**DRAFT LETTER TEMPLATE RE HCBS RULE**

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Andrew M. Slavitt

Acting Administrator

Centers for Medicare and Medicaid Services

Hubert H. Humphrey Building

200 Independence Ave., SW, Room 445-G

Washington, DC 20201

Dear Mr. Slavitt:

On January 16, 2014 the Centers for Medicare and Medicaid Services (CMS) issued a final rule [42 CFR §441.301(c)(4)(5)], which became effective on March 17, 2014 and which specified new standards regarding what constitutes a home and community based services (HCBS) setting, for purposes of receiving services under a Medicaid HCBS waiver program.

We appreciate the spirit of the rule, which is to promote independence, autonomy and choice of non-institutional-like settings for individuals receiving Medicaid waiver services. We write, however, to express our increasing concern and that of our constituents with the continuing failure of CMS to differentiate between applying the Rule to settings serving primarily younger individuals and the special needs of older individuals with complex chronic medical conditions or individuals with Alzheimer’s disease and other dementias.

In her press release of January 1, 2014 HHS Secretary Kathleen Sebelius stated, “Today’s announcement [of this Rule] will help ensure that all people participating in Medicaid home and community based services programs have full access to the benefits of community living.” The Rule summary published on January 10, 2014 purported that it “offers states new flexibilities in providing necessary and appropriate services to elderly and disabled populations” in order to achieve the stated community living goal.

In fact, it appears that the opposite is true, particularly as the Rule is being applied to non-residential adult day services provided to aging consumers and/or those afflicted with Alzheimer’s and dementia issues.

Since the Rule became effective, CMS has issued multiple installments of guidance and in early May stated that further guidance for settings serving consumers with dementia and Alzheimer’s would be forthcoming. That additional guidance has not been issued to date. The fact that CMS has approved only one state transition plan (Tennessee), and has given initial approval pending further information to only two additional state STPs (Kentucky and Ohio), to implement the new rule since its inception two and one-half years ago is indicative of the struggle states are having in trying to meet an artificial and unattainable “one size fits all” unfunded mandate.

Because the final rule will impact nearly every Medicaid beneficiary within the fifty states who requires residential services or non-residential adult day services, if CMS continues to impose exceedingly strict

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standards, they will limit choices for seniors, drive up the cost of care, and pull scarce resources away from caring for the elderly.

We understand that the Rule contains a provision for an appeal mechanism termed “heightened scrutiny” by CMS for those settings that do not fully meet the standards of the Rule. It is, however, unclear as to how this remedy can be adequately applied without a distinction by CMS of the differences between settings for the needs of younger individuals with disabilities and the unique needs of elderly consumers and individuals with dementia or Alzheimer’s. It is also unclear as to whether economic factors such as population sparsity, travel distances, or property availability will be taken into consideration as valid factors for heightened scrutiny.

In short, because the CMS Rule fails to delineate between the needs of younger individuals with disabilities and the unique needs of older individuals who, in addition to physical limitations, may be living with Alzheimer’s disease or other forms of dementia, the net effect of a strict interpretation and application of the Rule will be to limit consumer choice and access for necessary services – the exact opposite effects that CMS hopes to achieve with HCBS.

In sum, we urge that CMS not exceed its authority in the implementation process of disbursing Medicaid funds by requiring more burdensome and costly state mandates. Further, we request CMS to develop alternative implementation guidance specific to the senior population and that appreciates the unique needs of that population in providing quality HCBS to vulnerable seniors and to individuals with dementia or Alzheimer’s disease.

Please advise us of how you will address the concerns we have expressed.

Sincerely,