



August 20, 2009

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

Re: File Code CMS-2296- ANPRM (Concerning the Medicaid Program Home and
 Community Based Services (HCBS) Waivers)

President To Whom It May Concern:

Patricia A. Polansky
 New Jersey

On behalf of the National Association of State Units on Aging (NASUA), I am submitting the following comments in response to the Notice published in the *Federal Register* on June 22, 2009, concerning the merits of providing States the option to combine or eliminate the existing three permitted waiver targeting groups, and on the most effective means to define home and community.

1st Vice President
 Irene Collins
 Alabama

2nd Vice President
 James Toews
 Oregon

NASUA represents the 56 officially designated state and territorial agencies on aging. Many of our members serve as the operating agency in their states for Medicaid home and community based services (HCBS) waivers that serve older adults, and in some cases, individuals with disabilities.

Secretary
 Carol Sala
 Nevada

Option to Combine or Eliminate the Existing Three Permitted Waiver Targeting Groups
 NASUA supports the CMS goal of providing more flexibility to the States in their administration of HCBS waivers, however, we think it is important to recognize that each State functions in a different environment and incurring the administrative burden and cost of combining waivers may not be in the best interests of the populations served.

Treasurer
 Charles D. Johnson
 Illinois

Many states operate different waivers within different departments that have the expertise to serve the targeted population. For example, the needs of individuals with developmental disabilities are vastly different from those with physical limitations. As a result, most states do not serve the two populations in the same state agency. In contrast, older adults and physically disabled are often served through the same state agency.

Past President
 Kathy Leitch
 Washington

Where existing arrangements and agreements with the State Medicaid agency are working effectively, they should be allowed to continue. For this reason, we appreciate that the stated intent of the future proposed rules is to make this design approach **optional**.

Another concern related to combining target groups is the impact such consolidation could have on waitlists. Many of our members are concerned that a combined statewide waitlist could disadvantage elders who often come into the long term care system in crisis and may not stay in the system very long.

CMS requested specific input on various aspects of the proposed change, including facilitating compliance with the ADA and facilitating a more needs-based service system. NASUA believes for the many States that have practiced person-centered planning for many years, it would make no difference, nor has the current regulatory scheme necessarily been a barrier to ADA compliance or person-centered planning.

Home and Community Based Characteristics

NASUA's members are concerned about the proposal to define home and community based characteristics in federal regulation. We strongly believe this is something that should be left to the States to determine within the context of their own conditions, demographics, and geography. Moreover, we are concerned that any attempt CMS makes to define these standards by, for example, establishing minimum criteria such as what is set forth in the ANPRM that will trigger further evaluation, could have a chilling effect on States' ability to design truly person-centered settings. Rather than increasing choice, we believe that such criteria could reduce it because providers would likely choose to develop only those settings that would not trigger a more extensive and detailed compliance analysis. States would likely be quite reluctant to expend resources to support settings that did not comply strictly with the criteria set forth in the ANPRM, if it is ultimately adopted. The uncertainty of the result of further analysis would have the unintended effect of reducing options and choice.

Another issue with the approach CMS has taken is that it does not seem to reflect the diversity of client need among the populations that could be combined under the first part of the ANPRM. A frail older adult has different needs than a developmentally disabled person in her 20s. For example, an assisted living facility that permits an older adult to socialize with peers yet maintain some independence would likely not pass muster under CMS' proposal because in many of these facilities the landlord and the provider would be the same. Such an arrangement is more cost-effective, but would be discouraged under CMS' proposed approach. Further, if landlord and provider are required to be separate entities, it may be difficult to ensure accountability for functions that impact the quality of resident care.

In contrast, an assisted living facility targeted at the needs of older adults is most likely not a sufficiently integrated community setting for a younger developmentally disabled individual. The concepts set forth in the ANPRM appear to be more heavily focused on the needs of the developmentally disabled at the expense of older adults. Many of NASUA's members serve both populations and are concerned that any attempt by CMS to define home and community characteristics could have the unintended effect of not

only limiting individual choices, but could result in the dismantling of settings that are currently in use and satisfying client needs.

We think that different regions of the country should be permitted to develop their own standards for defining a community which are appropriate for their states. We are concerned that CMS' attempt to do this would have to be necessarily vague. Such standards could foster a climate for litigation over subjective views of what constitutes a home and community based setting. We are also concerned that the imposition of residential-size limits may also have unintended consequences on the workforce. If there is a low federal standard for residence size, the challenges of ensuring there are sufficient workers to meet the need may be exacerbated.

While we certainly applaud CMS' effort to support the States' efforts to provide services in home and community based settings appropriate to client need, we think that such support does not have to take the form of regulation in this instance. NASUA certainly is interested in participating in any stakeholder group CMS may convene around these issues.

Should you have any questions, please contact Martha Roherty, NASUA Executive Director 202-898-2578.

Sincerely,



Martha Roherty
Executive Director

cc: NASUA Members