

June 8, 2022

JLCAR STAFF COMMENTS TO OBJECTION RESPONSE 2021-120 He-M 524

The JCLAR on April 15, 2022 preliminarily objected to proposed rule 2021-120 He-M 524 concerning In-Home Supports of the Department of Health and Human Services (Department). The preliminary objection made by the JLCAR was based on public testimony.

JLCAR Attorney Christina Muñiz previously reviewed the proposed rule He-M 524, the public testimony submitted to JLCAR, the Department's 1915(c) waiver, and the Department's corrective action plan, and found no basis for objection. The JLCAR preliminary objection was based on public testimony made before the JLCAR on April 15, 2022, both in writing and orally. After review of the public testimony provided on April 15, 2022, the objection response rule text, and the objection response letter from the Department dated June 6, 2022, the JLCAR Committee Attorney has found no further basis for objection. The following comments are formatted to match the formatting of the objection response letter from the Department dated Jun 6, 2022 for clarity.

I. Background

JLCAR staff has no reason dispute of any of the facts presented in the background statement made by the Department. JLCAR staff can confirm that the Department filed its initial proposal on November 15, 2021, it was published in the November 24, 2021 *Rulemaking Register* with a public hearing scheduled on January 5, 2022. Further, the Department filed its final proposal on March 21, 2022, and a conditional approval request was filed on April 7, 2022, for the JLCAR meeting on April 15, 2022. JLCAR staff had no comments on the rules at the time of the meeting. At the JLCAR meeting on April 15, 2022 the JLCAR voted to preliminarily object to the proposal based on public testimony at the meeting.

II. He-M 524 does not adequately provide services to recipients of waiver.

JLCAR staff agrees with the Department's assessment of its 1915(c) Home and Community Based Services (HCBS) Medicaid Waiver. The Department is governed by the Centers for Medicare and Medicaid (CMS) and is functioning under both a 1915(c) waiver and a Corrective Action Plan (CAP). In this case, the 1915(c) waiver dictates what definitions must be used for "service coordination" or "case management" and it is the Department, working closely with CMS, that has the authority to determine when and how to comply with its CAP. To the best of JLCAR staff's knowledge the Department, and these proposed rules, do not appear to be out of compliance with the 1915(c) waiver or the CAP.

III. He-M 524 impacts state cost for long term care-jeopardizes the states 50% funding match.

JLCAR staff agrees with the Department that “there are no provisions of this rule that put the 50% match at risk.” JLCAR staff believes that not using the definition required by the 1915(c) would be more likely to put the 50% match at risk.

IV. The Department is drafting rules, specifically definitions, outside of rulemaking.

JLCAR staff agrees with the Department that the guidance document it is developing is not a form of rulemaking outside of the rulemaking process. RSA 541-A:1, XV states that the term “rule” does not include “informational pamphlets, letters, or other explanatory material which refer to a statute or rule without affecting its substance or interpretation.” Guidance documents are allowed, and the Department may quote, cite, and even paraphrase the rule. The guidance document does not supersede the rule and does not have the force and effect of law while the rule does. It is not prudent to have a guidance document that conflicts with a rule as this would cause clarity issues, however, the guidance document JLCAR staff has reviewed is only a draft. Department staff has assured JLCAR staff that the guidance document draft will be updated to match the adopted rule text once the rulemaking process is finished.

It is not the practice of JLCAR staff to review every guidance document that an agency may produce. However, if it is mentioned in the rule or brought to JLCAR staff’s attention, then JLCAR staff would review the guidance document for consistency with the rule. JLCAR staff would (and has in the past) make comments on the rule if there were inconsistencies, clarity issues, or compliance issues between the guidance document and the rule. It is not practical nor necessary for JLCAR staff to review drafts of guidance documents.

V. Remote Services – He-M 524.16(d) – potential error in rule

JLCAR staff agrees with the Department’s assessment that the word “can” does not appear in He-M 524.16(d) and thus no changes are needed. JLCAR staff reviewed all instances of the word “can” in the rule text and none appear to apply to this context.

He-M 524.16(d) does say that services “may” be provided in an acute care hospital subject to restrictions specified in other paragraphs of the rule. JLCAR staff speculates that perhaps the public testimony mistakenly interchanged the words “may” and “can”. Presumably, what was meant was that the rule as written is allowing services to be provided when they should not be provided. Meaning that the word “may” should be changed to “shall not” as opposed to the word “can” being changed to “cannot. However, JLCAR staff believes that the Department does have the authority to allow these services to be provided under the circumstances stated, and it does not appear to conflict with statute to use the word “may” as opposed to “shall not” in this instance.

VI. Remote services v. Telehealth services: Different services.

JLCAR staff has no issue with the use of the word “remote” instead of the word “telehealth” to avoid confusion with other requirements for other rules and statutes. Further, He-M 524.16(c) establishes how remote services would be provided which is not

the same as how telehealth services would be provided in other situations. The use of the word “remote” allows for more flexibility in how services are provided than the word “telehealth” would allow for. It appears to be within the authority of the Department to determine which word is best for this circumstance and the use of the word “remote” does not raise any issues for JLCAR staff.

VII. Providers question what determines the eligibility date as well as issues with completing the functional screen before the person-centered plan and/or health or screening tool assessment.

JLCAR staff agrees that the amendments the Department made to He-M 524.03(a) and (b) in the objection response text do make the rule more intuitive and clearer for the regulated community. JLCAR staff have no issue with the proposed change.

VIII. Recommendation that the Department keep the requirements of He-M 524 on face to face to what is documented in the waiver.

JLCAR staff believes that the Department has the authority to set the minimum requirement for the manner and frequency in which the service coordinator must meet with the individual or guardian. The minimum requirements set forth in proposed He-M 524.20 appear to be in compliance with the waiver.