

CHAPTER IX - ASSURING THE HEALTH AND SAFETY OF MEDICAID WAIVER PARTICIPANTS

CIP IA, CIP IB, BIW, COR and CLTS

9.01 Introduction

The assurance of waiver participant health, safety and welfare is one of six assurances required by the Centers for Medicare and Medicaid Services (CMS) and given by Wisconsin in the State's approved waiver(s). Wisconsin details how this is to be accomplished in the waiver application submitted to and approved by CMS and accepts these responsibilities as conditions of waiver approval. Waiver agencies are required to address these assurances by implementing the program design, policies and processes described in this and other sections of this Manual pursuant to the state/county contract and the appendices covering the different waiver programs.

This chapter applies to waiver participants who are adults or children. An adult who is living outside of the family home with other participants, alone and who is supported by paid staff presents a very different situation than a child living with parents, family members or a child living with foster parents. Clearly, the level and nature of monitoring and intervention and the waiver agency's overall strategy for assuring safety must be adjusted to account for these different situations. Parental authority and decision making must be respected most of the time and questioned only if a practice places a child at risk or is in violation of laws or rules. This distinction also affects how incidents are managed and reported. The various sections of this chapter are intended to assist in guiding waiver agencies in all situations.

This chapter and some of its contents relate to a number of other requirements described elsewhere in this Manual that apply to individuals on the individual participant level. The Department believes that the agency's ability to effectively address participant health and safety requires good performance with each individual waiver participant in a number of functions detailed elsewhere. Specifically, the health and safety of an individual waiver participant served can only be achieved by the development and implementation of an effective, high quality individualized service plan where needed services are competently delivered by qualified providers in safe settings.

This chapter focuses on the design and effectiveness of waiver agency's system or subsystems that are specifically intended to address health and safety. It adds to the focus on individuals an expectation that county waiver agencies will also design systems and perform functions at a system level to prevent abuse, neglect or other threats to health, safety and well being and will be capable of effectively responding to incidents and situations when such threats occur. This system-level approach is intended to enhance but not replace the individualized approach used in the waiver programs covered by this chapter. The approach also recognizes other preventive and protective services and

systems available in the community that focus either on the general public or on broader human service constituencies.

Participant safety is also affected by measures taken by providers, agencies that license or certify these providers and other entities that oversee the individuals who work for these providers. Assuring that individuals who work for or are providers are qualified, checking their criminal background or history of problematic actions in a support or care giving role are but a few of the mechanisms that contribute to safety that are referenced or discussed elsewhere in this chapter.

9.02 Application of this Chapter to Individuals and Agencies

This chapter applies to all individuals served and funded by the CIP 1A, CIP 1B, BI, COR and CLTS waivers, their guardians, if any, county waiver agencies and their staff, provider agencies and their staff and other designated staff in county or provider systems who work to prevent the occurrences of abuse, neglect or other threats to health and safety or who are charged with responding to situations when such events occur. Requirements in this chapter may also apply to county agencies operating as agents of the state in waiver programming and to waiver service providers if requirements are more appropriately assigned to either/both county agencies and service providers.

This chapter also describes the interaction of the required waiver safety system with natural community preventive and protective service systems that serve all community members or broader targeted human service constituencies. These systems include protective services such as law enforcement, Emergency Medical Services, the legal and court system and the county's adults at risk and children's protective service systems. The county's safety system may also involve non-governmental organizations such as agencies involved in the prevention of and intervention with domestic abuse.

The requirements in this chapter and Manual only apply to the waiver agency and not these other agencies which have their own missions and mandates. These materials supplement and do not supplant, replace or eliminate any other requirements imposed by laws or rules that apply to the entities funded by the waiver or involved in waiver service provision. Specifically, expectations related to safety that are conditions of licenses (e.g. with DHS' Division of Quality Assurance (DQA) or Department of Children & Family Services (DCFS) licensing), requirements involved in abuse and neglect reporting for children and adults, the provision of protective services for both children and adults or other mandates originating in other rules or laws are not supplanted by the requirements of this chapter. The waivers utilize these systems and supplement them as necessary.

