



American Health Care Association

1201 L Street, NW, Washington, DC 20005-4046
Main Telephone: 202-842-4444
Main Fax: 202-842-3860 2nd Main Fax: 202-842-3924
Writer's Telephone:
Writer's E-Mail:
www.ahca.org

February 14, 2008

Gale Arden
Director, Disabled & Elderly Health Programs Group
Centers for Medicare & Medicaid Services
7500 Security Boulevard
Baltimore, MD 21244

Attention: Proposed rule implementing the Self-Directed Personal Assistance Services Program, Medicaid State Plan Option (Cash and Counseling) under Sec. 6087 of the Deficit Reduction of 2005 (DRA)

Sent electronically to <http://www.cms.hhs.gov/eRulemaking>

Dear Ms. Arden:

The American Health Care Association (AHCA) and the National Center For Assisted Living (NCAL) represent more than 10,000 non-profit and for-profit providers dedicated to continuous improvement in the delivery of professional and compassionate care for our nation's frail, elderly, and disabled citizens who live in nursing facilities, assisted living residences, subacute centers, and homes for persons with mental retardation and developmental disabilities. We are committed to performance excellence and Quality First, a covenant for healthy, affordable, and ethical long term care.

AHCA/NCAL supports the principle of empowering Medicaid recipients to exercise choice in selecting from an array of long term services and in arranging for service providers, and believes that self-directed personal assistance services (PAS) can be a viable choice for some seniors. However, we have some concerns with certain aspects of the proposed regulations.

PROVISIONS OF THE PROPOSED RULE

Sec. 441.460 – Participant Living Arrangements

AHCA/NCAL's principal concern is CMS' stated intent to exclude residents of assisted living facilities from participating in the self-directed personal assistance programs. In the preamble to Sec. 441.460, CMS notes that residential facilities may sometimes prohibit self-directed services for fear of duplication of services and further states that such a limitation "should be applied to individuals residing in assisted living facilities, as

THE AMERICAN HEALTH CARE ASSOCIATION IS COMMITTED TO PERFORMANCE EXCELLENCE AND QUALITY FIRST, A COVENANT FOR HEALTHY, AFFORDABLE AND ETHICAL LONG TERM CARE. AHCA REPRESENTS MORE THAN 10,000 NON-PROFIT AND FOR-PROFIT PROVIDERS DEDICATED TO CONTINUOUS IMPROVEMENT IN THE DELIVERY OF PROFESSIONAL AND COMPASSIONATE CARE FOR OUR NATION'S FRAIL, ELDERLY AND DISABLED CITIZENS WHO LIVE IN NURSING FACILITIES, ASSISTED LIVING RESIDENCES, SUBACUTE CENTERS AND HOMES FOR PERSONS WITH MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES.

Rick Miller
CHAIR

Avarere Health Services Inc.
Wilsonville, OR

Robert Van Dyk
VICE CHAIR

Van Dyk Health Care
Ridgewood, NJ

Angelo S. Rotella
IMMEDIATE PAST CHAIR

Friendly Home
Woonsocket, RI

Gail Clarkson
SECRETARY/TREASURER

The Medilodge Group Inc.
Bloomfield, MI

Neil Pruitt, Jr.
EXECUTIVE COMMITTEE LIAISON

UHS-Pruitt Corporation
Norcross, GA

Lane Bowen
AT-LARGE MEMBER

Kindred Healthcare
Louisville, KY

William Levering
AT-LARGE MEMBER

Levering Management Inc.
Mt Vernon, OH

Rick Mendlen
AT-LARGE MEMBER

Kenyon S. Shea & Associates
El Cajon, CA

Richard Pell, Jr.
AT-LARGE MEMBER

Genesis HealthCare Corporation
Kennett Square, PA

Kelley Rice-Schild
AT-LARGE MEMBER

Floridean Nursing & Rehab Center
Miami, FL

Leonard Russ
AT-LARGE MEMBER

Bayberry Care Center
New Rochelle, NY

Van Moore
DD RESIDENTIAL SERVICES MEMBER

Westcare Management
Salem, OR

Wade Peterson
NOT FOR PROFIT MEMBER

MedCenter One Care Center
Mandan, ND

Howie Groff
NCAL MEMBER

Tealwood Care Centers
Bloomington, MN

Toni Fatone
ASHCAE MEMBER

Connecticut Assn. of Health Care Facilities
East Hartford, CT

Gail Rader
ASSOCIATE BUSINESS MEMBER

Care Perspectives
Phillipsburg, NJ

Bruce Yarwood
PRESIDENT & CEO

we anticipate that the provider would both control the housing and be expected to provide the PAS.” AHCA/NCAL agrees that many assisted living facilities would not be interested in their residents receiving PAS; however, some assisted living facilities are open to having outside providers provide PAS services. We think that barring assisted living residents from participating in PAS programs outright in the regulations exceeds the statutory language, would be unnecessarily inflexible, and may unnecessarily constrain options available for Medicaid beneficiaries under the statute. (The DRA states that “self-directed personal assistance services may not be provided under this subsection to individuals who reside in a home or property that is owned, operated, or controlled by a provider of services, not related by blood or marriage.”)

