



April 25, 2011

Centers for Medicare and Medicaid Services  
Department of Health and Human Services  
Attention: CMS-2337-P  
Mail-Stop C4-26-05  
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Dr. Berwick,

The National Association of States United for Aging and Disabilities (NASUAD) is pleased to offer comments on the Centers for Medicare and Medicaid Services (CMS) proposed rule for the Community First Choice Option (CFCO) as authorized under Affordable Care Act (ACA), Section 2401. The Association's comments are organized by proposed rule section.

Briefly, NASUAD's key CFCO priority comment areas include program eligibility with an emphasis on functional eligibility, service delivery setting, scope of available enhanced Federal Medical Assistance Percentage (EFMAP), and clarification on a variety of elements including the role of relatives in the development in a person-centered plan. The Association also offers recommendations for subsequent guidance including how Medicaid Managed Long-Term Care (MMLTC) arrangements should be incorporated into CFCO State Plan Amendment submissions as well as in CFCO-related reporting.

## Background

NASUAD was founded in 1964 under the name National Association of State Units on Aging (NASUA). In 2010, the organization changed its name to NASUAD in an effort to formally recognize the work that the state agencies were undertaking in the field of disability policy and advocacy. Today, NASUAD represents the nation's 56 state and territorial agencies on aging and disabilities

and supports visionary state leadership, the advancement of state systems innovation and the articulation of national policies that support home and community based services for older adults and individuals with disabilities. The Association’s mission is “to design, improve, and sustain state systems delivering home and community based services and supports for people who are older or have a disability, and their caregivers.

### **NASUAD Comments**

Below, NASUAD provides comments by proposed rule sections. We conclude with general recommendations for subsequent CMS guidance.

#### **Section 441.500 Basis and Scope.**

In general, the proposed rule should allow for different “benefit” packages for people with different needs. Examples include populations such children versus adults and young adults versus older adults, benefits and the nature of such benefits in relation to the target population (i.e., habilitation packages may be different for people with developmental disabilities than people who are over 65). NASUAD recommends the addition of language indicating that states may define the services subject to approval by the Secretary.

#### **Section 441.505 Definitions.**

NASUAD offers several comments in the definitions section as well as recommendations for language consistency both within the proposed rule as well as among other CMS rules.

- *Agency-Provider Model* – In the proposed rule, CMS includes a definition of “agency-provider model”. However, in Section 441-545, CMS uses the term “agency model.” The defining language for the two terms appears similar but it is unclear if the terms are synonymous. NASUAD recommends that CMS use either one term if the implied framework is one agency service delivery approach or use two terms and develop two definitions. The current construction is ambiguous.
- *Backup Systems and Supports* -- The proposed rule states that backup systems and supports means electronic devices used to ensure continuity of services and supports and may include pagers, personal emergency response systems, and other mobile communication devices. To assure consistency with other home and community-based services programs and to allow states to define services we recommend adding, “as defined by the State and approved by the Secretary”.
- *Instrumental Activities of Daily Living (IADL)* – The proposed rule broadens the definition of IADLs from the definition in the State Medicaid Manual. We recommend returning to the IADL definition in the Medicaid

Manual.<sup>1</sup> If the proposed definition is incorporated in the final rule please clarify what is meant by “traveling around and participating in the community.”

### **Section 441.510 Eligibility.**

First, we request clarification about whether states are required to provide Community First Choice services to those individuals described in sub paragraph (b)(3) (waiver participants) or whether coverage of this group is optional.

Second, the section addresses CFCO financial eligibility as well as functional eligibility for individuals with an income over 150 percent of FPL. Functional eligibility for the over 150 percent group is defined as eligible for nursing facility services under the state plan. Please clarify that the state may determine functional eligibility for individuals with income equal to or less than 150 percent of FPL using a state selected or developed assessment tool that includes required CMS elements.

Third, in order to align with the 1915(c) waiver option of receiving services on a less than monthly basis, we recommend the following additional language to (b)(3): “is receiving at least one home and community-based waiver service per month or monthly monitoring when services are furnished on a less than monthly basis.” The language parallels both options available to states under 1915(c) waivers when determining the minimum frequency waiver services may be provided.