9.03 Response Systems Required

Each county agency that administers any of the waiver programs to which this chapter applies must, in collaboration with the Department, have adequate systems, policies and programs in place that:

1. Seek to prevent abuse, neglect, mistreatment of waiver participants and the misuse/misappropriation of their money and property. Such systems must use planned strategies supported by data collection and analysis of incidents to identify causes, contributing factors and trends that identify higher risk situations and at-risk individuals so the county can take actions to modify such things as staffing arrangements and/or the physical environment to reduce risk.
2. Have an organized strategy that seeks to keep people healthy and prevent illness, injury or medical and dental problems.
3. Are capable of identifying high(er) risk situations where abuse, neglect or mistreatment of waiver participants may be happening based on known risk factors and by the use of information collected in incident reports.
4. Have systems and strategies that ensure waiver participants are protected from incidents that involve physical, verbal and sexual abuse, maltreatment, neglect, financial exploitation and have the ability to discover when such situations occur and strategies to remediate the effects of such incidents when they do occur.
5. Have the means to both make legally required reports of abuse, neglect or other alleged or actual incidents listed in this chapter and respond to reports the waiver agency receives. This includes having written procedures identifying the individuals responsible for the response and written descriptions of the manner in which such reports will be made and addressed. This requires the use and collaboration of other adult and children's protective services and may also involve law enforcement.
6. Have policies in place that protect individuals (waiver participants or provider staff) who report possible or actual incidents covered in this chapter from retaliation by providers. Such policies should incorporate anti-retaliation requirements on S. 46.90 and S. 51.61 stats and HS 94.¹ Any provider that violates these requirements should

¹ HFS 94.28 Right to file grievances: HFS 94.28(1)

A patient or a person acting on behalf of a patient may file a grievance under s HFS 94.29 procedures... and may communicate, subject to s. 51.61(1)(p), Stats., with any public official or any other person without fear or reprisal.

(2) No person may intentionally retaliate or discriminate against any patient, person acting on behalf of a patient or employee for contacting or providing information to any official or to an employee of any state protection and advocacy agency, or for initiating, participating in or testifying in a grievance procedure or in any action for any remedy authorized by law.

be considered to have breached their contract with the waiver agency and the state and

must be subject to disallowance for the entire cost of care of the subject individual(s) for the period when retaliation occurred.

7. Have systems in place to receive, review and appropriately approve or deny the use of restrictive measures according to the provisions in detailed in Chapter VIII and the Guidelines for Restrictive Measures contained in Appendix R of this Manual.
8. Have response systems in place that account for the need to protect waiver participants in a variety of **unanticipated** occurrences that may require immediate, urgent and even emergency response addressing a range of scenarios including but not limited to health emergencies, dangerous and challenging behavior, criminal activity by or to a waiver participant, environmental dangers including fires and weather events and other events or situations that are likely to involve high levels of risk for waiver participants.
9. Have back up systems that are able to quickly and effectively respond to all situations where providers and/or support persons become unavailable to perform their typical role for any reason such as a staff person not showing up or a family member who provides support becoming ill and unable to provide supervision and care.
10. Be able to effectively address all reporting required by the waiver or by other mandates in law, rule or Department policy.

Waiver agencies have broad discretion in determining the best design of their system so long as the system is capable of "effectively responding" to situations where the health and safety of waiver participants may be compromised or placed at risk. In this section, "effectively responding" means the system is capable of assuring participant safety, performing well enough to remove individuals from danger or risk and prevent the recurrence of threats to individual health, safety and welfare or violations of the participant's rights.

