THCA TENNESSEE HEALTH CARE ASSOCIATION
TNCAL TENNESSEE CENTER FOR ASSISTED LIVING

June 13, 2011

Donald Berwick, M.D., Administrator
Centers for Medicare & Medicaid Services
U.S. Department of Health and Human Services
Attention: CMS-2296-P
P.O. Box 8016
Baltimore, MD 21244-1850

Re: File Code CMS-22296-P, Medicaid Program: Home and Community-Based Services Waivers Proposed Rule, 76 Federal Register, April 15, 2011

The Tennessee Health Care Association and Tennessee Center for Assisted Living is a statewide nonprofit trade association representing more than 260 providers of long-term care services, including many who provide home and community-based services (HCBS) to Medicaid beneficiaries. Our mission is to empower members to excellence in quality through advocacy, education, resources and support. We are the Tennessee affiliate for the American Health Care Association and the National Center for Assisted Living (AHCA/NCAL). As the largest long-term care trade association in Tennessee, we would like to outline our concerns over the above mentioned proposed rule.

In our review of the proposed regulations, we have identified several provisions that, if implemented, would prevent a significant number of low-income individuals from receiving HCBS from their provider of choice. By creating new definitions of what constitutes a HCBS setting and thus eliminating important patient choices of care setting, this rule contradicts the essence of enhanced person-centered care. To arbitrarily create limited access, prevent true patient choice and purposefully interrupt the concept of a "continuum of care complex" is simply bad public policy.

Issue: Setting restrictions on venue only restricts participant choice
The greatest concern we have is the regulations as proposed could significantly limit the choices available to consumers through the use of adjacency restrictions that would limit the campus approaches to the spectrum of care:

441.301(b)(1)(iv) "...that HCBS settings: must be integrated in the community; provide meaningful access to the community and community activities, and choice about providers, individuals with whom to interact, and daily life activities. A setting is not integrated in the community if it is: (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,

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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. In the background section "Such qualities may include regimented meal and sleep times, limitations on visitors, lack of privacy and other attributes that limit individual's ability to engage freely in the community."

We believe that any definition of HCBS settings applied across the Medicaid program **should include** assisted living communities, group homes, and nursing facilities. From the language quoted above, it appears that any services originating from establishments that are located in or next to an assisted living or nursing facility could be excluded from receiving Medicaid HCBS payments. This definition could have dire consequences to the current operation of how home and community-based services programs function as well as a negative impact on the consumers who rely on HCBS today and into the future. Examples include, but are not limited to, respite care, adult care homes (or specialty units) and adult day care.

Frequently the campus models are lauded for their ability to allow for "aging in place" and to recognize circumstances where family members want to stay close together yet may have significantly different care and service needs. Proximity of an HCBS setting to an institutional setting or disability-specific housing complex has little, if any, bearing on the degree of community integration experienced by HCBS residents. In fact, geographic separation should not matter if a residence is well-integrated with the larger community through transportation services combined with in-house and off-site programming.

Issue: Limiting access to specialized care

Many states have specific options that offer housing designed expressly around an individual's diagnosis or disability. These small, community-based settings provide specialized care and treatment for those inflicted with complicated or progressive diseases. Restricting access to this specialized care for those receiving Medicaid payments due to this definition is unfair and certainly removes these desired settings from consideration. We hope that the intent of your proposed rule language would not be to limit these programs only to non-Medicaid individuals.

Issue: Eliminating assisting living communities as an option

As a general rule, all of the conditions listed below are an attempt to restrict assisted living participation from the HCBS waiver programs. Again, this reduces the individual participant's choice. Additionally, some of the requirements could present safety issues for participants, such as the presence of a stove and other cooking utilities when the tenant has dementia. How are all of these conditions compatible with person-centered plan, aging in place, or the efficiency of services? In addition, the lack of specific guidance to these conditions makes it is impossible to determine what is excluded or not excluded.

"For the purposes of this regulation, we note that ALS (assisted living settings) for persons who are older, without regard to disability, would not be excluded from home and community-based settings when the following conditions are met:

• Individual has a lease.

• 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.
• Individuals have lockable access to and egress from their own apartments.
• Individuals are free to receive visitors and leave the setting at times and for durations of their own choosing.
• 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 the ALS.
• Leases may not reserve the right to assign apartments or change apartment assignments.
• Access to the greater community is easily facilitated based on the individual's needs and preferences.
• An individual's compliance with their person-centered plan (in the event that the individual has shared his/her plan or the landlord is also the provider of services) is not in and of itself a condition of the lease."

Issue: Any willing/qualify provider
We believe that the rule contains conflicting language in the background section of the proposed rule and the "any willing provider" language below. The rule, as written, will restrict the ability of individuals to obtain services from any willing/qualified providers, especially in rural communities where there is already a limited choice of providers.

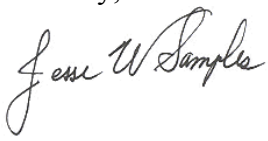
"In addition, we note that this proposal in no way preempts broad Medicaid requirements, such as an individual's right to obtain services from any willing and qualified provider of a service."

We recommend that the Centers for Medicare & Medicaid Services (CMS) look at the models of delivering care as well as the regulations of each individual state that allowed or helped build the models of care prior to finalizing these rules. One size does not fit all.

Conclusion: Bad public policy
Choice of provider by the participant is paramount to the functioning of any home and community-based services program. The proposed rule as written, and in concept, would limit choices and reduce availability of services.

Thank you for the opportunity to comment on this proposed rule.

Sincerely,



Jesse W. Samples
Executive Director

Cc: Mark Davis, President, THCA Board of Directors
David Kyllo, National Center for Assisted Living
Darin Gordon, Deputy Commissioner, TennCare