

The American Health Care Association and the National Center for Assisted Living (AHCA/NCAL) is the largest association in the United States representing long term and post-acute care providers, with more than 14,000 member facilities. Our diverse membership includes non-profit and proprietary skilled nursing centers, assisted living communities, sub-acute centers, and homes for individuals with intellectual and developmental disabilities. By delivering solutions for quality care, AHCA/NCAL aims to improve the lives of the millions of frail elderly and individuals with disabilities who receive long term or post-acute care in our member facilities each day.

Assisted living communities serve individuals who typically need help with everyday activities and some health care services but do not require 24-hour skilled nursing care services for extended periods of time. These communities offer a unique mix of companionship, independence, privacy, and security in a home-like setting. The philosophy of assisted living is built on the concept of delivering person-centered care and services to each individual resident. Person-centered care means that the care and services meet residents' specific needs and preferences. The American Health Care Association (AHCA) represents assisted living providers through its National Center for Assisted Living (NCAL). NCAL is dedicated to serving the needs of the assisted living community through national advocacy, education, networking, professional development, and quality initiatives.

NCAL appreciates the opportunity to review and comment on the (CMS-2442-P) **Ensuring Access to Medicaid Services** proposed rule. Comments collected within this document are from subject matter experts, including registered nurses and assisted living administrators, and are presented on behalf of the NCAL members who represent the assisted living community. NCAL applauds the efforts identified throughout the preamble as they relate to consistency, transparency, and increasing access to healthcare services. NCAL supports quality improvement efforts but acknowledges that adequate funding is needed for these efforts. It is also important to note that Quality Measures that require the submission of paper records or electronic health records creates additional burdens on assisted living providers. Not all assisted living providers use an electronic health record. Furthermore, requiring paper records necessitates additional administrative costs and burdens.

It is critical to ensure that the proposals made are not duplicative of state requirements. We also believe it is critical to ensure that administrative costs associated with implementing regulations should be covered. This will ensure that funds used to cover administrative tasks to implement the proposals do not take away from the funds used to support Home and Community Based Services (HCBS) waiver recipients, creating a larger access issue. We agree that it is important to consider the unintended consequences not only to a States' ability to comply with the rule but also to providers who cannot afford to comply or who may not have the workforce to comply with the proposals. An unintended consequence of a provider's inability to comply is choosing not to be a HCBS provider or worse, closure of the business for those who have a significant number of waiver recipients in their communities and the reimbursement does not adequately

cover the costs of care and services. If this occurs, it will further reduce access to eligible waiver recipients, especially in rural areas where access to affordable services is already limited.

Last, while NCAL supports the efforts to increase wage adequacy, we are highly concerned that the direction outlined within this proposal will, inadvertently, increase workforce challenges. By not including all provider types, we are concerned that the workforce will resign from one provider type and move to another provider type because they are paid higher wages related to the 80% proposal. If this shift in workforce occurs, it would have devastating results on resident care and services provided. NCAL recommends a study to collect data to ensure that there are no unintended consequences from initiating an 80% proposed rule. More specifically, NCAL recommends data collection and analyses across all provider types including the impact on the operations and resident access to services occur before determining the percentage of the rate that should be applied to support wage adequacy.

Page Number	Section Category	Specific Section Header	Column & paragraph citation	Constructive Comments (+/-), Alternative Options, or Questions (Provide data or facts when applicable to support comment. Provide examples of how proposed rule would impact setting. Include pros/cons of your position comment.)
27961	I. Background	A. Overview	Column 1, paragraph 3	NCAL agrees that “current access regulations are neither comprehensive nor consistent across delivery systems or coverage authority”. Although we support many of the underlying objectives within this proposal, we believe the objectives will not result in increased access to service and supports for the waiver recipient in HCBS Assisted Living (AL) setting across the country for reasons outlined in these comments including how HCBS waivers are categorized within the state and how AL services are paid for within the state (i.e., some are FFS, some are managed care, some are other payment categories, and some are a

