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June 10, 2011

Centers for Medicare & Medicaid Services  
Department of Health and Human Services  
Attention: CMS-2296-P  
P.O. Box 8016  
Baltimore, MD 21244-1850

***Re: Medicaid Program; Home and Community Based Services (HCBS) Waivers  
CMS-2296-P***

This letter is being submitted pursuant to the request for comments concerning CMS's proposed amendments to the current regulations implementing Medicaid home and community-based services waivers (HCBS) published in the April 15, 2011 *Federal Register*. The proposed amendments provide states the option to combine the existing three waiver targeting groups and convey expectations regarding person-centered plans of care, provide characteristics of settings that are not home and community-based, clarify the timing of amendments and public input requirements, and describe strategies available to ensure state compliance.

The Montana Health Care Association (MHCA) is an association of providers across the long term care continuum (skilled nursing, assisted living, and home care) - including assisted living residences that provide home and community based services under the Medicaid waiver. We understand and are interested in the entire long term care services continuum and support the right of all seniors at all income levels who need assistance to receive the services they seek in the setting of their choice.

***Terminology***

Assisted living services take many different names throughout the country, with each state setting its own terminology. In Montana, assisted living residences and communities are referred to in statute as "assisted living facilities" (ALFs) so this is the terminology we will use in these comments.

### ***I. Background - Home and Community-Based Settings***

While you indicate that the purpose of the waiver and the proposed amendments is: to allow states to offer services to “beneficiaries who otherwise would require services at an institutional level of care”; to assist states in meeting their obligations under *Olmstead* to serve individuals in the most integrated setting appropriate to their needs; and to “have access to the benefits of community living, what you are proposing is likely to in fact lead to more admissions of older persons to nursing homes and limit their ability to be served in an assisted living facility of their choice.

We appreciate your statement that “ALS for persons who are older, without regard to disability, would not be excluded from home and community based settings.” However, you then set out eight conditions that must be met, and these conditions will severely limit the ability of ALFs to serve clients under the waiver. Thus, our comments are directed at how your proposals affect individuals’ ability to choose an assisted living facility that is right for them - and to avoid premature admission to a nursing facility.

*ALFs come in all shapes, sizes and service packages.* ALFs in Montana offer a great deal of variety. Some of the ALFs are older residences (converted to meet requirements) and some are new more modern residences - with individual rooms and common areas. Others include “apartments” with kitchens. Some are rather elegant with chandeliers and fancy linens and some are less “showy”. Some of the larger facilities include amenities such as libraries/reading rooms, a billiards room, game rooms, and other spacious and specialized areas. Some include beauty shops and laundries. ALFs literally come in all shapes and all sizes and service packages.

*ALF characteristics were developed in the market place to offer desired choices.* The market place has shown us that individuals who have the money to pay for their own care - including in-home services - often choose to be in an assisted living facility - and that the assisted living facilities they choose cover a wide range of sizes and service options. Montana’s ALFs are overwhelmingly funded by individuals who pay for their own care. This means that all of these different types of residences have been developed in communities across the state to serve the needs and demands of the market place. The numbers, types and availability of ALFs certainly differ from community to community, with smaller communities having fewer and different choices - but that is the nature of life in a frontier state like Montana. Our ALFs are not “Medicaid” facilities - they represent community standards across the state.. It should be considered a desirable thing that those served by the Medicaid waiver would have the same array of choices available to those not on Medicaid.

*Waiver clients like having assisted living to choose from.* Assisted living is a very desirable service in the long term care continuum. In Montana, a recent look at those waiting for services under the waiver revealed that more than half of those waiting to be served were choosing assisted living.

*Assisted living helps individuals transition out of nursing homes.* In addition, Montana has initiated a “nursing home transition” program in which nursing home residents are reviewed to determine whether they can be served in a lower level of care. Each year, anywhere from 30 to 50 individuals transition from nursing homes to other settings. About half of those people need the level of services provided by assisted living. If the ability to choose assisted living were not part of the waiver, these individuals would remain in nursing homes.

