

DIALOGUE WITH DSS REGARDING 13 SLOTS FOR ABI WAIVER II-YEAR 2

December 2015

Dear Commissioner Bremby,

It has come to my attention that in my earlier letter to you, the issues we are concerned about regarding the ABI Waiver were not clear to everyone who read the letter. I would like to clarify so there is no confusion.

- 75 slots were added to Waiver 2, Appendix B-3, as of Dec. 1, 2015.
- DSS has selectively made only 62 of those slots available.
- **The people on the wait list, left behind last year, cannot apply for any of the 62 slots DSS made available on Dec. 1, 2015.**
- **DSS is NOT making available any of the 13 slots for which these left-behind individuals could qualify.**

DSS has violated the terms of the ABI Waiver II document, Appendix B-3, which clearly states the state must submit a Waiver amendment to CMS to modify the number of participants for any year, as follows: "**The State will submit a waiver amendment to CMS to modify the number of participants specified for any year(s)**, including when a modification is necessary due to legislative appropriation or another reason." Here is the full provision:

Appendix B: Participant Access and Eligibility, B-3 a:

Unduplicated Number of Participants. The following table specifies the maximum number of unduplicated participants who are served in each year that the waiver is in effect. **The State will submit a waiver amendment to CMS to modify the number of participants specified for any year(s)**, including when a modification is necessary due to legislative appropriation or another reason. The number of unduplicated participants specified in this table is basis for the cost-neutrality calculations in Appendix J:

And any such waiver amendment would also have to be approved by the Legislative Committees of Cognizance.

By limiting the slots to 62, DSS has also violated the Waiver II provision which says the state does not limit the number of participants "at any point during the year." Here is the full provision:

Appendix B: Participant Access and Eligibility, B-3 b:

"Limitation on the Number of Participants Served at Any Point in Time. Consistent with the unduplicated number of participants specified in Item B-3-a, the State may limit to a lesser number the number of participants who will be served at any point in time during a waiver year. Indicate whether the State limits the number of participants in this way: (select one):"

(X) The State does not limit the number of participants that it serves at any point in time during a waiver year.

And any such waiver amendment would also have to be approved by the Legislative Committees of Cognizance. The Waiver language is clear; DSS cannot modify the number of participants without an amendment approved by CMS, or limit the number of participants served during the year.

We are requesting that DSS immediately make all 75 slots available instead of only the 62 slots DSS has selectively decided to open.

DSS is discriminating against wait listed brain injury survivors who can only qualify for the 13 slots DSS has refused to make available. This is a violation of the Waiver language and a violation of the law. DSS cannot change the number of available slots without getting approval from the Legislative Committees of Cognizance and the Centers for Medicare and Medicaid Services (CMS). We, again, request that DSS immediately open all 75 slots on the ABI Waiver II. Thank you for responding to this request.

Respectfully,

Elaine Burns

President

CT Brain Injury Support Network

From: "Bremby, Roderick L." <Roderick.Bremby@ct.gov>

To: 'Elaine Burns' <elaine@theburnsteam.net>

Sent: Wednesday, December 9, 2015 9:06 AM

Subject: RE: ABI Waiver II [not-secure]

Dear Ms. Burns,

Thank you for your recent communication concerning the ABI Waiver II. The ABI Waiver II does not propose "jumping over" existing waiting lists. The waiver utilizes reserve capacity for persons transitioning from Money Follows the Person (MFP) program, or for persons served by the Department of Mental Health and Addiction Services (DMHAS) ABI program.

The reserve capacity was approved by the Centers for Medicare and Medicaid Services when they approved the waiver. This actually served the purpose of allowing people who did not fall into the reserve capacity categories to move up on the waiting list and be served sooner. The department carefully monitors the waiting list to ensure that persons are served in the order in which they applied. The amended version of the waiver has 180 slots in year 2. Eighty-one (81) are reserved for MFP and 58 are reserved for DMHAS leaving available 41 slots for non MFP or DMHAS program participants.

Twenty-eight (28) of the 41 available slots were filled or at least obligated in waiver year 1 that ended 11/30/2015. That leaves 13 slots available for waiver year 2 that began 12/1/2015. When the budget was developed for the waiver, the underlying assumption was that approximately 13 persons would leave waiver 1 each year by attrition. Since funding for waiver 2 is dependent upon waiver 1 attrition, there are no funds available to immediately utilize the 13 slots now identified as unfilled or designated in in waiver year 2 that began two days ago. Our plan is to assign these waiver year 2 slots over the course of the waiver year as resources become available.

Please feel free to contact me, or Kathy Bruni, should you have additional questions or wish to discuss this matter in further detail.

