



June 29, 2012

Barbara Edwards  
Centers for Medicare & Medicaid Services  
Department of Health and Human Services  
Attention: CMS-2249-P2  
P.O. Box 8016  
Baltimore, MD 21244-8016

**RE: CMS-2249-P2. Medicaid Program; State Plan Home and Community-Based Services, 5-Year Period for Waivers, Provider Payment Reassignment, and Setting Requirements for Community First Choice**

Dear Ms. Edwards,

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

CEAL appreciates the opportunity to comment on the proposed definition of a home and community-based “setting” as defined in section 441.530 of the Medicaid Program; State Plan Home and Community-Based Services, 5-Year Period for Waivers, Provider Payment Reassignment, and Setting Requirements for Community First Choice proposed rule, 77 Federal Register 26378, May 3, 2012, CMS-2249-P2. CEAL previously submitted comments on the definition of home and community-based settings in June 2011 in response to 1915(c) Medicaid Home and Community Based Services waiver proposed rules.

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.

CEAL appreciates the fact that many of our recommendations from the prior comment period were incorporated into the current revised definition of home and community-based settings. We support many elements of this definition, particularly those that emphasize the importance of person-centeredness in planning and delivering services. We specifically appreciate the recognition of the unique needs of individuals with Alzheimer’s and other dementias. However, we continue to have concerns that certain elements of the definition would eliminate many assisted living communities that provide strong person-centered services from the definition of HCBS if implemented as written, potentially resulting in the unintended effect of disadvantaging the estimated 139,000 assisted living residents who receive support from state Medicaid HCBS programs.

### **CEAL Recommendations and Discussion**

Provided below are the consensus recommendations of the CEAL Board of Directors, along with a discussion of the issues and our concerns.

#### **1) Support for Person-Centered Elements Included in the Definition**

CEAL applauds and strongly support the elements of the definition that emphasize the importance of a person centered approach in HCBS. Specific examples that we support include:

- “The setting is selected by the individual from among all available alternatives and is identified in the person-centered service plan”
- “An individual's essential personal rights of privacy, dignity and respect, and freedom from coercion and restraint are protected”

- “Individual initiative, autonomy, and independence in making life choices, including but not limited to, daily activities, physical environment, and with whom to interact are optimized and not regimented”
- “Individuals have the freedom to furnish and decorate their sleeping or living units”
- “Individuals have the freedom and support to control their own schedules and activities, and have access to food at any time”

**2) “Individuals share units only at the individual's choice”**

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 recommends that CMS form a work group of appropriate stakeholders to determine a method for ensuring that Medicaid waiver applications and renewals demonstrate how the state assisted living program ensures adequate reimbursement for private room occupancy (i.e., the state assisted living program does not restrict room and board payments to less than the cost of providing a private room and provides housing assistance as required). CEAL would be very interested in participating in this workgroup and facilitating it if you so choose.

**3) “The individual has, at a minimum, the same responsibilities and protections from eviction that tenants have under the landlord tenant law of the State, county, city or other designated entity”**

Another condition outlined in the definition for “provider-owned or controlled residential settings” is that “the individual has, at a minimum, the same responsibilities and protections from eviction that tenants have under the landlord tenant law of the State, county, city or other designated entity.”

- CEAL recommends replacing this with the following:

*Individual has a lease, residency agreement or other form of written agreement that includes the ability to appeal move-out decisions to an objective third-party. Reasonable accommodations are made both by the provider and the state to accommodate aging in place.*

*An appeal of a move-out decision should not prevent the move-out when there is a significant risk of harm to the resident, other residents, or staff. The appeal process will include nonpayment of fees unless the state has a demonstrated alternative process for addressing payment disputes. All appeals should be pursued expeditiously and should not take longer than 30 days.*

- CEAL strongly supports the right of assisted living residents to contest evictions and other move-out decisions in accordance with state assisted living regulations and other applicable federal, State, county, or city laws. However, we also recognize that situations may arise in which a significant risk of harm to the resident, other residents, or staff may necessitate an emergency move-out procedure. Examples of such situations include, but are not limited to, medical emergencies, worsening of medical conditions, and behavioral or psychiatric emergencies.

#### **4) CEAL Concerns about the “Rebuttable Presumption” That Certain Settings Are Institutional.**

In the proposed Section 441.656, CMS states it will impose a "rebuttable presumption that a setting is not a home and community-based setting, and will 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 prejudice 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 consumers with disabilities have chosen.

In conclusion, CEAL appreciates and supports CMS' efforts to implement expectations regarding person-centered care. We believe that adopting the CEAL recommendations provided herein will help to maintain assisted living as a viable option for individuals receiving home and community-based services. We look forward to continuing working with you on this important undertaking.

Sincerely,

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

Karen Love  
President  
Center for Excellence in Assisted Living