We urge you to not make assumptions and place “one size fits all” restrictions on those served by the home and community based services waivers. Assisted living - in all of its varieties - is an important part of providing the long term care choices individuals need to be served in the least restrictive, most integrated environment.

***Individual has a lease.***

*Comments.* This language is unnecessarily restrictive and would eliminate all or nearly all of Montana’s ALFs from consideration as a choice for older waiver clients - contrary to your stated goal of allowing older individuals to choose this option. I am unaware of any ALF in Montana that operates under a lease arrangement. State law requires ALFs to have a “resident agreement” which is a contract that sets out the agreement between the parties for services, payment, etc. ALFs are also required to have a “service plan” for each resident which sets out resident abilities, choices, goals, risk issues, etc. This assures a person-centered approach for each individual. Individuals with more needs also have a health care plan which further individualizes the services provided.

*Recommendation.* Do not require a “lease”. Require a contract or agreement that sets out the terms and conditions of the arrangements between the individual and the ALF, including requirements outlined in state law.

***Setting is an apartment with individual living, sleeping, bathing and cooking areas, and individuals can choose whether to share a living arrangement and with whom.***

*Comments.* A large number of our ALFs do not and cannot meet this requirement. As stated above, our ALFs come in all shapes and sizes and have varying features - just like people’s homes. While some have apartment-style living, the vast majority do not. Many ALFs offer private rooms rather than apartments. While an individual toilet and sink area may be available, in some cases shower and bath areas are shared. Some ALFs also have double occupancy rooms and double occupancy apartments (2 bedroom). Again, we stress that individuals in communities all over Montana choose these settings when purchasing assisted living services privately. They choose according to their preferences and also according to what they can afford. This is why there are so many different types of ALFs. Another consideration is that in many communities in Montana an ALF that meets this requirement is simply not available - so individuals served by the waiver will lose assisted living as a choice or be forced to move to a community where there are ALFs that meet the requirement. In terms of cooking areas, for many ALF clients there are serious safety concerns in terms of having cooking equipment available. There are ways to assure privacy and choice without prescribing individual apartments with bathing and cooking areas.

*Recommendation.* Do not describe what the building looks like or its amenities. The HCBS waiver doesn’t even pay for room and board - but only for services. The availability of person-centered services is what is most important in defining a home and community based setting. Describe the components of person-centered services the most important of which is choice. Include language that assures that services are designed to meet the individual needs and preferences of the individual receiving them as well as reasonable opportunities for input, choices and privacy given the realities of a congregate living situation. Also include language that acknowledges that for some individuals, limitations may be appropriate for health or safety reasons. While individuals can and should be able to assume some risk, the safety of others is also important in a congregate living

situation. The individual's person-centered service plan provides the avenue to assure preferences, choices and needs are accommodated.

***Individuals have lockable access to and egress from their own apartments.***

*Comments.* This is a reasonable provision except in the case of those with Alzheimer's or other dementia, particularly as the disease progresses.

*Recommendation.* Include language that acknowledges that there can be exceptions made through the person-centered service planning process.

***Individuals are free to receive visitors and leave the setting at times and for durations of their own choosing.***

*Comments.* MHCA generally agrees with this provision. However, an exception should be made for those with Alzheimer's or other dementia with respect to leaving the facility without assistance or supervision. Again, this can be addressed in the person-centered service plan.

*Recommendation.* Include language that allows limitations with respect to leaving the facility unattended in the case of those for whom that would be a significant risk factor.

***Aging in place or allowing individuals to remain where they live as they age and or support needs change must be a common practice of ALS.***

*Comments.* We support this language but in Montana there are some limits under assisted living licensing statutes and regulations.

*Recommendation.* Add language: "...within the limits of state law and regulations."