### **Section 441.515 Statewideness.**

We recommend deleting sub paragraph (c), “In a manner that provides the supports that the individual requires in order to lead an independent life.” The language is overly broad. If CMS elects to leave such language, NASUAD recommends defining such supports in Section 441.520, Required Services.

### **Section 441.520 Required services.**

To assure consistency with other home and community-based services programs and to allow states to define services we recommend adding the following language to sub paragraph (a) “If a State elects to provide the Community First Choice Option, the State must provide all of the following services as defined by the State and approved by the Secretary.”

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<sup>1</sup> The State Medicaid Operations Manual Section 4480 (c) Personal Care Services indicates that IADLs capture more complex life activities and include personal hygiene, light housework, laundry, meal preparation, transportation, grocery shopping, using the telephone, medication management, and money management.

Additionally, NASUAD recommends that CMS clarify what is meant by “health related tasks.” State Nurse Practice Acts vary greatly and have very specific requirements regarding what types of health related tasks may be delegated and/or overseen by licensed medical professionals, such as registered nurses, and which must be delivered by such professionals. Furthermore, NASUAD requests that CMS add language acknowledging that the scope of health related tasks may vary by state. Health services that are not delegated under a state Nurse Practice Act or in states without nurse delegation, such services would have to be delivered under state plan home health or waiver skilled nursing benefits.

#### **Section 441.525 Excluded services.**

First, we are unable to locate 441.520(a) 5 referenced in sub paragraph(c). Second, in the preamble as well as in the proposed rule, NASUAD request that CMS clarify whether cell phones, hand-held communication devices, such as smart phones, and computers that allow participates to communicate with providers of “home and community-based attendant services” would be allowable expenditures.

#### **Section 441.530 Setting.**

We agree with the intent to exclude settings which provide institutional care. However, to ensure participant independence and choice in residential settings that meet the unique needs and preferences of each individual, regardless of age, type or nature of disability we recommend that subparagraphs (d) and (e) be deleted. However, should CMS elect to retain such language, NASUAD has two specific recommendations. First, subparagraph (d)’s reference to “custodial care” – depending on how it is defined - could preclude individuals who live in any building that provides assistance with activities of daily living (a federal definition of custodial care) from receiving CFCO services. In order to prevent inadvertently excluding individuals who choose to receive HCBS services in community based residential settings we recommend removing the words “custodial care” from sub paragraph (d).

Second, subparagraph (e) includes the following phrase, “on the grounds of or immediately adjacent to.” Such language could prevent the provision of CFC services in numerous settings that happen to be located near senior housing, including housing with services. The reference to “designed expressly around an individuals’ diagnosis” could refer to Alzheimer’s care, thus prohibiting CFC services to be provided in a building that happens to be nearby a setting that offers such care. While NASUAD strongly recommends that CMS strike subparagraph (e), should CMS choose to retain it, the Association urges CMS to clarify instances in which subparagraph (e) would not apply.

**Section 441.535 Assessment of need.**

First, the preamble, CMS states the following, “the assessment should include a determination of whether there are any persons available to support the individual, including family members. These persons may be able to provide unpaid personal assistance ....” Inclusion of such language in the preamble implies that CFCO includes a waiver of comparability as found at Section 1915(j)(3). NASUAD has been unable to identify a corresponding provision in ACA Section 2401 or in the proposed Section 1915(k) rule. The Association requests that CMS clarify whether such a waiver of comparability is intended and add language authorizing such a waiver. Second, while the preamble clearly indicates that the CMS will not dictate the assessment tool, related to our eligibility points, above, NASUAD requests that CMS clarify in the rule that states may design and/or select the assessment tool to determine functional eligibility as well as identify needed services long as such tools contain the required CMS elements (see below).

