September 20, 2013

Marilyn Tavenner
Administrator
Centers for Medicare & Medicaid Services
Department of Health and Human Services
Room 314G
200 Independence Avenue, SW
Washington, DC  20201

CC: Barbara Edwards

RE: Definition of Medicaid home and community-based services (HCBS)

Dear Ms. Tavenner,

The Center for Excellence in Assisted Living (CEAL) is a non-profit collaborative of eleven national organizations that represent a unique blend of key stakeholders in assisted living. CEAL promotes high-quality assisted living, serves as a convener to bring together diverse stakeholders to discuss and examine issues related to assisted living, helps bridge research, practice and policies that foster quality and affordability, and maintains an objective national clearinghouse of information and resources about assisted living.

The following national organizations comprise the CEAL Board of Directors:

- AARP
- Alzheimer’s Association
- American Assisted Living Nurses Association
- American Seniors Housing Association
- Assisted Living Federation of America
- Consumer Consortium for Advancing Person-Centered Living
- LeadingAge
- National Center for Assisted Living
- NCB Capital Impact
- Paralyzed Veterans of America
- Pioneer Network
We are writing to express our continuing concerns regarding the proposed definition of Medicaid home and community-based setting that, as proposed, would adversely impact assisted living residents from receiving Medicaid benefits under the home and community-based services waiver programs. Specifically, we have concerns that certain elements of the definition, as discussed below, would eliminate many assisted living communities that provide strong person-centered services from the definition of HCBS if implemented as written, potentially disadvantaging the estimated 139,000 assisted living residents who receive support from state Medicaid HCBS programs and under other Medicaid home and community-based services authorities.

The proposed definition of HCBS settings is of critical interest to CEAL members because CMS states in the rule that it is the agency’s intent to implement this definition across Community First Choice, 1915(i) state plan, and 1915(c) HCBS waiver programs. According to the 2010 National Survey of Residential Care Facilities conducted by the National Center for Health Statistics, 19 percent of the 733,000 assisted living residents use Medicaid to pay for at least a portion of their assisted living services and avoid more costly institutional settings.

**Rebuttable Presumption - Possible Exclusion of Alzheimer’s Care, Continuing Care Retirement Communities, and Multi-Level Campuses**

In the proposed Section 441.656 and Section 441.530, CMS states it will impose a "rebuttable presumption that a setting is not a home and community-based setting, and engage in heightened scrutiny, for any setting that is located in a building that is also a publicly or privately operated facility that provides inpatient institutional treatment, or in a building on the grounds of, or immediately adjacent to, a public institution, or disability-specific housing complex."

CEAL appreciates efforts by CMS to improve the previous version of the definition, which could have simply banned settings in proximity to institutions or those offering services targeted to a specific disability. However, the rebuttable presumption standard is still restrictive and could eliminate many important person-centered options for older adults and people with disabilities. In essence, this can prejudge settings including assisted living units in continuing care retirement communities, Alzheimer’s care facilities, and multi-level campuses as being institutional in nature. Such a presumption increases the risk of disqualification from the Medicaid program and could dampen investment in community-based settings willing to serve Medicaid beneficiaries, which already are in short supply in most states. Further, many married couples who chose housing options with varying levels of service in one location could be forced to either move or be separated if they rely on Medicaid funding.

The proposed rule already creates a set of requirements specific to provider-owned and controlled residential settings receiving HCBS funding, which effectively create heightened scrutiny for such settings. If such settings meet these criteria, it is unclear what additional evidence they must provide to qualify as a home and community-based setting by virtue of their location or whom they serve – therefore, we question the rationale and need for utilizing a rebuttable presumption for this determination. Thus, CMS should consider the impact of these and other issues in drafting the final rule in a way that will address the legitimate concerns
expressed by many disability groups while not creating barriers to innovative housing and service options that many elder consumers with and without disabilities have chosen.

**Shared Living Units**

The proposed definition specifies several conditions that must be met in a “provider-owned or controlled residential setting” in order to qualify as a home and community-based setting. One of these conditions is that “Individuals share units only at the individual's choice.”

Foundational elements of person-centeredness are privacy, autonomy, and choice. To fully realize these foundational elements, CEAL believes in private bedrooms. However, most states restrict room and board payments to levels that are woefully insufficient to support private bedrooms. CEAL believes that it would be counterproductive for CMS, in effect, to require single occupancy under Medicaid HCBS programs absent an additional funding source to pay for the additional cost. More than 40 states currently allow sharing of units to help fund room and board costs. According to research by RTI for the federal government, 46 percent of assisted living Medicaid residents live in rooms designed for more than one person. Requiring single occupancy without a viable funding source could dramatically reduce the supply of assisted living available to Medicaid beneficiaries. Under current law, Medicaid cannot provide matching funds to state to pay for room and board costs in HCBS settings.

CEAL recommends that CMS form a work group of appropriate stakeholders to determine a way to provide additional funding for room and board in assisted living settings. CEAL would be very interested in participating in this workgroup and facilitating it if you so choose.

CEAL also understands that CMS is considering reducing the ability of Alzheimer’s facilities to secure their boundaries and receive Medicaid funding. To ensure the health and safety of residents, communities offering care for residents of Alzheimer’s disease and others individuals with significant cognitive issues must have the ability to make sure they do not wander into potentially dangerous situations. It should be noted that the need for such precautions also exists when family members are caring for individuals with Alzheimer’s in private homes.

We appreciate your consideration of the above-noted concerns and stand ready to work with CMS in any way possible to ensure access to HCBS waiver programs for over 139,000 residents currently receiving Medicaid services. We note that CMS incorporated many of our recommendations from the prior comment period in the current revised definition of home and community-based settings and appreciate all that has been done to date to address our concerns. We support many elements of this definition, particularly those that emphasize the importance of person-centeredness in planning and delivering services. We also appreciate the recognition of the unique needs of individuals with Alzheimer’s and other dementias.

We understand that final language from CMS regarding this definition can be expected in the near future. Further, we have been made aware that some state Medicaid offices in some states have begun implementing the proposed definition of HCBS settings in their implementation of HCBS waiver programs.
We respectfully request the opportunity to meet with you in person to address our mutual concerns so that we can best serve the current and future needs of Medicaid recipients in assisted living.

Respectfully,

Josh Allen, RN, C-AL
Board Chair
Center for Excellence in Assisted Living

Karen Love
President
Center for Excellence in Assisted Living