Respectfully,

Rod

From: Elaine Burns <elaine@theburnsteam.net>

To: "Bremby, Roderick L." <Roderick.Bremby@ct.gov>

Sent: Wednesday, December 9, 2015 2:09 PM

Subject: Re: ABI Waiver II [not-secure]

Commissioner Bremby-

Thank you very much for your response. We have reviewed the complete Waiver II document and cannot find any place in it where it says "funding for waiver 2 is dependent upon waiver 1 attrition," as you state in your response. If it is not in the waiver approved by CMS (and the legislative committees), then there is no authority for DSS to refuse to fill the remaining 13 slots based on such lack of attrition in Waiver I. Please identify where in Waiver II such authorization, if any, appears. Thank you.

Elaine Burns

From: Elaine Burns [<mailto:elaine@theburnsteam.net>]

Sent: Wednesday, December 16, 2015 11:04 AM

To: Bremby, Roderick L.

Subject: Re: ABI Waiver II

Dear Commissioner Bremby,

I am writing to ask again where, in the ABI Waiver, it says DSS does not have to fill the 13 slots if the money hasn't been budgeted yet, as I cannot find it anywhere. I know this is a busy time of year, but if I do not hear back within a week, by December 23rd, I will assume that there is in fact no such authority in the ABI Waiver and I will be writing to Centers of Medicare and Medicaid to advise them of the violation.

Respectfully,

Elaine Burns

President

CT Brain Injury Support Network

From: "Brennan, Kathleen M." <Kathleen.Brennan@ct.gov>

To: 'Elaine Burns' <elaine@theburnsteam.net>; "Bremby, Roderick L." <Roderick.Bremby@ct.gov>

Sent: Wednesday, December 16, 2015 2:02 PM

Subject: RE: ABI Waiver II [not-secure]

Dear Ms. Burns:

The Commissioner has asked that I respond to your e-mail of earlier today pertaining to the ABI II waiver slots.

Twenty-eight (28) of the 41 available slots were filled or at least obligated in waiver year 1 that ended 11/30/2015. That leaves 13 slots available for waiver year 2 that began 12/1/2015. When the budget was developed for the waiver, the underlying assumption was that approximately 13 persons would leave the ABI I waiver each year by attrition. Since funding for the ABI II waiver is dependent upon ABI I attrition, there are no funds available to immediately utilize the 13 slots now identified as unfilled or designated in waiver year 2 that began December 1st. The waiver is an enabling document that allows us to operate the program. This in no way means that we are required to offer slots unless we have the supporting funds available. Appendix J of the waiver includes the approved budget and assumes a phase-in process of such slots. Our plan is to assign these waiver year 2 slots over the course of the waiver year, as resources become available.

This process mirrors the waiver slot process under the Katie Beckett Waiver. When the legislature approved 100 additional slots for the Katie Beckett Waiver in July of 2014, we opened the new slots at a rate of 10 per month.

Please let me know if you have any additional questions.

Respectfully,

Kathleen M. Brennan

Deputy Commissioner

Department of Social Services

Original Message-----

From: Elaine Burns <elaine@theburnsteam.net>

To: Bremby, Roderick L. <Roderick.Bremby@ct.gov>

Sent: Wed, Jan 6, 2016 8:37 am

Subject: Re: ABI Waiver II [not-secure]

Dear Commissioner Bremby,

I am again asking for a link to the Katie Beckett Waiver so that I can review the language giving DSS the authority to open up the slots on the Acquired Brain Injury (ABI) Waiver in a manner that mirrors the Katie

Beckett Waiver, that is, to not fill all the slots provided in the waiver, per the December 16th e-mail to me from Deputy Commissioner Kathleen Brennan.

We are still faced with significant concerns regarding the slots on the Waiver:

- 75 slots were added to Waiver 2, Appendix B-3, as of Dec. 1, 2015.
- DSS has selectively made only 62 of those slots available.
- The people on the wait list, left behind last year, cannot apply for any of the 62 slots DSS made available on Dec. 1, 2015.
- DSS is NOT making available any of the 13 slots for which these left-behind individuals could qualify.

While Ms. Brennan stated in her December 16th reply to me that Waiver II allows DSS to not fill all of the slots, I can find no authority for this. In fact, the Department specifically checked off in the Waiver II document, Appendix B-3, subsection d, the option: "The waiver is not subject to a phase-in or a phase-out schedule."

This was chosen **instead** of checking off: "The waiver is subject to a phase-in or phase-out schedule that is included in Attachment #1 to Appendix B-3. *This schedule constitutes an intra-year limitation on the number of participants who are served in the waiver.*"

And in Appendix B-3, DSS checked off, in section b: "The State does not limit the number of participants that it serves at any point in time during a waiver year."

Lastly, section c of Appendix B-3 specifies the only situations where holding back on filling all the waiver slots is authorized: "Reserved Capacity for Money Follows the Person Demonstration (MFP) Participants Reserved Capacity for DMHAS Acquired Brain Injury Services Program Participants"

In Ms. Brennan's reply, she stated:

"When the budget was developed for the waiver, the underlying assumption was that approximately 13 persons would leave the ABI I waiver each year by attrition. Since funding for the ABI II waiver is dependent upon ABI I attrition, there are no funds available to immediately utilize the 13 slots now identified as unfilled or designated in waiver year 2 that began December 1st. The waiver is an enabling document that allows us to operate the program. This in no way means that we are required to offer slots unless we have the supporting funds available."

