

Looking Ahead: Self-Direction in 2021

December 17, 2020

Agenda

- What might the 2020 election results mean for self-direction?
- How might other national issues and events impact self-direction in the year ahead?
 - Pending Supreme Court decisions
 - Heightened focus on joint employment
 - EVV deadline on January 1st
 - Ongoing pandemic
- Questions & Comments

2020 Election & Implications for Self-Direction



Potential Actions Impacting SD Under President Biden

- What do Biden's campaign plans on disability and caregiving tell us about what he may support during his upcoming term?
- Realistically, what will Biden's Administration be able to implement?

Biden's Disability Plan: Self-Direction

Affirming the right of people with disabilities to self-direct services. Biden will encourage more states to allow older Americans and people with disabilities receiving long-term services and supports under Medicaid the option of self-directing their own home and community-based services, including the right to hire family members as support workers. He will direct the Administration for Community Living to identify best practices in self-direction and make them available to people who need them.

Biden's Disability Plan: Related Issues

- Ensure full inclusion of people with disabilities in policy development, including a senior position in the White House dedicated to disability community engagement and policy coordination.
 - <https://46disabilityjobopportunityproject.com/>
- Work with Congress to pass legislation ensuring adherence to the U.S. Supreme Court's Olmstead decision
- Support for efforts to provide people with disabilities alternatives to guardianship, including supported decision-making

Biden's Disability Plan: Related Issues

- Provide greater access to HCBS, including efforts to end institutional bias and to secure permanent reauthorization and investing in Money Follows the Person
- Invest in the direct care workforce, including increasing the minimum wage to \$15 per hour and provide federally-funded paid leave
- Supporting family caregivers, including working with Congress to ensure that paid family caregivers are able to earn credit towards Medicare and Social Security

Limitations to Implementation & Alternative Options

- Implementation of Biden's disability plan may be limited by the ongoing economic crisis and Senate opposition
- Options to exercise executive authority and take administrative action without Congress
 - Biden's goals for self-direction would not require Congressional involvement
- Opportunities at the state & waiver level to enact related changes with support from a Biden administration

Issues Impacting Self- Direction in 2021



Pending Supreme Court Decisions

- Affordable Care Act
 - ❑ Oral arguments in early November over the constitutionality of the individual mandate and the future of the Affordable Care Act in totality
 - ❑ How the Supreme Court will ultimately rule (likely in spring or summer 2021) is unknown. The discussion in oral arguments indicated the ACA will likely be upheld regardless of whether the individual mandate is found unconstitutional
 - ❑ We expect no impact on self-direction so long as the overall ACA is not overturned

- Medicaid Work Requirements
 - ❑ Oral arguments will likely take place in late winter or early spring 2021 to determine whether states can place work requirements on Medicaid programs
 - ❑ Regardless of the outcome, the population typically enrolled in self-direction programs are not subject to work requirements

Joint Employment

- Under the Biden administration, we expect to see heightened focus on joint employment under the Fair Labor Standards Act (FLSA), including greater enforcement
- The Department of Labor is expected to release new joint employment guidance replacing the previous joint employment rule promulgated under the Trump administration
 - Not yet known what this guidance will specifically include, but many indications it will be less friendly to employers and more friendly to employees than the Trump-era guidance
- Applied Self-Direction monitors joint employment updates on a daily basis and is available to assist your organization with joint employment concerns

Upcoming EVV Deadline

- Effective January 1st, 2021, the states that received a good faith effort exemptions will be newly subject to FMAP reductions if they fail to comply with EVV requirements
- Advocates continue to push Congress to delay penalties for states by withholding funding from CMS to implement the FMAP reductions until the expiration of the Public Health Emergency or earlier
- It remains unclear whether advocacy at the final hour will make an impact. States should assume the EVV deadline will not change and prepare to be compliant with EVV requirements as of January 1st

How will CMS assess penalties?