Second, again in the preamble, indicates that the Agency is “working to determine universal core elements to include in a standard assessment for consistency across programs.” NASUAD members have long struggled with the development of universal assessment tools. As discussed in our comments related to Section 441.500, NASUAD requests that CMS recognize in its universal core elements development process that core elements likely will vary by population and that, rather than specific elements, CMS develop domains. Within broad universal domains that cut across programs and population, program and/or population specific elements could be developed. Additionally, NASUAD urges CMS to convene a meeting of stakeholders to discuss CMS’ vision and the viability of universal core domains with elements that might vary by population and program.

Finally, the Association requests that in subparagraph (b), CMS substitute the word ‘requires’ with the words “would benefit from” the Community First Choice Option services.

**Section 441.540 Person-centered service plan.**

First, Sections 441.535 and 441.540 imply that two separate meetings will be held, one to assess the individual’s needs, strengths, and preferences and the second to develop the service plan through a person centered planning process. We recommend that the proposed rule reflect the ability to combine these meetings.

Second, in order to adequately assess for environmental as well as health and safety needs, states must be allowed to require the face to face meeting be held in the participant’s place of residence. We recommend deleting the words “and locations” from sub paragraph (a)(3).

Third, subparagraph (b) (2) refers to the “person-centered functional assessment.” We recommend changing the language in sub paragraph (b) (2) to: “Reflect clinical and support needs as identified through a functional assessment.” In general we recommend that Section 441.540 more clearly reflect the distinction between the assessment of functional need and the person centered service plan.

Forth, we recommend that the language in subparagraph (b) (6) be changed to: “Be distributed to all individuals and providers responsible for its implementation and signed by all parties within 30 days of the development date.” Requiring all provider signatures at the point of development will delay services.

Fifth, we recommend that the language in sub paragraph (b) (7) be changed to: “Be understandable to the individual receiving services and/or the individual’s representative.”

Sub paragraph (4) (i) through (iv) prevent relatives, guardians and others from participation in the person centered service plan. This appears to be in conflict with sub paragraph (a)(1) in the same section which allows the person to choose who participates in the service planning process. We recommend that the words “and service plan development process” be removed from sub paragraph (c) (4) and in the same paragraph change the language to: “At a minimum, these standards must ensure that the individuals or entities conducting the assessment of need are not:” ....

#### **Section 441.545 Service models.**

*No Comments*

#### **Section 441.550 Service plan requirements for self-directed model with service budget.**

We recommend adding the following language to sub paragraph (d) (1): “Determining worker duties as identified in the approved self directed service plan and within the scope of Community First Choice services.”

#### **Section 441.555 Support System.**

First, NASUAD requests that CMS clarify its vision for ensuring development of a conflict free support system as alluded to in the preamble discussion of the service plan; the proposed rule contains no such language or guidance. Second, to avoid conflict with standard language referring to contracts we recommend substituting the word ‘plan’ for the word ‘agreement’ in sub paragraph (2) (xi): “Development of risk management plans.”

#### **Section 441.560 Service budget requirements.**

First, the proposed wording in subparagraph (3)(i) refers to ‘the procedure for an individual to freely change the budget.’ To clarify the rights of the individual we

recommend the following wording be substituted: “The procedure for an individual to freely adjust the amounts allocated to specific services and supports within the approved service budget.

Second, we recommend that health and safety be added to the wording in sub paragraph (c): “The State must have procedures in place that will provide safeguards to individuals when the budgeted service amount is insufficient to meet the individual's health and safety needs.”

**Section 441.565 Provider qualifications.**

NASUAD requests that CMS clarify whether legally responsible relatives will remain excluded from the definition of family members who are permitted to provide Community First Choice attendant services and supports in sub paragraph (b).

**Section 441.570 State assurances.**

In subparagraph (c)(4), CMS indicates that a state must assure that all applicable provisions of federal and state law are met including those related to “occupational health and safety.” Since the majority of CFCO services will be delivered under person-centered plans and primarily in persons’ residences, please clarify how CMS envisions states ensuring compliance with OSHA requirements if that is the intent. If compliance with OSHA requirements is not the intent please clarify what is meant by “occupational health and safety.”