But it appears that, under the above terms of this waiver document, DSS, by its own choices, has in fact obligated itself to fill all of these slots, even if certain assumptions it had made concerning a completely different waiver, Waiver I, and the saving of money under it, did not happen to pan out. Waiver II says nothing about the filling of those 13 slots being conditioned on what happens or does not happen to individuals on Waiver I, and the department specifically declined in this approved waiver to check off the option of "phasing in" or "limit[ing] the number of participants that it serves at any point in time during a waiver year." DSS cannot rewrite the approved waiver document on its own to reflect internal, but unstated, "assumptions" and turn those assumptions into actual waiver terms.

Not complying with the terms of an approved waiver is similar to not complying with the terms of the approved Medicaid state plan, which establishes an entitlement for Medicaid enrollees. Neither is permissible under federal law, and, as long as it chooses to run this waiver, the Department will have to come up with the money to comply with its commitments to the federal government contained within it.

But in regards to the funding for the only 13 slots DSS is NOT making available, DSS stated, at the Public Hearing regarding the outsourcing of the ABI Waiver:

- Funding for the outsourcing was already approved and in the budget and;
- There would **not** be any reduction in the number of DSS social workers who currently do the work DSS proposed outsourcing to a private entity.

In regards to those statements by DSS:

- Please confirm when the funding for the outsourcing of the ABI Waiver was approved by Legislators, I am confused as to why legislators would approve **funding** for outsourcing prior to approving the outsourcing itself, (which was denied).

It also occurs to me that the funding needed to open up the thirteen slots for those left behind last year, is very similar to the amount DSS stated is already in the budget to outsource the ABI Waiver. Now that the

outsourcing has not been approved, will DSS use those (already approved and in the budget) funds to open up the 13 slots?

At the Public Hearing DSS also stated that they have already outsourced a number of ABI Waiver cases in the Danbury, CT area. Since Legislators nor CMS have approved outsourcing of the ABI Waiver, will those cases now be returned to DSS Social Workers and will the funding currently being spent to outsource those cases now be used for direct services under the ABI Waiver?

As you know, there is a Request for a Declaratory Ruling regarding other significant issues with DSS management and potential fraud regarding the ABI Waiver. I am hoping DSS will resolve this issue so that we do not have to notify Centers of Medicaid and Medicare of the ongoing violation of the ABI Waiver II in regards to the 13 slots, which would come on the heels of CMS being notified of the significant issues raised in the Request for Declaratory Ruling.

Just last year, legislators approved Waiver II in order to save CT approximately 9 million dollars by receiving federal reimbursement for the services to just 50 brain injury survivors. I cannot imagine the cost to CT if DSS continues to risk of the loss of federal reimbursement funds for almost 500 brain injury survivors due to the violation caused by **not** filling the 13 slots, as required and the option selected by DSS, in the ABI Waiver. Thank you for your attention to this matter and for your timely response to each of the issues above.

Respectfully,

Elaine Burns

President

Brain Injury Support Network

Dear Commissioner Bremby,

Nancy Grano from Centers for Medicare and Medicaid, has been kind enough to send me the link for the Katie Beckett Waiver that I have requested from DSS more than five times. In review of the Katie Beckett Waiver, it is clear the ABI Waiver is very different in regards to the opening of slots, from the Katie Beckett Waiver.

Ms. Brennan stated in her December 16th reply, that ABI Waiver II allows DSS to not fill all of the slots, and that "Our plan is to assign these waiver year 2 slots over the course of the waiver year, as resources become available. This process mirrors the waiver slot process under the Katie Beckett Waiver."

However, in contrast to what Ms. Brennan stated, the ABI Waiver does NOT mirror the Katie Beckett Waiver. The choice DSS selected, in regards to allowing DSS to limit the number of participants, is the exact opposite of what DSS selected in the ABI Waiver.

In Appendix B-3 of the **Katie Beckett Waiver**, DSS selected :

"The State limits the number of participants that it serves at any point in time during a waiver year"

In Appendix B-3 of the **Acquired Brain Injury Waiver**, DSS selected:

"The State does not limit the number of participants that it serves at any point in time during a waiver year."

Please note the language Centers for Medicaid and Medicare used, in the letter of approval for ABI Waiver II: "This approval is subject to your agreement to serve no more individuals than those indicated above. **If the State wishes to serve more individuals or make any other alterations to this Waiver, an amendment must be submitted for approval.**"

It is clear that in regards to a federal Waiver DSS has no authority to change it or manipulate it outside the legally approved methods [addendums] for doing so. DSS must immediately open all 13 slots, the agency and the state of CT is in violation of federal and state law. I will notify CMS of the violation if this is not resolved by the end of this week.

Respectfully,
Elaine Burns, President
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