CHANGES IN DISABILITY LAW
A NOTE CONCERNING THE PROGRAM MATERIALS

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ASHLEY MEIER BARLOW is an attorney at Meier & Barlow Law Firm in Ft. Thomas, Kentucky. As a sensible, caring and compassionate lawyer, Reason, Respect and Grace guide her in life and her legal practice. Ms. Barlow graduated Magna Cum Laude from Miami University with a BS in German Education and received her JD from Salmon P. Chase College of Law in 2006. Her main areas of practice include family law, special education, and estate planning. Ms. Barlow is involved in her community through her service as the President of the Board of Directors for the Down Syndrome Association of Greater Cincinnati, and she serves as an advocate with the National Down Syndrome Congress. Ever the optimist, she believes there’s a silver lining to every situation and when she’s not in the office, she’s with her husband and two boys, one of whom has Down Syndrome, soaking up the sun on a beach somewhere, surfing, or swimming laps.
I. TOPIC OVERVIEW

A. Estate Planning
   1. ABLE accounts.
   2. Self-Settled Trusts.

B. Medicaid Waivers

C. Special Education
   1. Sixth Circuit Case Law Update.
   2. *Endrew F.* decision.

II. CHANGES IN ESTATE PLANNING LAWS

A. ABLE Accounts
   1. Overview.
      b. Enacted in Kentucky on April 5, 2016.
         i. Allows Kentuckians access to Ohio’s STABLE account eligibility.
         ii. Fees apply.
      c. Allows families to save for children with disabilities without disqualifying them from government benefits like Social Security and Medicaid.
      d. Codified at 529A (similar to 529 college savings plans).
   2. Eligibility.
      a. Disability onset must have occurred by age 26;
      b. Must have had disability a year or expect disability to continue at least one year; and
      c. One of the following:
i. Be entitled to Supplemental Security Income (SSI) because of their disability;

ii. Be entitled to Social Security Disability Insurance (SSDI) because of their disability;

iii. Have a condition listed on the Social Security Administration’s List of Compassionate Allowances Conditions; or

iv. Be able to "self-certify" their disability and diagnosis when opening a STABLE account.

3. Contributions.

a. Up to $15,000 a year from a third party.

b. Up to $12,140 a year from the beneficiary’s earnings.

c. $100,000 cap.

d. Must start with at least $50.

e. Can be invested five different ways, which can be changed up to twice annually.

f. Earnings are tax-deferred and tax-free if spent on disability purposes.


a. Protects means-tested government benefits like SSI and Medicaid.

b. Money invested is not counted towards assets for eligibility.

c. If means exceed the normal resource limits, benefits will be suspended (not terminated) until means decrease to below the resource limits.

5. Spending availability.

a. Must be spent on qualifying disability purposes.

i. Considered qualifying if:

(a) The expense was incurred while the beneficiary was eligible;

(b) The expense relates to the disability; and
(c) The expense maintains or improves the health, independence, or quality of life of the person with a disability.


(a) **Education.**

(i) Tuition for preschool through post-secondary education.

(ii) Books.

(iii) Supplies and educational materials.

(b) **Housing.**

(i) Expenses for a primary residence.

(ii) Rent.

(iii) Purchase of a primary residence.

(iv) Mortgage payments.

(v) Real property taxes.

(vi) Utility charges.

(c) **Transportation.**

(i) Expenses for transportation.

(ii) Use of mass transit.

(iii) Purchase or modification of vehicles.

(iv) Moving expenses.

(d) **Employment support.**

(i) Moving expenses.

(ii) Expenses related to obtaining and maintaining employment.

(iii) Job-related training.

(e) **Health prevention and wellness.**

(i) Expenses for health and wellness.
(ii) Premiums for health insurance.

(iii) Mental health, medical, vision, and dental expenses.

(iii) Habilitation and rehabilitation services.

(iv) Durable medical equipment.

(v) Therapy.

(vi) Respite care.

(vii) Long-term services and supports.

(f) **Nutritional management.**

(i) Communication services and devices.

(ii) Adaptive equipment.

(iii) Assistive technology.

(iv) Personal assistance.

(g) **Assistive technology and personal support.**

Expenses for assistive technology and personal support (e.g., a smartphone for a child with autism).

