April 14, 2016

Andy Slavitt, Acting Administrator
Centers for Medicare & Medicaid Services
Department of Health and Human Services
200 Independence Avenue, SW
Washington, DC 20201

Dear Mr. Slavitt:

LeadingAge has concerns with sections of the recently released additional Frequently Asked Questions and guidance on how CMS will review requests to build new settings in categories that are presumed to be institutional in nature. The guidance will have a negative impact on the availability of Medicaid funded Assisted Living and Adult Day Centers to serve vulnerable older adults and persons with disabilities.

LeadingAge members and affiliates touch the lives of 4 million individuals, families, employees and volunteers every day. The LeadingAge community includes 6,000 not-for-profit organizations and other groups representing the entire field of aging services, 39 state partners, hundreds of businesses, research partners, consumer organizations, foundations and a broad global network of aging services organizations that reach over 30 countries. The work of LeadingAge is focused on advocacy, education, and applied research. We promote home health, hospice, community-based services, adult day service, PACE, senior housing, assisted living residences, continuing care communities, nursing homes as well as technology solutions and person-centered practices that support the overall health and wellbeing of seniors, children, and those with special needs.

First, in the guidance on new construction, CMS states

"It was CMS' expectation that after the publication of the final regulation, stakeholders would not invest in the construction of settings that are presumed to have institutional qualities, but would instead create options that promote full community integration, per the HCBS Settings regulatory requirements found in 42 CFR 441.301(c)(4)(i), 441.710(a)(1)(i), and 441.530(a)(1)(ii), respectively."

LeadingAge agrees with CMS that as states, counties, developers and other stakeholders are considering the construction of new settings in which Medicaid funded HCBS would be provided the regulatory provisions ***found in 42 CFR 441.301(c)(4)(i), 441.710(a)(1)(i), and 441.530(a)(1)(ii),*** must be taken into account and adhered to. We would be pleased to work with CMS to disseminate information on the rule to our business members that are Architecture and Senior Development firms. LeadingAge has reviewed the final rule, and cannot find any reference to limitations in the new construction of HCBS provider settings collocated in a nursing home or hospital. The state under the heightened process must determine if the collocated provider is an institution.

In 441.301(c)(4)(i) (4) of the rule; "*Home and Community-Based Settings.* Home and community-based settings must have all of the following qualities, and such other qualities as the Secretary determines to be appropriate, based on the needs of the individual as indicated in their person-centered service plan:
(i) The setting is integrated in and supports full access of individuals receiving Medicaid HCBS to the greater community, including opportunities to seek employment and work in competitive integrated settings, engage in community life, control personal resources, and receive services in the community, to the same degree of access as individuals not receiving Medicaid HCBS."

Please note there is no mention of co-location of an Assisted Living or Adult Day Center in or on the grounds of a nursing home or hospital in ***441.301(c)(4)(i)*** of the rule.

In 441.710(a)(1)(i) of the rule, "(1) Home and community-based settings must have all of the following qualities, and such other qualities as the Secretary determines to be appropriate, based on the needs of the individual as indicated in their person-centered service plan:
(i) The setting is integrated in and supports full access of individuals receiving Medicaid HCBS to the greater community, including opportunities to seek employment and work in competitive integrated settings, engage in community life, control personal resources, and receive services in the community, to the same degree of access as individuals not receiving Medicaid HCBS."

Please note there is no mention of co-location of an Assisted Living or Adult Day Center in or on the grounds of a nursing home or hospital in ***441.710(a)(1)(i)*** of the rule.

In 441.530(a)(1)(ii) of the rule "(ii) The setting is selected by the individual from among setting options, including non-disability specific settings and an option for a private unit in a residential setting. The setting options are identified and documented in the person-centered service plan and are based on the individual's needs, preferences, and, for residential settings, resources available for room and board."

Please note there is no mention of co-location of an Assisted Living or Adult Day Center in or on the grounds of a nursing home or hospital in ***441.530(a)(1)(ii)*** of the rule.

LeadingAge urges CMS to refer states to its online Fact Sheet entitled "Summary of Key Provisions of the Home and Community-Based Services (HCBS) Settings Final Rule" when they determine provider compliance with the rule. The CMS Fact Sheet states:

> "In this final rule, CMS is moving away from defining home and community-based settings by 'what they are not,' and toward defining them by the **nature and quality of individuals' experiences.** The home and community-based setting provisions in this final rule establish a **more outcome-oriented definition of home and community-based settings, rather than one based solely on a setting's location, geography, or physical characteristics**."

Second, in the guidance on new construction, CMS states

"CMS recognizes that there may be some locations where the ability to construct additional settings in which Medicaid-funded HCBS would be provided may be significantly limited, such as heavily built-up urban areas, states may request a heightened scrutiny review of newly operational settings meeting

any of the presumed institutional scenarios described in the regulation. However, CMS strongly encourages states to limit the growth of these settings."