**Section 441.575 Development and Implementation Council.**

As CMS is aware, state resources are strained. Please clarify whether existing bodies, such as Money Follows the Person (MFP) advisory bodies or subgroups of an MFP advisory entity, or any other advisory group focused on HCBS expansion could also serve as CFCO development and implementation councils.

**Section 441.580 Data collection.**

First, we request clarification as to what is meant by “type of disability” in subparagraph (c) and subparagraph (e) “data regarding how the state provides [CFCO] and other home and community-based services.”

Second, please clarify whether the requirement in subparagraph (d) to report the specific number of individuals who have been previously served under sections 1115, 1915(c) and (i) is intended to include those individuals served concurrently under sections 1115, 1915(c) and (i) or just those who are no longer accessing personal care services under those authorities and now are accessing only Community First Choice services.

### **Section 441.585 Quality assurance system.**

On January 19, 2011, in collaboration with the National Association of State Directors of Developmental Disabilities Services (NASDDDS), NASUAD transmitted a letter expressing concern about CMS direction regarding Section 1915(c) HCBS quality improvement requirements. Please clarify how CMS' expectations regarding Section 1915(k) quality assurance are similar or dissimilar to Section 1915(c) quality improvement with specific attention paid to individual outcome measures and remediation activity level of detail.

### **Section 441.590 Increased Federal financial participation.**

CMS stipulates that increased federal financial participation is available for "home and community-based attendant services." However, CFCO includes an array of other operational requirements including support systems, person centered planning mechanisms (i.e., Fiscal Management Services (FMS) entities) and notable quality assurance and reporting requirements. NASUAD requests that CMS clarify whether increased federal financial participation is available for activities that support the delivery of "home and community-based attendant services" in context of CFCO requirements.

### **Other Comments**

As noted above, in addition to comments on specific sections, NASUAD has an array of additional questions and requests:

- *Information Collection Requirements (ICRs)* – In the preamble, CMS describes its time estimates for various CFCO activities such as assessment of need and service plan development. NASUAD strongly recommends that CMS revisit these estimates and would welcome the opportunity with other stakeholders to offer guidance to CMS. For example, CMS has estimated one hour for the face-to-face assessment. Association member experience indicates an estimate of at least two hours for just conducting the face-to-face assessment. Such an estimate does not include travel time to and from the residence nor the necessary time to analyze the information. Additionally, CMS estimated two hours to develop and finalize a service plan. Member state agency experience shows that approximately two hours is needed to develop the plan with an additional two hours, at a minimum to finalize the plan.
- *Medicaid Managed Long-Term Care (MMLTC)* – Many states currently are operating or are exploring MMLTC arrangements. NASUAD requests that CMS provide guidance on how MMLTC states or states interested in MMLTC should collect data for a CFCO application as well as for reporting both financial and quality assurance. Specifically, CMS should address how CFCO requirement interact with subcapitation arrangements and plan quality requirements.

- *Appeals* – In Section 441.540, CMS describes the requirements for service plans including a requirement that states have “strategies for solving conflict or disagreement within the process, including clear conflict of interest guidelines for all planning participants.” Additionally, in Section 441.555, subparagraph (b)(2)(xiv), CMS requires that participants be provided “information about an advocate or advocacy systems ... and how [they] can access [such] systems.” However, CMS does not discuss CFCO appeals processes in the proposed rule. Please clarify CFCO appeals processes and relations with the two provisions noted above.

Again, NASUAD looks forward to working CMS on making CFCO as attractive as possible to states that choose to pursue ACA provisions. Questions regarding NASUAD comments should be directed to Lindsey Copeland, Director of Federal Policy and Legislative Affairs, at [lcopeland@nasuad.org](mailto:lcopeland@nasuad.org) or Mike Cheek, Senior Director for State Services, at [mcheek@nasuad.org](mailto:mcheek@nasuad.org). Alternatively either may be reached at (202) 898-2578.

Sincerely,

[Transmitted Electronically]

Martha A. Roherty,  
Executive Director