				combination of the different payment methods).
27967	II. Provisions of the Proposed Rule	A. Medicaid Advisory Committee and Beneficiary Advisory Group	Column 2, Paragraph 2	NCAL supports the development of the Beneficiary Advisory Group (BAG) which will have representation on the newly named Medicaid Advisory Committee (MAC). We agree that Federal Match for Medicaid administrative activities for expenditures related to MAC and BAG should remain available. Beneficiary voice is a critical component of understanding the end user experience with services. We agree that discussion of social determinants of health such as access to housing is critical. However, we believe a comprehensive study should be completed to assess which states already have groups that serve the same or a similar function as the MAC and/or a BAG to ensure there is no duplicative activity.
27968	II. Provisions of the Proposed Rule	A. Medicaid Advisory Committee and Beneficiary Advisory Group	Column 2, paragraph 1	NCAL supports the incorporation of demographic representation on the BAG/MAC that includes people over the age of 65 and those with disabilities.
27968	II. Provisions of the Proposed Rule	A. Medicaid Advisory Committee and Beneficiary Advisory Group	Column 3, paragraph 1	NCAL supports at least 25% of MAC participants to be individuals with lived Medicaid beneficiary experience from the BAG, including those participants who are age 65 and older and/or individuals with disabilities. NCAL asks CMS to consider allowing some portion of

				providers that do not currently support Medicaid beneficiaries to provide feedback to states that have low provider participation in the HCBS program resulting in access challenges for HCBS Medicaid beneficiaries.
27969	II. Provisions of the Proposed Rule	A. Medicaid Advisory Committee and Beneficiary Advisory Group	Column 3, paragraph 2	NCAL supports bi-direction communication and transparency that supports diverse voices across the spectrum of MAC and BAG participants. Furthermore, NCAL supports the BAG meetings happening prior to the MAC meetings to further encourage open communication amongst BAG participants.
27971	II. Provisions of the Proposed Regulations	B. HCBS	Column 3, paragraph 2	NCAL supports CMS' initiative to "improve access to care, quality of care, and beneficiary health and quality of life outcomes", however we encourage CMS to ensure that all proposals are not overly prescriptive to ensure States flexibility to operate the Medicaid program and accommodate the needs of the population they serve. We also ask CMS to consider the state specific differences that could impact results; for example, not all states categorize AL as an HCBS provider, limiting access to AL services for HCBS Medicaid beneficiaries.
27973	II. Provisions of the Proposed Rule	B. Home and Community-Based Services	Column 3, paragraph 1	NCAL supports the intention of the 90% performance level to offer flexibility for various scenarios that might impact the State's ability to achieve

				<p>minimum performance levels. However, NCAL recommends inclusion of good cause exceptions and good faith efforts throughout the preamble. There may be situations where good cause exceptions and/or good faith efforts may apply that otherwise would not be incorporated into the 90% performance level. States ability to comply with the proposal will be through a collaboration with HCBS providers. Failure to include good faith efforts does not take into account that states and providers will work collaboratively to meet this requirement. Providers will likely need to submit the person-centered care plans to the state for review and this increases the administrative burden on providers who already struggle with staffing challenges, particularly in rural areas. Similarly, state agencies may be faced with the same staffing challenges as providers.</p> <p>In lieu of the preferred permanent inclusion of good cause exceptions and/or good faith efforts, we ask CMS to consider allowing use of good cause exceptions and/or good faith efforts during the first 12 months with the ability to evaluate the need and extend as necessary.</p>
27973	II. Provisions of the Proposed Rule	B. Home and Community-Based Services	Column 3, paragraph 2	NCAL supports the wording change to read “The State must ensure that person-