Waiver agencies must have a written description of how their response system addresses all of the above requirements. The system must conform to the following specific Department procedural and structural expectations:

1. There must be a clearly written policy statement evidencing the agency's acknowledgement of its obligation and intent to promote and protect individual health, safety and welfare.
2. There must be written procedures and protocols on operational aspects of the system with defined time lines for responding to and investigating all complaints involving

allegations or reports of abuse/neglect or situations where an individual's safety may be compromised including complaint and grievances under HFS 94.40.

3. There must be written and disseminated internal policies and procedures and contractual language for providers to require and adequately support the incident reporting system required in this chapter. Counties must require and support efforts by their staff, families, and service providers to report incidents promptly and accurately on this system and to protect those who do report from retribution or reprisal. They must also comply with legal requirements to report on all other legally mandated reporting systems.
4. There must be written communications and directives to staff and providers concerning the requirement to report incidents in contracts, agreements, local manuals and instructions.
5. There must be an assignment of responsibility for a variety of response options including emergency response options for all situations where risks or threats to safety can be anticipated or found to ensure that each waiver participant's safety and welfare are adequately protected.
6. There must be written policies addressing reporting of these situations to persons or agencies with an interest in the situation including appropriate community law enforcement and protective service agencies.
7. There must be written directives and contractual conditions barring the use of restrictive measures unless such measures are either approved according to the provisions of the Guidelines in Appendix R of the Manual or, if not governed by HFS 94.10, do not constitute abuse under S.46.90 (1) (a) 5.

9.04 Investigation / Inquiry Expectations of Waiver Agencies

For any situation where there is evidence or suspicion of any type of abuse/ neglect/ exploitation, or violation of an individual's client rights, an immediate investigation or inquiry by the agency or an entity authorized by the agency must be conducted. The focus of the investigation or inquiry is on determining what occurred and how it affected the waiver participant and not establishing the guilt of the alleged perpetrator.

In designating the entity responsible for the investigation or inquiry, the waiver agency and their providers should consider the following factors:

1. The nature/severity of the event, finding or incident. If this involves a possible crime, law enforcement must be called in and system responses limited so as not to impede any criminal investigation by these authorities. If the incident evidences health or medical issues, appropriately qualified personnel should be involved.

2. The impact of the event and incident on the participant considering both their physical and mental well being. For example, if the person has been physically harmed, having

a nurse or other qualified medical professional involved at some point in the inquiry would be very desirable. Using urgent or emergency care facilities should be considered, again considering the severity of the harm.
3. The person or persons involved in the inquiry or investigation should be free of actual, potential or perceived conflicts of interest.
4. The person or persons involved in the inquiry or investigation should have appropriate knowledge and experience with how to conduct such an inquiry so the
5. Investigation is completed in a timely way and does not interfere with the efforts of any law enforcement agency that may be involved.
6. Counties and their designees are strongly encouraged to involve law enforcement when the alleged act involves a crime. To do otherwise is to deny people with disabilities full citizenship and membership in their community.

The agency shall identify locally determined time lines for such investigations at the beginning of the investigation and document these in writing. If HFS 94.40 applies, time lines specified in that rule shall apply. If the waiver participant resides in a licensed home, the agency responsible for licensing must be notified of the alleged abuse/ neglect/ exploitation or violation of rights in a timely enough fashion to permit that agency to respond to the situation. If the incident involves an alleged act covered by adult or child protective service laws, the incident shall also be reported to those systems in the prescribed manner.

Failure to respond to reports as specified may be considered evidence that a county has not adequately acted in a manner that assures the health, safety and welfare of waiver participants and could be grounds for a full or partial disallowance of funding used for the participant for the period when the person was at risk of harm.

9.05 Waiver Agency Response Options

Maintaining the health, safety and welfare of waiver participants should be the highest priority for county and provider staff serving waiver participants. If there is **ANY** evidence of immediate harm to the health, safety or welfare of the waiver participant, the agency must take all reasonable steps necessary to determine what is happening or has happened and then take necessary actions to assure the health, safety and well-being of the waiver participant.

