LeadingAge™ Wisconsin
Better Services for Better Aging

*Electronically Submitted*

**From:** Tom Ramsey
**Sent:** Tuesday, September 02, 2014 4:41 PM
**To:** 'DHSOFCE@dhs.wisconsin.gov'
**Subject:** Transition Plan

These comments represent thoughts and concerns expressed by the members of LeadingAge Wisconsin to the Department of Health Services' (DHS) Home- and Community-Based Services (HCBS) Medicaid Waiver Transition Plan. While the preponderance of member concerns are not with the transition plan but rather with the rule itself (CMS—2249-F; CMS—2296-F, published on Thursday, January 16, 2014 in Volume 79, No.11 of the Federal Register), one particular provision in the transition plan has proven to be quite troubling. But before we proceed, a note on who we are.

LeadingAge Wisconsin is a statewide membership association of not-for-profit organizations principally serving seniors and persons with a disability. Membership is comprised of 195 religious, fraternal, private and governmental organizations which own, operate and/or sponsor 172 nursing homes, 7 facilities for the intellectually and developmentally disabled (FDD/ID), 182 assisted living facilities, 102 apartment complexes for seniors, and over 300 community service agencies which provide programs ranging from Alzheimer's support, adult and child day care, home health, home care, and hospice to Meals on Wheels. LeadingAge Wisconsin members employ over 38,000 individuals who provide compassionate care and services to over 48,000 residents/tenants/clients each day.

The primary concern of LeadingAge Wisconsin is with the 1915(c) Medicaid waiver HCBS Settings requirements under s. 441.301(c)(4) and (5) of the federal rule. To be more specific, LeadingAge Wisconsin members operate 102 community-based residential services (CBRF) and many of those operators either believe that their CBRFs currently do not comply with certain provisions of the rule or are uncertain whether they are in compliance. Some believe compliance is easily achievable; others believe because of their challenging client group(s), compliance is programmatically out of the question. It's the latter group that should be all of our concerns because at this juncture, it would appear under the federal rule that the only alternative for residents in those facilities would be a nursing home. The irony in such an outcome would be striking.


204 South Hamilton Street | Madison WI 53703
P 608.255.7060 | F 608.255.7064 | **www.LeadingAgeWI.org**

As noted above, LeadingAge Wisconsin members generally have no objections with the tasks and timetable set forth in the DHS transition plan. However, the provision we noted above as troubling is under "Preliminary Assessment of HCB Services, " which reads in part: "State will conducted a state-directed preliminary assessment of existing HCB services for compliance with HCB characteristics (Yes, No, or Needs Provider Self-Assessment Verified by MCO/State)."

In drafting the rule, the Centers for Medicare and Medicaid Services (CMS) undertook what we believe was an impossible task; to define and/or describe "community." Community is not and never will be a "black or white" concept and despite CMS' best efforts to incorporate flexibility to the "community" designation, it failed to adequately account for the "grays." Try telling the wife living in a county-operated CBRF that the county-operated nursing home next door where her husband lives isn't part of her "community." The rule is fraught with uncertainties and the State's proposed assessment tool, with its "Yes, No, Verify" requirement, provides no opportunity for the CBRF operator or other assisted living provider to explain their operation and situation in greater detail. Where is the opportunity to show a facility meets "the spirit of the law," if not the letter of the law? LeadingAge Wisconsin members suggest this provision be modified to permit assisted living providers to elaborate on why they believe their settings are home- and community-based.

Here are just a few examples of the uncertainties in the rule that at the very least need further clarification;

1) **S. 441.301(c)(4)(i)** requires a HCBS setting to be "integrated in" and supportive of "full access of individuals receiving Medicaid HCBS to the greater community . . . . to the same degree as individuals not receiving Medicaid HCBS." None of the members of the Wisconsin football team are receiving Medicaid HCBS so that requirement might be setting the bar a bit high. But other than a problem with the rule's language, where are the examples of what is being required? How are community integration and full access to the greater community defined or explained?
2) **S. 441.301(c)(4)(ii)** requires a HCBS setting to be "selected by the individual from among setting options including non-disability specific settings and an option for a private unit in a residential setting." Does that mean CBRFs which serve a specific client group no longer will be considered home- and community-based? Does that mean programmatic efforts to segregate elderly dementia residents from young residents with mental health challenges are misplaced? Who is required to offer the option of a private unit in a residential setting?
3) **S. 441.301(c)(4)(vi)(A)** states that landlord-tenant law and resident protections should be applied in cases involving eviction in a provider-owned or controlled residential setting. For years there have been arguments in Wisconsin over whether the contract between a long-term care provider and a resident/tenant is a service agreement or a lease. LeadingAge Wisconsin members believe a change of statute to exclude assisted living facilities from the landlord-tenant law would be a step in the right direction. Having said that, we believe the Discharge or Transfer requirements

under DHS 83.31 and the Grievance procedures under DHS 83.33 provide CBRF residents with far-greater protections than the recently-amended landlord tenant law. The same would apply to RCAC tenants under the DHS 89.29 Admission and Retention of Tenants requirement and the DHS 89.39 Grievance procedures.