- FMAP reductions will be based “**only on the authority or authorities** for which the state has not implemented a compliant EVV solution”
- If states have implemented EVV only under specific authorities (e.g., in State Plan programs but not in waiver programs) or in only some of their existing 1915(c) waivers, “they may work with CMS to determine how to apply FMAP reductions in a more targeted manner if possible”

*Source: [Overview of Electronic Visit Verification \(EVV\) Implementation, CMS, 2020 HCBS Conference](#)

What does it mean to be fully compliant?

- Demonstrate that the EVV solution is:
 - Minimally burdensome
 - Inclusive of a stakeholder engagement process
 - Ensuring choice, in not limiting selection of providers or caregivers
 - Respectful of the manner in which care is delivered
 - Conducted in accordance with HIPAA privacy and security law
- “Require electronic verification of the six required data elements for all PCS visits within the applicable authorities in their state.”

*Source: [Overview of Electronic Visit Verification \(EVV\) Implementation, CMS, 2020 HCBS Conference](#)

COVID Implications: Budget Shortfalls & Stimulus Funding

- States are facing severe revenue losses with plans to reduce budgets by as much as 15 or 20 percent in fiscal 2021 and/or fiscal 2022.*
 - For the latest on budget cuts in your state:
<https://www.ncsl.org/research/fiscal-policy/state-actions-to-close-budget-shortfalls-in-response-to-covid-19.aspx>
- Negotiations continue as we speak in Congress on additional stimulus funding. Latest updates suggest stimulus will omit dedicated funding stream for state and local governments
- New proposal for [COVID HCBS Relief Act](#) would include a 10 percent FMAP increase to enhance HCBS.

COVID Implications: Maintenance of Effort

- Families First Coronavirus Response Act (FFCRA) includes a 6.2% FMAP increase. To be eligible, states must “maintain Medicaid eligibility standards, methodologies or procedures that are no more restrictive than what that state had in place as of 1-1-20” until the end of the PHE *
- New ‘Interim Final Rule’ from CMS would change how ‘maintenance of effort’ is defined, including potentially allowing states to make cuts to optional benefits including HCBS.
 - [Comment period on the Interim Final Rule](#) until 1/4/21
- Regardless of changes to maintenance of effort, the incoming Biden Administration would likely reverse course

*Source: CMS FFCRA – Increased FMAP FAQs (see p.4),
<https://www.medicaid.gov/state-resource-center/downloads/covid-19-section-6008-faqs.pdf>

Self-Direction is Resilient

- Self-direction has faced budgetary threats in past recessions. While some cuts have been made, **historically self-direction has been maintained**
- Prior economic downturns weren't caused by a pandemic. **COVID-19 has highlighted the many benefits of self-direction** making it less vulnerable to budget cuts (and may lead to further investment in some states)

COVID Implications: Medicaid Enrollment & Emergency Authorizations

- Medicaid enrollment has been surging in response to the pandemic and subsequent economic crisis
- Anecdotal reports of increased self-direction enrollment as an alternative to other LTSS
- States have allowed a variety of temporary flexibilities in response to COVID-19 via Appendix K, 1135s, etc.
 - In the coming year, states will begin to determine whether to make such changes permanent
 - ASD will be encouraging states to continue to allow for paid family caregivers, if they had not done so previously
 - CT, ME, and ND are already on record that they plan to continue allowing paid family caregivers to provide certain services *

*Source: <https://www.kff.org/report-section/state-medicaid-programs-respond-to-meet-covid-19-challenges-long-term-services-and-supports/>

COVID Implications: Renewed Focus on Rebalancing & Spotlight on Self-Direction

- There has been significant national attention on the risks of congregate care and increasing positive attention for home and community-based services (HCBS)
- Subsequently there has been renewed attention given to rebalancing efforts, including support from CMS for states to expand and enhance HCBS *
- The case for self-direction has never been stronger and we expect 2021 will afford continued opportunities to advocate for growth and expansion

*Source: <https://www.cms.gov/newsroom/fact-sheets/long-term-services-and-supports-ltss-rebalancing-toolkit-fact-sheet>

Questions & Comments

