



June 15, 2012

By Electronic Mail and U.S. Mail

Ms. Marilyn Tavenner
Centers for Medicare and Medicaid Services
Department of Health and Human Services
Attention: CMS – 2249-P2
P.O Box 8016
Baltimore, MD 21244-8016

RE: File Code CMS-2249-P2

Federal Register May 3, 2012 Proposed Rule

Definition of Home and Community-Based Setting in the Community First Choice Option Final Rule and Applications to Other Home and Community- Based Services Programs

Dear Ms. Tavenner,

The Assisted Living Federation of America (ALFA) is the largest professional association representing professionally managed, appropriately licensed person centered senior living communities, and the residents and families they serve. Our members operate independent living, assisted living, and memory care communities. Those that operate assisted living and memory care are licensed and regulated in every state. According to the 2010 National Survey of Residential Care Facilities conducted by the National Center for Health Statistics, there are 733,000 residents living in 31,100 licensed assisted living communities nationwide.

We appreciate the opportunity to comment on the above referenced regulations, however we will only be commenting on the sections that refer to the definition of a home and community-based setting. It is critical for ALFA to comment because the proposed rule states that CMS wants to align language pertaining to what constitutes home and community-based settings across Community First Choice, 1915(i) and 1915(c) HCBS state plan and waiver programs.

ALFA submitted comments on the definition of home and community-based setting in August 2009 on the 1915(c) Medicaid Home and Community Based Services waiver Advanced Notice of Proposed Rulemaking and again in June of 2011 on the Proposed 1915(c) Rules. This waiver is of critical importance to ALFA and our members because 48 states participate in this waiver. In these states, 139,000 elderly residents who call assisted living their home rely on this waiver program to avoid more costly institutional settings.

First and foremost, we would like to thank you for taking many of our recommendations in the prior two comment periods and incorporating them into the revised definition of home and community-based setting included in this proposed rule. The new definition supports the importance of providing person-centered planning and care as well as supporting each individual's rights to live with dignity, privacy, and independence. These principles are the cornerstone of the assisted living philosophy and mission, and are embraced by all ALFA



members. We appreciate CMS' recognition of the special needs of individuals with Alzheimer's and other dementias as well as the flexibility provided to meet those special needs.

Finally, we appreciate and echo the sentiment expressed recently by CMS that *"while it is not practical to create one singular definition that encompasses all settings that are home and community-based, with this rule we propose quality principles essential in determining whether a setting is community-based."*

I. Home and Community-Based Services Provided in the Community, Not in Institutions

The proposed rule outlines various qualities that must be exhibited in a home and community based-setting. ALFA is supportive of the majority of these qualities. However, we believe further clarification is needed in three areas:

1. *"Individual choice regarding services and supports, and who provides them, is facilitated."*
 - Provider-owned or controlled environments licensed by state law have requirements that make them responsible for the well-being of the resident and restrictions on who (in addition to the licensed provider) can provide services in that setting. While resident rights allow individuals to supplement existing services provided by the licensed entity, they cannot replace them. Any additional services and supports would also need to meet certain licensing standards such as criminal background checks.
 - **Recommended new language: *Individual choice regarding supplementation of services and supports and who provides them is facilitated, provided they meet all applicable requirements of the licensed entity.***
2. *"The unit or room is a specific physical place that can be owned, rented, or occupied under a legally enforceable agreement by the individual receiving services and the individual has, at a minimum, the same responsibilities and protections from eviction that the tenants have under the landlord/tenant laws of the state, county, city or other designated entity."*
 - As provider-owned or controlled environments licensed by state law, residents are provided protections from evictions in state licensing statutes and regulations. *We would suggest CMS defer to these licensing standards for protections from evictions.* However if there is no licensing statute in a provider- controlled environment, then landlord tenant statutes should be the default law.

Recommended new language: *An individual has, under state licensing law, protections from evictions. If these protections are not provided, the individual shall have, 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. In addition, ALFA recommends that the word *unit* be replaced with *room* throughout the document.

3. ***“Individuals share units only at the individual’s choice.”***

- *Previous discussions on this topic have recognized that while state waivers pay for care, they do not provide reimbursement for the room. Therefore, it does not seem appropriate for this waiver to dictate if a room is private or shared.*
- ***Recommended new language: Individuals in shared rooms will have a choice of roommate.***

II. Two Additional Criteria

In addition to the above criteria, we would like to comment on the two proposed criteria that are not included in the proposed regulation but upon which CMS has requested comments.