(h) **Miscellaneous expenses.**

(i) Financial management and administrative services.

(ii) Legal fees.

(iii) Expenses for oversight.

(iv) Monitoring.

(v) Home improvement, modifications, maintenance and repairs.

(vi) Funeral and burial expenses.

b. Can attach a card to the account.
c. Audits can occur, so proper accounting is advisable.

6. Updates.
   a. ABLE National Resource Center.

B. Self-Settled Trusts

III. PROPOSED CHANGES TO MEDICAID WAIVERS

A. Waivers Reviewed
   1. Acquired Brain Injury (ABI) waiver.
   2. Acquired Brain Injury – Long Term Care (ABI-LTC) waiver.
   3. Home and Community Based (HCB) waiver.
   5. Model II Waiver (MIIW).
   6. Supports for Community Living (SCL) waiver.

B. Proposed Changes
   2. Program administration and consistency – To be implemented: Summer 2019.
   4. Rate setting methodology – To be implemented: Fall 2019.
   5. Use of assessment data to develop an independent assessment tool – To be implemented: Fall 2019.
   7. Quality improvement Strategy – To be implemented: Late 2019.
   8. Future assessment for long term services and supports – To be implemented: Late 2019.
C. Specific Considerations for the Michelle P. Waiver

1. The committee is considering a change to the “one size fits all” approach to service hours.

2. The change would include more or less than the current 40-hour work week for MPW recipients.

3. Change would also allow for services to be spread out differently in accordance with how the recipient needs the hours.

4. Goal is to avoid waste and a “use it or lose it” policy.

D. Miscellaneous Changes

1. Considering a more stream-lined process for certification and re-certification. This may involve a cell phone application.

2. Family members will continue to be able to be employed as service providers on Waiver plans of care.

3. “Consumer Directed Option” will be recoined “Participant Directed Services.”

4. Considering the availability of adding transportation as a service, particularly to individuals that live in rural areas.

5. Considering a rate adjustment so that providers can attract qualified, dedicated service providers.

6. The overall funding for the waivers should remain stable.

7. There continue to be ways for stakeholders to provide input.

   a. MedicaidPublicComment@ky.gov.

   b. Public comment town halls/webinars.

   c. (502) 564-7540.

   d. Department of Medicaid Services, Attention: Public Comment, 275 E. Main Street, Frankfort, KY 40621.

E. Assurances

   • No services that are currently provided will cease to exist.

F. Timeline

1. Some changes should be finalized in September 2019 +/-.
2. The committee will re-evaluate in 2020 and may make additional changes.

3. Committee will also need to review regulations to ensure consistency.

IV. CHANGES IN SPECIAL EDUCATION CASE LAW

A. Administrative Cases

1. 118 LRP 49141.
   a. Parents’ claims under common law negligence against the district employees were barred by the doctrine of sovereign immunity.
   b. Claims under the Civil Rights Act of Kentucky and federal claims were allowed.

2. 118 LRP 42704.
   a. Student: Child with autism that received extensive services in K-8.
   b. Issue: Parents came to an impasse with district on services to be provided in 9th grade.
   c. Procedural posture: This is the second of two due process hearings and follows an appeal to the Exceptional Children Appeals Board.
   d. Holding: If a district cannot finalize an IEP for a school year, the district cannot provide FAPE, and it must reimburse parents for private placement.

3. 118 LRP 42703.
   a. Student: Child with chromosomal abnormalities, deafness, cortical vision impairment, and sensory processing disorder.
   b. Issue: Mother placed student in private school on the allegation that district couldn’t meet the student’s needs. She had agreed that he had made progress the prior year. He regressed at the private school and did not get IEP services. He returned to the district, and the ARC agreed to increase his service minutes. He also got an augmentative communication device. He did not recoup skills, and the ARC later even reduced some of his goals. The mother asked for a specialized school program, and the school did not respond. The student missed a lot of school to attend private therapies. Mother requested private school
placement at a school that provides year-round intensive educational and therapeutic services. The district denied the request.

4. 118 LRP 42701.
   a. Student: Child with emotional/behavior disorder.
   b. Procedural posture: Appeal to ECAB.
   c. Issue: Child was suspended, and a manifestation determination review yielded that the child’s behavior was a manifestation of his disability. District advocated for a change of placement while parents wanted the child to have opportunity to leave the classroom when escalating and to be able to bring a private therapist to school. Due process ensued.
   d. Holding: Change of placement is appropriate in light of the student’s behavior records and attempts made to meet his needs.