				<p>centered service plan (PCP) is reviewed, and revised, as appropriate, based upon the reassessment of functional needs as required by §441.365(e), at least every 12 months, when the individual's circumstances or needs change significantly, or at the request of the individual.”</p> <p>Many states already have regulations for this type of PCP review in place.</p> <p>HCBS AL providers across the country report instances of challenges in untimely completion of resident reassessments when resident care needs change. While we believe the states are making their best effort, because of these delays NCAL supports the proposal that states demonstrate that a reassessment of functional need was conducted at least annually for at least 90 percent of individuals continuously enrolled in the waiver for at least 365 days. NCAL also supports State review and revisions as appropriate based on results of the of the required reassessment of functional need at least every 12 months for at least 90 percent of individuals continuously enrolled in the waiver for at least 365 days. NCAL believes an assessment of state agency oversight of case managers should also</p>
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				include the response time of the case manager when a HCBS recipient and/or provider reaches out to the case manager for assistance in updating the PCP.
27976	II. Provisions of the Proposed Rule	B. Home and Community-Based Services 2. Grievance System	Column 3, paragraph3	NCAL supports the standard resolution of a grievance and notice to affected parties to occur within 90 calendar days of the receipt of the grievance and supports the extension of up to 14 calendar days if the beneficiary requests the extension. We ask CMS to allow any existing grievance process that meets the proposed grievance and notice process to meet this requirement to eliminate duplication. We also ask CMS to ensure states give providers at least 14 days from receipt of notification that the provider is a party to a grievance to respond to the grievance.
27978	II. Provisions of the Proposed Rule	B. Home and Community-Based Services 2. Grievance System	Column 1, paragraph 1	NCAL agrees that it is not necessary to establish a grievance requirement for section 1905(a) (medical assistance) state plan personal care, home health and case management services based on the fact that 1905(a) services are not required to comply with HCBS settings requirements and because the person-centered planning and service plan requirements for most section 1905(a) services are substantially different from those for section

				1915(c), (i), (j), and (k). However, there is inconsistent data collection of HCBS services in assisted living due to variations among states.
27978	II. Provisions of the Proposed Rule	B. Home and Community-Based Services 3. Incident Management System	Column 3, paragraph 3	Each state defines the term “assisted living” differently. To ensure this provision is applied to the intended target population, NCAL suggests describing the intended population in lieu of using the term “assisted living” which may vary by state. For example, Pennsylvania uses the term Personal Care Home and Ohio and Indiana use the term Residential Care Facility.
27983	III. Provisions of the Proposed Rule	B HCBS 5. HCBS Payment Adequacy	Entire section	NCAL does not support the proposal that CMS mandate any pre-set percentage of waiver service reimbursement to direct care givers without evaluation of the adequacy of HCBS waiver rates in all 50 States and the District of Columbia. Additionally, comprehensive data collection is needed to understand the impact of such a proposal including ability to achieve direct care worker wage adequacy, as well as, unintended consequences on the program and access to services for waiver beneficiaries. Although we fully understand the workforce shortage issues and agree one factor of employee retention is livable and adequate wages, there is no