***Leases may not reserve the right to assign apartments or change apartments.***

*Comments.* ALFs in Montana do not use leases but do have resident agreements that outline the responsibilities of the parties to the agreement (contract). Typically, these agreements do reserve the right to change apartments or rooms under certain circumstances. One circumstance is when the individual's condition or needs change. An example would be individuals in an apartment or room with a cooking area who can no longer cook for safety or other reasons specific to that individual, who would be moved to a unit without a cooking area. The other most common example occurs when residents move from a larger to a smaller apartment or room because they can no longer afford the larger apartment or room. This occurs whether people are paying for their own assisted living services or whether they are on Medicaid. It is not unusual for this to happen when an individual transitions from privately paying to Medicaid waiver payment. Medicaid waiver does not pay for a two bedroom apartment or the largest, most expensive room in the ALF - it doesn't pay for room and board at all; so it makes sense that when the individual can no longer pay for the larger room or apartment, they transition to a smaller one. The same circumstances exist for those who pay for their own care - when they can no longer afford the unit they are in, they transition to something they can afford.

*Recommendation.* This provision should be deleted. In the alternative, the language should be changed to account for changes made because of changes in the resident's needs and because of changes in a resident's finances such that they are no longer able to pay the agreed upon price for the unit they are in. Disclosures related to when a move might be necessary should be included in the resident agreement so individuals are aware at the time they move in that these changes may be necessary. The term "lease" should be changed to acknowledge other types of resident agreements.

***Access to the greater community is easily facilitated based on the individual's needs and preferences.***

*Comments.* We agree with this condition. ALFs offer an internal "community" and activities designed to specifically meet the needs and interests of their residents and encourage socialization, but are well aware that it is important to maintain ties to the outside community as well. Technology also can play a role in staying connected to family, friends and the community. The bottom line is that this is a reasonable condition.

***An individual's compliance with their person-centered plan is not in and of itself a condition of the lease.***

*Comments.* We agree that individuals have a right to make choices about their care and services, even choices that are not in their best interests. We believe that these issues can often be dealt with in risk agreements where the individual acknowledges awareness of potential consequences of their actions/choices but wish to assume the risk of those consequences. However, a line must be drawn when an individual's choices have the potential of putting others at risk or in danger. When individuals choose congregate living arrangements - and many older individuals do - they know that there will be occasions when the community good must prevail.

*Recommendation.* Language should address negotiated risk agreements and the ability of the ALF to assure the safety and well being of other residents. This should also be addressed in the resident agreement.

## ***II. Provisions of Proposed Regulations***

***Part 441 - Services: Requirements and Limits Applicable to Specific Services  
Subpart G - Home and Community Based Services: Waiver Requirements***

***Section 441.301 (b)(1)(i)(A) and (B) Person-Centered Planning Process and the Person-Centered Plan.***

*Comments.* We support these provisions for person-centered care and services.

***Section 441.301(b)(1)(iv)(A) - Located in a building that is also a publicly or privately operated facility that provides inpatient institutional treatment or custodial care; in a building on the grounds of, or immediately adjacent to, a public institution; or a housing complex designed expressly around an individual's diagnosis or disability, as determined by the Secretary; or (B)***

***Has qualities of an institutional setting, as determined by the Secretary.***

*Comments. We oppose these provisions.* The assumption is that home and community based settings cannot be located in or near a building that is part of a larger campus or provides institutional care, or a housing complex designed around an individual's diagnosis or disability. Waiver services are normally measured against institutional settings, more particularly hospitals and nursing homes. Our experience in Montana is that assisted living services under the waiver clearly allow individuals to delay nursing home placement and to transition from nursing homes into assisted living services. Thousands of people around our state choose this service and pay for it themselves. This is an accepted and sought after alternative to nursing home placement. Yet, as explained earlier, this service takes on many different faces - all designed to serve needs identified in our communities.