County waiver agencies must have written back up/contingency plans in place for incidents that can be anticipated even if these are unlikely. Back up plans must be person or site specific, be in place ninety (90) days from the publication of this section of the

Manual and are subject to Department approval. Department staff or representatives may request these plans at any time.

At minimum, a back up plan for addressing each incident listed on the Critical Incident Report form should be developed. Back up plans should also be developed for other common occurrences that can put waiver participants in some sort of higher risk. These include situations when the planned and required level of staffing or support present in any setting is not sufficient to address the needs of the waiver participants or others requiring assistance who are present. Such situation may occur when staff fail to show up, have to leave unexpectedly, become incapacitated or if a resident returns from an outside activity early or any other time staff coverage is unexpectedly not adequate for supporting the people present.

Waiver agencies, working with providers and families, should also have a written policy for how to deal with problem staff when a staff person has done something that suggests he or she should no longer be relied on for support or service. This policy should also cover situations when the act is alleged to have been committed but the perpetrator has not been determined. Agency policy should focus on the waiver participant and must do whatever is necessary to get the person to safety. Policies addressing the perpetrator or alleged perpetrator should clearly define the role of the agency vs. law enforcement in any investigation and should address the staff person's employment status. Agencies should be able to send a staff person home, suspend the individual staff person(s) allegedly involved pending the investigation or remove individuals who are not providers from the immediate environment. Agencies should have established procedures for terminating providers for continued or repeated noncompliance with safety requirements. While a less attractive option, agencies should be able to remove the waiver participant(s) from the setting until the allegations are satisfactorily resolved.

Language permitting termination of contracts and provider agreements must be incorporated into provider agreements and contracts with providers. Procedures for terminating providers must include provisions for assisting waiver participants to find and choose qualified providers when the original provider is no longer available. This option should be available to waiver participants and/or their guardians if, as a result of incident, the consumer or guardian wish to change providers in response to mistreatment. Change of providers is a participant right under waiver freedom of choice requirements.

9.06 Incident Prevention, Management, Resolution and Reporting²

² This section of this chapter replaces previous policy memos on this subject.
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The approved waiver requires the Department and county waiver agencies to assure the health, safety and welfare of waiver program participants. One of the strategies CMS requires of waivers to address this assurance is by requiring the state, and by extension, waiver agencies, to take both systemic and individualized steps to prevent incidents that are harmful to waiver participants or place them at risk of harm. If preventive measures fail and a potentially harmful incident occurs or is suspected, the Department requires agencies and their providers and/or agents to intervene as necessary, report the incident, address and manage the situation, monitor the participant and ultimately to resolve these incidents to the extent possible.

The incident discovery process often begins with the family or provider or when someone external to the provider observes something suspicious. If a family member or provider observes an incident, the effects of abuse or neglect or evidence of any of the other reportable incidents, they shall inform the county agency as soon as practical.

Waiver agency, family members and provider agency staff serving a waiver participant shall be required by the waiver agency to inform the designated CIR contact person³ in the waiver agency of the actual or alleged occurrence of any of the incidents defined in the appendix of the Manual concerning the required report. The waiver agency shall ensure that the participant's parent or guardian has been informed of any reportable incident listed in the Appendix and the results of any investigation made by the agency in a timely manner. This report can be when the agency first becomes aware of the incident or when there are results from an investigation or inquiry made by the agency. Parents or guardians must be informed of the event within twenty four (24) hours of time and date of the waiver agency's report to the state. If the incident involves a crime (such as abuse, neglect, exploitation, child abuse, theft of property or funds, sexual assault, assault or theft), the applicable law enforcement and protective service agencies must be notified.

Managing an incident may be done in a number of ways by waiver agencies depending on their size, geography, population density and level of public services. Some waiver agencies may employ specialized staff designated by the agency for responses to such situations. Others may use the person's support and service coordinators. Still others may use individuals involved in the contract monitoring side of their functions. Yet another variant is the use of designated representatives of provider agencies assigned the responsibility of making appropriate inquiries and intervening as necessary to affect resolution. No model is required or preferred by the state; what is required is adequate performance!

