Overview of Guidance Regarding State Flexibilities to Determine Financial Eligibility for Individuals in Need of Home and Community-Based Services
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Issue

Recent Congressional action allows states to expand eligibility for Medicaid-funded home and community-based services (HCBS). This issue brief describes how the eligibility expansion could be applied to PACE and presents a rationale for this. Using this rationale, PACE organizations should ask their State Medicaid agencies if an expansion of eligibility for home and community-based services will be made and if so, that the expansion be applied to PACE.

Overview

On Dec. 7, 2021, the Centers for Medicare and Medicaid Services (CMS) released a State Medicaid Director Letter providing guidance to states on how to expand eligibility for HCBS. The Sustaining Excellence in Medicaid Act of 2019 (P.L. 116-39) included a provision which amended section 2404 of the Affordable Care Act (ACA)) to allows states the option to "target and tailor income and resource disregards" for individuals seeking HCBS under section 1915(c), (d), (i), (k), and under section 1115 waivers. The Dec. 7 guidance describes the flexibility permitted under P.L. 116-39 for states in determining certain income and asset disregards. This option is intended to present states with an additional tool to use in their efforts to "rebalance" their Medicaid coverage of long-term services and supports from institutional to community-based care. If states are interested in this option, they must submit a State Plan Amendment (SPA) to initiate such provisions.

Given that PACE is not specifically cited in P.L. 116-39 or in the guidance, it is not entirely clear if this flexibility extends to PACE. However, NPA believes that it is possible to interpret P.L. 116-39 as extending to PACE and, therefore, the guidance can and should apply to PACE as well. Notably, when some states opted to include PACE as a voluntary Medicaid state option, they implemented the same financial eligibility requirement for PACE as applies to HCBS under 1915(c). Therefore, to ensure PACE is not put at a disadvantage, it is critical that PACE is included in the SPAs that states submit to CMS to implement the optional flexibility allowed under P.L. 116-39.

NPA encourages PACE organizations (POs) to talk with their state Medicaid agencies to see if they plan to submit a SPA to exercise greater flexibility with respect to income and asset disregards pursuant to P.L. 116-39 and the guidance. **If a state plans to submit a SPA, POs should urge it to ensure PACE is included in the SPA**. To help POs make the case that states can include PACE in their SPAs, NPA has developed the following talking points.

Talking Points

- Although PACE is not referenced specifically in P.L. 116-39 or the guidance, there are several established links between PACE and financial eligibility rules extended to HCBS.

- P.L. 116-39 amends section 2404 of the Affordable Care Act (ACA), a provision of law requiring states to consider individuals eligible for HCBS as an institutionalized spouse for purposes of applying the spousal impoverishment rules under section 1924 of the Social Security Act (SSA). Essentially, it expanded the definition of institutionalized spouse to include individuals receiving HCBS. However, the spousal impoverishment rules under section 1924 of SSA already applied to PACE.[1] While section 2404 of the ACA expanded institutionalized spouse status to HCBS eligible individuals, PACE was already covered under existing rules. **Given that the guidance highlights section 1924 – the spousal impoverishment rule – as an example for determining financial eligibility, and section 1924 specifically mentions PACE, the flexibility in this guidance should extend to PACE.**

- The PACE statute in section 1934(i) has a special rule for treatment of post-eligibility income determinations. It reads that "[a] state may provide for post–eligibility treatment of income for individuals enrolled in PACE programs under this section in the same manner as a state treats post–eligibility income for individuals receiving services under a waiver under section 1915(c)." **Therefore, if a state has previously opted to apply the same post-eligibility treatment of income rules to PACE participants as applied to HCBS individuals under section 1915(c), and the state moves forward with the income flexibilities outlined in the Dec. 7th guidance, those flexibilities should extend to PACE.** If a state has decided not to, then this rule under the PACE statute may not apply in that state.

Conclusion

While this guidance attempts to clarify some of the flexibilities states have for determining income and resource eligibility standards, it is not clear if the guidance is intended to apply to PACE. However, given that the spousal impoverishment rule (highlighted in the guidance) clearly applies to PACE and PACE has a rule that permits states to use the HCBS standards for post-eligibility of income determinations, NPA believes a strong argument can be made that this guidance can and should be applicable to PACE. Furthermore, while not directly linked to P.L.116-39, Congress did recognize PACE as an HCBS option in the American Rescue Plan Act that was enacted into law in March 2021. **NPA encourages POs to reach out to their state to see if they plan to submit a SPA and if so, urge them to include PACE as one of the HCBS providers**.

Please contact Liz Parry, Senior Director, State Policy, with any questions.

[1] The Spousal Impoverishment Rules under section 1924(a)(5) of the SSA states: "(5) Application to individuals receiving services under PACE programs.—This section applies to individuals receiving institutional or noninstitutional services under a PACE demonstration waiver program (as defined in section 1934(a)(7)) or under a PACE program under section 1934 or 1894."