
Medication Administration	PAS 2000 - Box 28 stated Individual is capable of administering his/her own medication Responses were Yes, with prompting/supervision, or no. (check only	PAS 2005 Box 27 states individual is capable of administering his/her own medications Responses are Yes, No. The definition of "no" in the PAS 2005 states an

PAS SECTION	PAS 2000	PAS 2005
	one): The criterion for a deficit was a "no" response	individual is not capable of administering his/her own medications if the prescription medication must be placed in the recipient's hand, mouth, tube, or eye by some one other than the recipient at all times. Injections are a skilled need and are not considered in this area. (*PAS 2005 defined "no"*)
Current Medications	PAS 2000 Box 29 asked that the Diagnosis be given for the Medication being prescribed.	PAS 2005 Box 28 removed Diagnosis
Section III MI/MR Assessment – Disorders Not tied to a deficit	PAS 2000 Box 30 did not include Obsessive/Compulsive Disorder and Post Traumatic Stress Disorder	PAS 2005 Box 29 Added Obsessive/Compulsive Disorder and Post Traumatic Stress Disorder
Section III MI/MR Assessment – Medications related to MI/MR diagnoses Not tied to a deficit	PAS 2000 Boxes 32 and 33 Listed 34 medications. Box 32 stated "Has the individual received any of the following mediations on a regular basis within the last two years with a "yes" – "no" response. Box 33 stated was the medication used to treat a neurological disorder with a "yes" – "no" response. Evaluator was to list the Medication, Dosage/route, frequency, reason prescribed, and diagnosis	PAS 2005 Box 31 states Has the individual received (or is receiving) antipsychotic, anti-depression, anti-anxiety and/or mood stabilize medication (List Below). Evaluator is to list only Medication and Reason prescribed. Dosage/route, frequency and diagnosis were alleviated.
Section III MI/MR Assessment – Alzheimer's, multi-infarct, senile dementia, or related condition	PAS 2000 Box 34 included statement Does the individual have Alzheimer's, multi-infarct, senile dementia, or related condition Response is Yes or No	PAS 2005 Box 33 states Does the individual have Alzheimer's, Multi-Infract, Senile Dementia, or Related Condition? The response is Yes No. The diagnosis has to come from a physician.
Section IV Physician Recommendation	PAS 2000 Heading for Section IV stated Physician Recommendation PAS 2000 Box 35 stated Prognosis (Check one only) stable, improving, deteriorating, terminal, other	PAS 2005 Heading for Section IV states Prognosis/Diagnosis From Referring Physician PAS 2005 Box 34 states Is Client Terminal (Has to come from a physician)

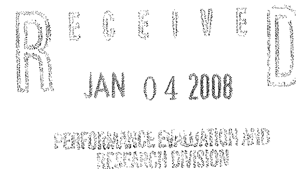
Appendix C: Agency Response

STATE OF WEST VIRGINIA
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
Office of the Secretary
State Capitol Complex, Building 3, Room 206
Charleston, West Virginia 25305
Telephone: (304) 558-0684 Fax: (304) 558-1130

Joe Manchin III
Governor

Martha Yeager Walker
Secretary

January 4, 2008



John Sylvia, Director
West Virginia Legislature
Performance Evaluation and Research Division
State Capitol Building, Room 314W
Charleston, West Virginia 25305

Dear Mr. Sylvia:

This is in response to your letter to me dated December 20, 2007 requesting a response to the Performance Evaluation and Research Division's *Special Report on In-Home Care*.

My staff and I met with your staff on January 3, 2008 to discuss the draft report and what we believe to be inaccuracies. We are generally pleased that your staff made several beneficial changes to the document. However, we maintain that the changes made to the eligibility evaluation instrument were not for the purpose of cutting costs, as alleged in the report. The Bureau for Medical Services did receive approval from the Medical Services Advisory Council as well as from the Centers for Medicaid and Medicare Services (CMS) to reduce the number of slots in the Aged and Disabled Waiver. This action was undertaken so that we could live within the Legislature's appropriation. The changes in eligibility were made to eliminate the subjectivity in the PAS 2000, so that clearer, more objective criteria could be used in determining program eligibility.

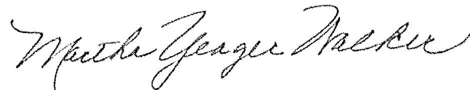
PERD, as well as legal staff from Legislative Services, assert that the implications of a court case in the State of Kentucky should have affected policy decisions in West Virginia. Although PERD staff and their attorney were advised of the important differences between the actions of Kentucky Medicaid and ours, the report instead focuses on the superficial similarities between the two programs. Since the West Virginia Bureau for Medical Services did not implement changes in eligibility standards for the purpose of cost containment, the case of Kerr v. Holsinger is not factually relevant to the issue. The report also fails to acknowledge that the settlement in Fleshman v. Walker was *proposed* by the Department of Health and Human Resources and that the final order entered is a product of that proposal.

Mr. John Sylvia
January 4, 2008
Page Two

The Department of Health and Human Resources has increased its communications with the Legislature under my administration. Monthly reports are sent to the Legislative Oversight Committee on Health and Human Resources Accountability (LOCHHRA) chairs to inform them of any new policy initiatives, state plan amendments and activities within the Department and especially within the Bureau for Medical Services. The LOCHHRA statute provides the Legislature with ample oversight authority of this Department in the event the committee feels DHHR is being less than forthcoming.

If you have any questions or need additional information, please let me know.

Sincerely,



Martha Yeager Walker
Secretary

cc: Rocco Fucillo
Marsha Morris
John Law
Jerry Roueche