There are several important reasons why CMS should not make the regulations overly rigid with regard to assisted living. First, the term “assisted living” encompasses a wide range of licensed facilities and providers, which, depending on state law and marketplace variation, can range from small home-like environments to campus-like settings that provide many levels of care. By barring all residents of facilities licensed as assisted living or residential care, CMS may inadvertently remove providers of care that could successfully provide services within the statutory intent of the PAS option and, thereby, take away beneficiary choice.

Second, the way that some states regulate assisted living may better fit the requirements of the statute than others. For example, in several states, including Connecticut and Minnesota, home health agencies are the licensed providers of services in assisted living facilities while the housing component falls outside the purview of assisted living regulation. (For more information on this regulatory approach, see “Assisted Living In Unlicensed Housing: The Regulatory Experience Of Four States,” Research Report, Bernadette Wright, AARP Public Policy Institute, April 2007.) Residents in such states tend to have stronger tenancy rights. In such states, PAS may well be a possibility as the housing provider may have little or no control over services, at least in some instances.

Third, some assisted living communities provide a “light” level of care and verge on being independent living housing. Certainly, residents in these settings should be provided the PAS option.

Fourth, residents of assisted living facilities often contract for services provided by caregivers from outside the facility. While it is true that many facilities want to coordinate such outside services to make sure residents receive needed care and to control liability, third-party care arrangements are common in assisted living. If residents and facilities come to agreement through a needs assessment process, service plans, or negotiated risk agreements about outside services, then residents should not be barred from the PAS option.

Fifth, some state Medicaid programs already include assisted living as an option under their cash and counseling programs. For example, New Mexico’s “Mi Via” program, which was implemented in November 2006, includes assisted living services as an option. Furthermore, New Mexico state officials are supportive of providing Medicaid beneficiaries with a wide range of options under the program including assisted living.

(For more information on New Mexico's Mi Via program, contact Guy Surdi, Mi Via program outreach coordinator, in the New Mexico Department of Aging and Long Term Services' Elderly and Disability Division, at 505-476-4731 or guy.surdi@state.nm.us.)

Rather than imposing an outright exclusion of assisted living in the regulations or their preamble, AHCA/NCAL recommends that CMS suggest that states follow the rule of reasonableness in crafting their PAS programs under the statutory language so that Medicaid beneficiaries can receive self-directed services in flexible ways that best meets their needs and choices.

Outright exclusion of assisted living also might signal a disturbing trend by extending the precedent of excluding or severely limiting the availability of assisted living as a choice for Medicaid beneficiaries – especially in the wake of CMS' decision in implementing the DRA's Money Follow the Person grant program in a way that significantly constrains the inclusion of assisted living. Assisted living is an important option for the frail elderly and assisted living providers strive to respect residents' privacy, independence, and dignity.

Sec. 441.464 – State Assurances

We agree with CMS' statement that it is important that individuals be made aware of feasible alternatives before enrolling in the PAS option. We fully agree that it is vital that Medicaid home and community based options, including assisted living, are available alongside the PAS option. To ensure that beneficiaries have an ample range of options, it is also important that they receive information about specific facilities, services, and programs that might be available to them outside the PAS program (not simply statements about general categories of care).

Section 441.476 – Risk Management

In response to CMS' request for input, AHCA/NCAL believes that criminal background checks should be mandatory for persons receiving PAS, their caregivers, and representatives. This is necessary both to ensure the safety of the consumer and as a protection against fraud.

Furthermore, state oversight of PAS programs should involve some sort of on-site oversight, including interviews of participants, care providers, and representatives. Information should be provided to all parties involved about access to the state long term care ombudsman and complaints should be investigated immediately and thoroughly by state officials.

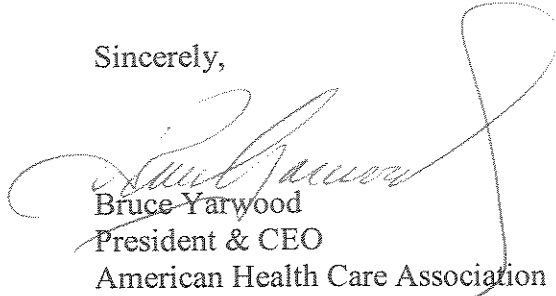
Section 441.480 – Use of a Representative

We agree with CMS that, in order to protect against conflict of interest, a participant's representative should be prohibited from also serving as a paid provider of PAS services to the participant.

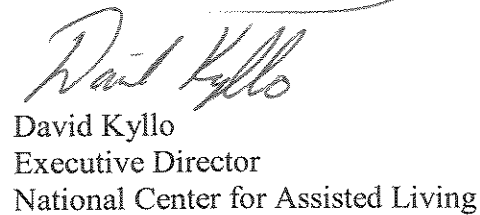
In conclusion, AHCA/NCAL believes that elderly Americans should have a wide range of options under the Medicaid program and that the PAS program should be implemented in a way that maximizes beneficiaries' ability to receive services that meet their needs and preferences in their setting of choice, including assisted living.

Thank you for this opportunity to comment. For more information, please contact Karl Polzer, Senior Policy Director, National Center for Assisted Living, at kpolzer@ncal.org or 202-898-6320.

Sincerely,



Bruce Yarwood
President & CEO
American Health Care Association



David Kylo
Executive Director
National Center for Assisted Living