1. The proposed requirement says that *“in a provider- owned or controlled residential setting, any modification of the conditions must be supported by specific assessed needs and documented in the person centered service plan.”* This requirement is meant to address two issues:
 - *“individuals receiving HCBS must not have independence or freedom abridged by providers for convenience, or well meaning, but unnecessarily restrictive methods for providing person-centered services and supports, and*
 - *Individuals with cognitive disabilities and other impairments may require modifications of the aforementioned conditions for their safety and welfare.”*
- ALFA is supportive of this provision and appreciates the flexibility that it provides to accommodate residents with cognitive impairments. We support CMS and agree that any modifications must be documented in the person centered service plan. However, the additional proposed requirements for safety need assessments, documentation, and collection of data are overly burdensome. The service plan is reviewed periodically and upon changes in condition, so the opportunity to review ongoing effectiveness or determine if the modifications can be lifted will be addressed in the service plan process.

Recommended new language: Individuals with cognitive disabilities and other impairments may require modifications of the aforementioned conditions for their safety and welfare. In a provider-owned or controlled residential setting, any modification of the conditions must be supported by the standard assessment form used in that setting, and documented in the person centered service plan.



2. “Receipt of any particular service or support cannot be a condition for living in the unit.”

- Licensed providers do have a statutory responsibility for protecting the individuals that live in the congregate setting. While noncompliant behavior is acceptable in some cases (a diabetic eating a sugar dessert), when the behavior could endanger the health, safety, and welfare of the individual or other individuals in the setting, the noncompliant behavior cannot be tolerated. An example that comes to mind is a cognitively impaired resident that refuses to wear a wander guard. In this case it would not be acceptable for the individual to be noncompliant.

Recommended new language: *Receipt of any particular service or support cannot be a condition for living in the room **unless non-receipt of the service or support endangers the health, safety, and welfare of the individual and/or those living in the same setting.***

III. Defining Institutional Settings

1. “In considering whether the setting has the qualities of an institutional setting we will exercise 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.**”

- We certainly agree with CMS that a nursing facility is not a home and community-based setting. However, the challenge is when a home and community-based setting is located in close proximity to a skilled nursing facility. Proximity alone should not be used as the basis to disqualify the setting as home and community-based. Many seniors choose to live in a community that offers a range of settings. ALFA would support an “*increased scrutiny*,” to use the words of CMS, but to exercise a rebuttable presumption of guilty until proven innocent does not seem appropriate. Rather, CMS should evaluate whether the community supports the person-centered qualities of choice, dignity and independence outlined in the proposed rule.
- **Recommended new language: Eliminate “rebuttable presumption” from the sentence.**

IV. Disability Specific Settings

1. We would like to respond to the comments questioning whether disability-specific congregate settings are appropriate for delivery of home and community based services.



- Certainly we would agree that unwilling segregation is a violation of Civil Rights. The Department of Justice has initiated a number of actions in states violating ADA by providers failing to provide more integrated alternatives, and we applaud those efforts for populations that can live more fulfilled lives when integrated into the community. However, residents with severe cognitive impairments are not a population that can benefit by integration within the community at large. The success of dementia care in this country is because of the advances made in special programming and physical plant improvements for individuals with these unique needs. Both have significantly contributed to increased quality of life and quality of care for cognitively impaired individuals.

Having a “secure” neighborhood where cognitively impaired residents can walk freely around day and night greatly contributes to their quality of life and safety. Special programming that allows residents to reminisce about days gone by creates a comfort for individuals that find the past more comforting than the present. Attention to detail including special china that makes it easier for memory impaired residents to recognize the food on their plate is used to help encourage adequate nutrition. To be in an environment without special programs or safeguards would be confusing and terrifying for a cognitively impaired individual.

The care provided is still very much person-centered. Individual service plans are developed and resident independence, dignity, and freedom of choice are all honored, whether it is in helping a resident pick out their own clothing to wear that day or choose from a selection of dining choices. Residents are not prisoners and do often participate in activities outside the senior living community as appropriate.

- **ALFA would like to suggest to CMS that having individuals with dementia live together is done for the well-being of the individual and should not be considered disability-related segregation.**

Thank you for the opportunity to submit these comments. Do not hesitate to contact me if you have any questions.

Sincerely,

Richard P. Grimes
President and CEO
Assisted Living Federation of America