4) **S. 441.301(c)(4)(vi)(B)** requires provider-owned or controlled residential settings to provide each individual "privacy in their sleeping or living unit," which the rule states includes "units have entrance doors lockable by the individual, with only appropriate staff having keys to doors," as well as individuals sharing units having a choice of roommates in that setting. Not one of the 102 LeadingAge Wisconsin CBRF operators have indicated they currently are in compliance with this provision. We might be stepping out on a limb but we suspect none (or at least very, very few) of the over 1,500 CBRFs and 1,690 adult family homes (the rule applies only to those that are certified) in Wisconsin meet these requirements, either. For some providers, compliance might be as easy as installation of a key pad or a door lock. But for others, compliance could very well be programmatically contraindicated. We assume this provision will be waived for dementia care units but we are unaware of any assurances to that effect. Because of the breadth of the potential noncompliance with this provision, it is our members' greatest concern.
5) **S. 441.301(c)(5)(v)** states that any setting that is located "in a building on the grounds of, or immediately adjacent to, a public institution, or any other setting that has the effect of isolating individuals receiving Medicaid HCBS from the broader community of individuals not receiving Medicaid HCBS will be presumed to be a setting that has the qualities of an institution" and will not be considered a home- and community-based setting. Does a county-operated CBRF adjacent to a county-operated nursing home qualify as "a setting adjacent to a public institution?" In other words, are county operations considered "public institutions" under this rule? How will isolation from the broader community be determined? Will physical limitations of a resident be taken into account? Will community activities within the setting be acknowledged? Will residents be asked whether they consider their CBRF or assisted living unit as "home?"

An intriguing question has been raised by several LeadingAge Wisconsin members. In looking at **s. 441.301(c)(5)(v)** in its entirety, the last portion of the section reads: "any other setting that has the effect of isolating individuals receiving Medicaid HCBS from the broader community of individuals not receiving Medicaid HCBS will be presumed to be a setting that has the qualities of an institution **unless the Secretary determines through heightened scrutiny, based on information presented by the State or other parties, that the setting does not have the qualities of an institution and that the setting does have the qualities of home and community-based settings."** (emphasis added).

The DHS has been silent on whether and/or how it intends to invoke the "heightened scrutiny" provisions noted above to seek HCBS status for facilities that might otherwise be determined non-compliant with the rule. Members are hopeful the DHS will "come to their rescue" when the time comes but the Department has not shared its plans to date.

That hopefulness stems in large part from comments on the proposed HCBS rule from former DHS Secretary Dennis Smith, who in a June 14, 2011 letter to former CMS Administrator Donald Berwick wrote the following:

> "Wisconsin has promoted inclusive community settings, including people's own homes and apartments for over 30 years. When a larger setting is used as the community living arrangement, Wisconsin has had specific criteria, measures and quality oversight to ensure that the setting is 'home-like' and that people have consistent opportunities for inclusion in the community. 'Person-centered planning' began in 1981 with the statutory language requiring individual service plans for individuals who choose to live in the community with assistance . . . . The proposed rule change will greatly challenge our latitude in offering choice for people with disabilities and for frail elders. Current HCBS Waiver participants and new applicants who need 24-hour support and supervision may not be able to obtain that protection without alternate living arrangements. Depending on the needs of the individual, the required level of supervision and/or assistance, including one-to-one staffing, may be cost prohibitive in a certain residential setting and may conflict with the s. 1915(c) requirement of cost neutrality . . . The proposed rule severely restricts the freedom of choice of individuals participating in HCBS waivers to select their living environment, for which they pay with their own money. At the same time, it is entirely possible that the proposed rule would thwart the achievement of its stated objective, in that it would make it more likely certain individuals who have a need for a residential setting more structured than a fully-integrated setting would only be permitted to reside in an institutional setting like a nursing home or ICF/MR."

Indeed, the proposed rule referenced by Smith now has been implemented and changes to that rule were made after Smith's comments were forwarded to CMS. But LeadingAge Wisconsin members would argue the thrust of Smith's arguments remain as relevant today as they were then. Their hope is the concerns Smith expressed in 2011 are shared by the DHS today and will drive the Department's transition activities toward advocacy on behalf of Wisconsin's assisted living providers.

Thank you for this opportunity to comment on behalf of LeadingAge Wisconsin members on the HCBS Medicaid Waiver rule and the DHS transition plan to implement the rule.

Respectfully,

Tom Ramsey
Vice President of Public Policy & Advocacy
**LeadingAge Wisconsin**
204 South Hamilton Street
Madison WI 53703
(608) 255-7060
tramsey@LeadingAgeWI.org