5. 118 LRP 10547.
   a. Student: Child with neonatal exposure to cocaine, which caused sensory processing disorder. His condition was exacerbated by concussions. He also had a specific learning disability in written expression.
   b. Issue: Student has 20 or 21 disciplinary infractions. The School Resource Officer was called to help in a disciplinary matter and had not been trained on or seen the child’s IEP. He had not been trained on the child’s behavior plan. The child was referred to the court system.
   c. Holding: District did not provide a FAPE. The SRO and all staff interacting with the student must be informed of his IEP. His behaviors were a manifestation of his disability, so the district must hold an MDR and review the child’s behavior intervention plan. Student awarded 10 days of compensatory education.

6. 118 LRP 4489.
   Holding: District not responsible for “offensive and reprehensible” actions of an employee, because Section 504 and the ADA only question "whether the independent misconduct of a teacher is attributable to the school [board] that employs h[er] under a specific federal statute designed primarily to prevent recipients of federal
financial assistance from using the funds” in a manner that
discriminates against individuals with disabilities.” Relying on

B. New mandates on schools after Endrew F. ex rel. Joseph F. v. Douglas
County School Dist. RE-1, 137 S.Ct. 988 (2017)

1. School must offer an IEP reasonably calculated to enable a child to
make progress appropriate in light of the child’s circumstances.

2. IEP must aim to enable the child to make progress. After all, the
essential function of an IEP is to set out a plan for pursuing
academic and functional advancement.

3. The programming and goals must be appropriately ambitious in
light of the child’s circumstances, just as advancement from grade
to grade is appropriately ambitious for most children in the regular
classroom. The goals may differ, but the objectives should be
challenging.

4. An IEP must have as its target substantial academic and functional
progress for the student.

5. The specially designed instruction and related services must be
determined by what is appropriate for the student in the student’s
unique circumstances.
On October 15, 2018 the Cabinet for Health and Family Services (the Cabinet) and Department for Medicaid Services (the Department) responded to Navigant’s 1915(c) Home and Community-Based Services Waiver Redesign Assessment Recommendations Report. In the response, we (the Department) shared the next steps to improve home and community-based services (HCBS) waiver programs. This guide explains the plan and what it will mean to individuals who use waivers and their families.

Ideas to Make Waivers Better

Group A
• Activities beginning Fall 2018, to be completed by Summer 2019

What are the next steps and what does this mean to me?

1. Make it easier for individuals, their providers, and case managers to let us know when an incident (something serious) happens or other concerns related to the well-being of the individual.

2. Change our process for investigating incidents and making the way we handle them the same for all individuals and waivers.

3. Work with the Department for Community Based Services (DCBS) to improve communication about mistreatment of individuals who use waivers.

4. Release updated 1915(c) waiver applications and state regulations. Updating these will make the rules and requirements for using waivers easier to understand and follow. All updates will include time for you to review and make comments.

5. Offer more job training and tools to providers. We will take a closer look at providers and teach providers and case managers the things they need to know to work with waivers and support individuals.

6. Create an easier way to call to get answers to questions and tell us your concerns.

Group B
• Activities Beginning Fall 2018, to be completed by Fall 2019

What are the next steps and what does this mean to me?

1. Clearly explain the rules for Participant Directed Services (PDS) like:
   • Who can use PDS
   • What PDS tasks are allowed and who can help with these tasks
   • What family members can and cannot be hired by an individual who uses PDS
   • Who can be a PDS employee
What Does This Mean To Me?

Individuals Who Use Waivers Edition

- How will providers help individuals who use PDS

2. Use information to make better decisions about individuals and understand how waivers are used today and in the future.

3. Have new rules for case managers along with tools to help them be more person-centered.

4. Do a better job helping case managers to deal with tough situations.

What are the next steps and what does this mean to me?

1. We will continue to ask for and listen to all your ideas. Individuals’ voices will be heard.
2. We will take time to carefully review the waivers and plan for the future.