The statement by CMS to limit the growth of these collocated settings implies that CMS is taking a position that the heightened scrutiny process will automatically view collocated HCBS settings as not able to meet the criteria to be compliant since CMS is encouraging the states to discourage all collocated Assisted Living and Adult Day Centers in Nursing Homes and /or hospitals, no matter if they comply with provisions ***found in 42 CFR 441.301(c)(4)(i), 441.710(a)(1)(i), and 441.530(a)(1)(ii)***.

Before making a statement strongly encouraging states to discourage the construction of these types of settings, CMS should give the states and providers an opportunity to delineate the current practices of Assisted Living and Adult Day Centers that comply with the rule, as well as the changes that states and providers will implement in the remediation process. **We urge CMS to clarify this statement encouraging the states to limit the growth of these settings. States should not be given the impression that collocation automatically means non-compliance. A corrections needs to be made!**

We know that members of Congress, the Administration and CMS do not want unintentional negative consequences occurring because of the interpretation and implementation of any regulation. **LeadingAge is extremely concerned that the interpretation of the HCBS settings rule delineated in this guidance from CMS will reduce the access of quality Medicaid waiver funded home and community based services throughout the country.**

These unintended negative consequences have already occurred. In Wisconsin the state argued in favor of HCBS settings compliance of a building project for a county-operated provider that was about to begin (actually, construction has just begun). It includes an AL facility for frail elderly residents on the grounds of the county-operated SNF and a second AL memory care facility attached to the county-operated SNF. The state told the LeadingAge state affiliate that CMS indicated they could not rule on the project until it is completed; despite the fact the Wisconsin DHS has been urging the county to build the memory care unit for years because they saw a need for Assisted Living in the county. Because of this ambiguity, the county currently is mulling the possibility of turning the new building into a SNF rehab unit because of their feeling that CMS would oppose an AL in on the grounds of a nursing home. This guidance will now be a catalyst to prevent the construction of a needed Assisted Living Centers that accepts Medicaid. There will now be fewer choices for HCBS for Medicaid beneficiaries in this county in Wisconsin.

From a business perspective, there are many reasons why providers build Medicaid -funded Assisted Living and Adult Day programs co-located in a nursing home or hospital. For example:

- The low Medicaid reimbursement for these services do not cover the costs of providing quality services in a freestanding HCBS setting; therefore providers collocate services in a nursing home and /or hospital in order to create operational efficiencies that enable the Assisted Living and Adult Day provider to be financially stable. This scenario is especially true for HCBS in rural areas.

- Not for profit providers may have donated land that is on the campus of their nursing home that they could use for Assisted Living or an Adult Day Center. In areas of the country where affordable land is scarce, building a Medicaid funded Assisted Living or Adult Day Center is not financially sustainable unless a provider has a donated location.
- Rural and frontier areas of the country may not have the volume of Medicaid older adults and persons with disabilities requiring HCBS, specifically Assisted Living and /or Adult Day services. A freestanding Assisted Living or Adult Day with a low census would not be financially sustainable.
- Many times an Assisted Living is co-located with a nursing home so a spouse requiring nursing home care can still be close to a spouse or adult child that is residing in the Assisted living.

In a recent National Association of State Medicaid Directors bulletin, it was noted that "States shared their ongoing concerns with implementation and compliance with the home and community-based services (HCBS) settings rule, and the impact the rule could have on options along the housing continuum for vulnerable beneficiaries."

The statement in this guidance discouraging Assisted Living and Adult Day Centers collocated in Nursing Homes is contrary to a number of regulations and programs, CMS and other Federal agencies are implementing. For example:

- In 2015, the Supreme Court ruled in *Armstrong v. Exceptional Child Center* that HHS, not the courts, should make sure Medicaid provider pay rates meet the so-called equal-access provision, which requires states **to pay providers rates "that are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area**." In the wake of that decision, CMS finalized a long-awaited rule from 2011 laying out requirements for states to provide information that would help the agency make sure changes to provider pay rates don't hurt beneficiaries. With the growth of the aging population, how will providers meet the needs of vulnerable populations if regulations impede the construction of innovative continuum of care options.

Again, LeadingAge appreciates the work of CMS on advancing person-centered care, choice, privacy and integration into the greater community. For years, LeadingAge has incorporated person centered care and integration in our member education program, and research. We hope our comments will be helpful to you.

Please do not hesitate to contact us if you have any questions or would like further discussion. We look forward to our continued work with you on this and related issues.

Sincerely,

Cheryl Phillips, MD

Cheryl Phillips, MD
Senior VP Public Policy and Advocacy