				<p>one size fits all percentage across states that will successfully fulfill CMS' objective of wage adequacy. Reasons include: 1) HCBS Waiver reimbursement rates in many states are well below the cost of care and services, 2) Reimbursement methodologies are different in each state, 3) low reimbursement rates would impair an HCBS provider from having sufficient remaining funds to cover the cost of all other covered services for the resident, additional employee benefits, administrative and non-administrative operational expenses. Examples of items that an employer would need to cover with the remaining 20% include but are not limited to: employee health insurance, and paid time off and general management. It is also important to consider that the use of a Registered Nurse in the role of a delegating nurse is required to oversee and/or manage tasks such as medication administration or assistance and other clinical tasks in an assisted living. This role is often classified as an administrative role. Often administrative costs and program costs exceed the reimbursement, 4) because the proposal only covers 3 FFS areas (homemaker, home health aid services, and</p>
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			<p>personal care services) it is unclear how payment adequacy can be achieved when some providers often provide more services than the ones outlined, and those services may be billed separately because they are included in a bundled rate. Prior to this proposed rule, NCAL has heard from many providers that are already at risk of un-enrolling from their state HCBS waiver program based on the insufficient reimbursement. If enacted, we believe more providers will unenroll, leaving an even larger gap in access to affordable services.</p> <p>Additionally, because there is no universal category or reimbursement method to pay HCBS AL providers, we respectfully request CMS categorically omit AL as a setting type from this section. Furthermore, we request that CMS does not leave out provider types and populations cared for by those providers, because that may result in recipients and residents being treated differently. It may, inadvertently, create a bigger workforce issue, because direct care staff may leave one area for better wages in another area. NCAL recommends a study to collect data to ensure that there are no unintended consequences</p>
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				of implementation of the 80% proposed rule.
27983 - 27984	II. Provisions of the Proposed Rule	B. Home and Community-Based Services 5. HCBS Payment Adequacy	Column 2, paragraph 1 through Column 3, paragraph 1	<p>NCAL does not support identifying a pre-set portion of the State FFS and managed care payments for HCBS to go directly to compensation of the direct care workforce without evaluation of the adequacy of HCBS waiver rates in all 50 States and the District of Columbia.</p> <p>Additionally, comprehensive data collection to understand the impact of such a proposal is necessary. This data collection would highlight the existing percentage of waiver rates that is attributed to direct care worker wages, the ability to evaluate proposed state-specific changes as well as, note any unintended consequences on the program and access to services for waiver beneficiaries. We recommend CMS conduct a study to understand the HCBS waiver rates in each state in each setting. The study should include an analysis of the impact of allocating a pre-set portion of HCBS payments to direct care wages including evaluating unintended consequences. We also believe CMS should define the specific and measurable goals it intends to achieve with this proposal. It is important to note that proper funding is needed to ensure that this is a priority and</p>

				<p>feasible. It is also important to understand the definition of direct care workforce varies by state and may not include assisted living. While we do not support identifying a pre-set portion of the payment to go to wages, if this proposal is implemented, we ask CMS to require that specific tasks completed by nurses in supervisory roles, which are often classified as administrative, be included in the percentage. The tasks we recommend be included are oversight of direct care staff, teaching and training of direct care staff, and documentation related to these areas. Without this oversight, direct care workers may not be providing accurate and safe care to the recipients. We believe these tasks are critical in the assisted living setting and exclusion of them may have a negative impact. We ask CMS to solicit comments from other stakeholders on other tasks that should be included in the percentage.</p>
27984	II. Provisions of the Proposed Rule	B. Home and Community-Based Services 5. HCBS Payment Adequacy	Column 2, paragraph 2	<p>NCAL does not support a minimum percentage of payments for facility-based residential services and other facility-based round-the-clock services that have other indirect costs that would be paid for at least in part by room and board payments that Medicaid does not cover for the same reason we do not</p>

				support a pre-set minimum percentage for other provider types without evaluation of the adequacy of HCBS waiver rates in all 50 States and the District of Columbia as well as comprehensive data collection to understand the impact of such proposal including ability to achieve direct care worker wage adequacy, as well as, unintended consequences on the program and access to services for waiver beneficiaries.
27984	II. Provisions of the Proposed Rule	B. Home and Community-Based Services 5. HCBS Payment Adequacy	Column 3, paragraph 1	While NCAL supports the proposal to define direct care workers, NCAL does not agree nurses in supervision and administrative roles should be excluded from the payment adequacy calculation in the assisted living setting. In assisted living it is important to consider that nurses may also include those who are doing administrative activities such as resident documentation critical to communication about resident needs. NCAL recommends including indirect care services which include some administrative tasks such as documentation of resident needs, teaching, training and oversight of direct care staff providing care and services under the direction of a nurse.
27986	II. Provisions of the Proposed Rule	B. Home and Community-Based Services	Entire section	NCAL supports the proposal to require information from States on waiting lists to