Incident management involves doing what is necessary to remove the person from a high risk situation where harm is likely to a safe situation. It then involves preventing that situation from recurring by taking actions to disqualify providers if appropriate or

³ Designated contacts may be a specialist staff who works with incidents or may be a person who works with the waiver participant who is the subject of the actual or alleged incident. The model used is the waiver agency's choice.

updating the individual's assessment and /or plan to make sure that the vulnerability exposed is addressed in future plans.

Resolution takes many forms; it may involve changing staff, updating and enhancing a service plan or behavior intervention plan, examining and modifying the physical environment and may include removal of the waiver participant from situations where risk is present.

Reporting begins usually at the family or provider level. The family or staff from provider agencies serving the waiver participant are required to inform the designated staff from the waiver agency of all reportable incidents involving Medicaid waiver participants as soon as practical. The county agency shall ensure that the waiver participant's guardian has been informed of any report of alleged abuse/neglect/exploitation and the results of any investigation made by the agency. If the abuse/neglect/exploitation involves a crime (such as rape, assault or theft) the applicable law enforcement agency must be notified.

Waiver agencies are also required to report these incidents. A standard department form, found in the Manual Appendix, provides a list of events covered by this reporting policy and establishes a prescribed protocol and format for waiver agencies to use in reporting these incidents for both adults and children. Compliance with this reporting requirement is a condition of financing the person's plan during the time period when an incident may have been active. Failure to do so could result in a disallowance for some or all of the service costs during the incident if reporting of a known incident did not occur.

Reporting or notifying the Department contact by the waiver agency and its contracted providers must be done as early as is reasonable once an incident has been discovered. Reporting includes not just submittal of the initial form but also involves prompt, periodic and continuous communication between waiver agency staff and either CIS or CSS until the situation is resolved. **Reportable incidents that are still active situations where risk is still present must be reported to the agency's assigned CIS/CSS within five (5) working days of the county learning of the situation or earlier if possible.** Waiver agency staff or their designees, who are primarily responsible for addressing the situation, are expected to keep CIS/CSS informed as the situation matures, as facts become known and as plans for resolution evolve. Incidents that come to light after the actual event occurs and where no additional resolution is needed can be reported up to thirty (30) days after the county first received the report of the incident.

CIS/CSS involvement depends on the nature of the incident, the effectiveness of the waiver agency's response, other entities involved (e.g. regulatory agencies) and the capabilities of the people dealing with the situation. It will go beyond just receipt of a form describing an event that happened. If the report deals with a situation that has already been addressed, state involvement may be just a debriefing to determine if the

event resulted in changes to the situation that spawned the incident. In active situations state involvement may include extensive on-site review and consultations. Reported incidents typically involve verified events but may also involve the initial reporting of alleged incidents that may turn out to be unfounded.

Reporting incidents permits the Department and waiver agencies to study these incidents individually and collectively by county, by provider group and by other cohorts to determine risk factors for future incidents and to see if there are trends or patterns that can assist in incident prevention. The required incident reports are intended to be used for this purpose. The compilation and analysis of these reports is a waiver requirement.

Waiver agency staff should take special note that reporting incidents on this system to regionally-based Community Integration Specialists (CIS) or children's service Specialists for the CLTS waivers does not eliminate any other reporting requirements or affect deadlines including but not limited to child abuse reporting, adults at risk reporting, reporting to Caregivers Registry, and reporting to agencies that license adult (DQA) or children's provider agencies. All of these other required reporting procedures remain in force and are not affected, replaced or superseded by this process.

County reports shall be made on the required Incident Reporting form that can found in Appendix S of this Manual along with instructions. Reports should be made according to the specifications contained in that appendix. Any attachments such as police reports or other important documents should be either Faxed, mailed or delivered in some secure manner depending on the importance of the document, the urgency of the situation and whether the situation is still active.