We actually have assisted living facilities that are "attached" to a nursing home but are newer than the nursing home, were built specifically for assisted living, offer private apartments and rooms, have their own living, dining and other common areas. The fact that there is a nursing home next door does not detract from the nature of the services offered. For some individuals there is comfort in knowing that a higher level service is close by if needed. For others, it allows a spouse to receive assisted living services in a setting that meets their needs and preferences, while being conveniently close to their spouse who may be in the nursing home. There are also campuses that offer a continuum of services from simply a place to live, to assisted living, to skilled nursing care. Again, people often choose these campuses for the very reason that higher levels of service are available - if or when needed. There is comfort in knowing that if they have to move, it won't be very far, and they will already know some of the administrative and other staff. As people age, convenience and safety can be of prime concern. The bottom line is that individuals CHOOSE these arrangements. Just because those of us who have not reached the age or condition of these individuals think we would prefer not to be anywhere close to an institutional setting, does not mean that the individuals who are choosing these settings are wrong or should be denied the opportunity to choose the setting they prefer. We should give them the greatest variety of choices possible rather than adopting regulations that limit their choices. In many communities in Montana, all of the different types of assisted living are available - large, small, campus, attached to nursing home, with apartments, with private rooms, with double occupancy rooms, etc. In other communities, the only assisted living services may be on a campus or in conjunction with a nursing home. People make choices about where to receive assisted living services and about whether they are willing to move to a different city or town to obtain services not available in their location. Isn't that what the waiver is about - people choosing what's best for them?

We believe the building and what it's "next to" doesn't matter. What matters is whether person-centered services are being provided and whether individuals can choose the setting that works for them.

Finally, these provisions will eliminate many of Montana's ALFs from being able to serve waiver clients - thereby limiting the choices afforded to Montanans seeking waiver services. In some communities, there may be no choices available.

We are also confused because in your discussion you indicate that "ALS for persons who are older, without regard to disability, would not be excluded from home and community based settings." Yet the conditions you provide exclude many if not most of our assisted living residences.

*Recommendation.* Eliminate subsections (A) and (B).

### ***Other General Comments***

***Payment issues.*** The HCBS waiver program pays only for services, but the Medicaid agency limits what can be paid for room and board. In Montana the limit is \$545 per month for room and board. The result, is that the low waiver payment combined with the low room and board payment creates some of the very issues you are trying to address in these rules - particularly related to double occupancy rooms and also the need to move to a smaller apartment or room when funding is reduced. Despite the fact that room and board is not a covered service under the waiver program, the state limits what ALFs can receive and also will not allow families to pay for a private apartment or a larger room or apartment. If the funding issues were resolved, at least some of the concerns expressed by CMS in terms of single occupancy, apartment-style living could be addressed. This wouldn't totally resolve the issues, because in some rural communities, those types of ALFs simply don't exist, and again, consumers sometimes choose other characteristics - but addressing the financial issues would certainly be helpful.

***The resident agreement and consumer-centered services.*** We strongly believe that the resident agreement and consumer-directed service planning are the key components of assuring services meet a reasonable standard for home and community based services. By requiring certain disclosures in the resident agreement, you can assure that consumers know prior to admission what to expect. Prior to admission, the consumer can look at various ALFs and weigh the advantages of each. If the ALF has policies about moving or any aspect of an individual's stay that the individual does not like, the individual can seek an ALF that is more to their liking. Full disclosure is an important part of consumer choice. If the consumer is aware of various policies and is not troubled by them, why would you limit their ability to choose a facility? Also, consumer-directed service planning is a way to assure that individuals have appropriate input and choices about all aspects of their life in an ALF and about all aspects of services provided.

In closing, we are concerned that your efforts to improve the waiver program might actually have the unintended consequence of reducing choice - for those waiver clients - largely older individuals - who need and want the services provided in assisted living facilities. We urge you to maintain the broadest possible choices for the seniors we serve, including those served under Medicaid waivers.

Thank you for the opportunity to comment.

Sincerely,

Rose M. Hughes  
Executive Director