		6. Supporting Documentation required		<p>improve public transparency and processes related to States' HCBS waiting lists and ensure that CMS is able to adequately oversee and monitor States' use of waiting lists in their section 1915(c) waiver programs. Further NCAL supports the amendment to § 441.303(f)(6). NCAL agrees there are varying methods used by states to allot waiver "slots" and maintain waiting lists. There are also many reasons states have waiver caps including but not limited to legislative compliance, financial/budget limitations and availability of waived services. NCAL encourages CMS to collect data detailing why states have caps on the number of HCBS waivers recipients as well as why states have waiting lists when they have not met their waiver cap. States must come up with a transparent process to collect state specific data that helps CMS and the public understand the reasons for waiting lists since it may vary greatly from one state to the other.</p>
27988	II. Provisions of the Proposed Rule	B. Home and Community-Based Services 7. Reporting Requirements b. Reporting on the Home and Community-	Column 3, paragraph 1	<p>NCAL supports every other year reporting of Quality Measures. Additionally, we support giving states flexibility in identifying measures that are most appropriate for their population given the</p>

		Based Services Quality Measure Set		<p>variations within each state. NCAL supports the recommendation that States establish the performance targets for the required measures. If established, national performance targets should consider applicability and feasibility across the country. It is important to consider that the more data that is asked of providers increases the burden on providers necessitating the need for adequate funding to support increased data reporting. In addition, it is important to ensure that there is no duplication if states are already collecting data or have something similar in place.</p>
27993	II. Provisions of the Proposed Rule	B. Home and Community- Based Services 8. Home and Community- Based Services Quality Measure Set	Column 1, paragraph 1	<p>NCAL supports regular Quality Measure review and updates provided that there is an adequate public comment period that includes the opportunity for stakeholders, including stakeholders from the long term care community, to provide comments. However, it is also important to note that a one-size fits all approach is not what is best for individual states. State Agencies have the primary role of oversight of assisted living. State agencies are in the most appropriate position to determine state specific quality metrics.</p>

27994	II. Provisions of the Proposed Rule	B. Home and Community-Based Services 8. Home and Community-Based Services Quality Measure Set	Column 2, paragraph 2	NCAL supports a phased in approach to Quality Measure stratification due to the relatively new voluntary use of the Quality Measure set released in July 2022. However, measures that require the submission of electronic health records or paper records to be faxed or mailed add either additional administrative burdens or additional cost for assisted living providers. Not all assisted living providers use an electronic health record and implementing one would be costly. NCAL asks CMS to consider funding to support implementation of this proposal.
27995	II. Provisions of the Proposed Rule	B. Home and Community-Based Services 9. Website Transparency	Column 3, paragraph 2	NCAL supports the efforts to promote transparency, ease of access, and end user experience on the website and information included on the website.
27996	II. Provisions of the Proposed Rule	C. Documentation of Access to Care and Service Payment Rates	Column 3, paragraph 1	NCAL supports the proposal to establish an updated process by which there are better methods of rate transparency.
28005	II. Provisions of the Proposed Rule	C. Documentation of Access to Care and Service Payment Rates 2. Payment Rate Transparency	Second column, bottom of page	NCAL supports the efforts for payment rate disclosure through personal care, home health aide, and homemaker services provided by individual providers and agency employed providers. However, just posting rates alone is not comparing apples to apples across states as

				definitions and service definitions may be different.
	III. Collection of Information	9. ICR. Regarding Reporting on the Home and Community-Based Services Quality Measure Set	Column 1, paragraph 4	<p>NCAL supports states determination of performance targets that is appropriate for individuals receiving care and services. NCAL recommends not setting national performance targets as this deters from allowing states the flexibility to make informed determinations about the targets.</p> <p>Furthermore, we ask CMS to consider the impact of quality measures, such as discharge to Home for Medicaid Participants, on an individual's discharge to the most appropriate place that meets their needs.</p> <p>In addition, quality measures should take into consideration the resources available in the discharge setting. Workforce challenges have impacted access to HCBS services. Moreover, the availability of services in an assisted living setting varies by the model of care the assisted living provider has chosen to deliver and state regulatory allowances or limitations, which determines what services can be provided in an assisted living setting. These are all factors that can influence the rate of discharge to an assisted living setting.</p>

Thank you for reviewing NCAL's comments. For questions, please email ncal@ncal.org.