Future Stakeholder Engagement Events

We are planning events that will give individuals, their families, and providers a way to learn about the next steps, ask questions, and share ideas. These events may include webinars, in-person meetings, an advisory panel, and public comment periods. Check the Department of Community Alternatives’ (DCA) website at https://chfs.ky.gov/agencies/dms/dca/Pages/default.aspx for announcements. You can also send us an email at medicaidpubliccomment@ky.gov, call DCA at (502) 564-7540 and ask for Misty Peach or send a letter to the following address:

Department for Medicaid Services
Division of Community Alternatives
275 E. Main Street 6W-B
Frankfort, Kentucky 40621
On October 15, 2018 the Cabinet for Health and Family Services (the Cabinet) Department for Medicaid Services (the Department) released its response to Navigant’s 1915(c) Home and Community-Based Services Waiver Redesign Assessment Recommendations Report. In the response, the Department informed the public of next steps to improve home and community-based services (HCBS) waiver programs. This guide summarizes these coming redesign activities and how they are expected to impact providers.

Summary of Waiver Improvements by Priority Group

**Group A**

- Activities beginning Fall 2018, to be implemented by **Summer 2019**

What are the next steps and what does this mean to me?

1. Providers should expect increased focus on critical incident reporting according to program requirements, increased investigations of reported incidents by Cabinet staff, and increased technical assistance and corrective action plan follow-up to address critical incidents and prevent future occurrence. The process for recognizing, reporting, investigating and following up on critical incidents will be better defined. Providers will have a better understanding of their role and responsibilities within the critical incident process.

2. As the single state Medicaid agency with foremost accountability to the Centers for Medicare and Medicaid Services (CMS), the Department will improve its ability to address concerns and prevent program challenges from occurring.

3. Clarify expectations, tasks, and definitions for traditional and participant directed services (PDS) case managers. Standards for person-centered planning and guidance related to oversight will be improved and clearer for providers to apply to their work.

4. Standardize definitions across waivers and make the regulations user-friendly with a focus on making rules and requirements more consistent across waivers and reducing individual interpretation.

5. Provide consistent responses to participant and provider questions causing less confusion. There will also be a call-line where case managers can direct participants and their caregivers that will provide support from Department staff with waiver specific knowledge.

6. The annual certification process will be simplified so each provider is subject to one review even if the provider serves multiple waivers. There will no longer be multiple annual reviews conducted by different departments. Providers will receive technical assistance and training to be more consistent across waivers and service types.

7. Service providers will work with the Department as the primary decision maker and interact with sister agencies as operational experts that carry out Department-assigned
monitoring and oversight activities. Then, providers will have strong rapport with the Department and the sister agencies to better serve waiver participants.

**What are the next steps and what does this mean to me?**

1. Clearly explain the rules for PDS including:
   - Who can self-direct their services
   - What PDS tasks are allowed, and who can help with these tasks
   - What family members can and cannot be hired by a participant
   - Who can be a PDS employee

2. Establish a 1915(c) rate setting methodology informed by a rate study.

3. Enhance case management by providing standardized tools, processes, performance standards, trainings, and a place to call the Department directly. These strategies will help providers get extra help when there are questions or tough situations to address. These standardized tools and forms will inform needs-based care planning methods for all populations.

4. Collect data from assessments in a usable, electronic format. This data will help guide discussions and analyses of a universal assessment tool, with special consideration for children. The Department will also use this tool to identify if independent assessment should be expanded to all waivers.

**What are the next steps and what does this mean to me?**

1. Evaluate the impacts of the adopted changes and have an increased emphasis on improving service outcomes and the participant experience. The Department will evaluate future waiver reforms to further improve overall performance of the system.

2. Make data-driven updates to the waiver programs. Using data will ensure resources are determined effectively and efficiently to meet the needs of all waiver participants. For example, data will be used for participant needs assessments and individualized budgeting.
Future Stakeholder Engagement Events

The Department is planning several events that will give individuals, their families, and providers a way to learn about these next steps, ask questions, and share ideas. These events may include webinars, in-person meetings, an advisory panel, and public comment periods. Check the Department of Community Alternatives’ (DCA) website at https://chfs.ky.gov/agencies/dms/dca/Pages/default.aspx for announcements. You can also send us an email at medicaidpubliccomment@ky.gov, call DCA at (502) 564-7540 and ask for Misty Peach or send a letter to the following address:

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