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Date: November 7, 2007

To: Assisted Care Living Facilities
Area Agencies on Aging and Disability
Tennessee Commission on Aging and Disability

FROM: Patti Killingsworth, Chief of Long Term Care Operations

RE: Implementation of Assisted Care Living Facility Services in the Statewide Waiver Program for Persons who are Elderly and/or who have Physical Disabilities

As you may know, effective October 1, 2006, the State of Tennessee received approval from the Centers for Medicare and Medicaid Services (CMS) to begin covering a number of new services for persons enrolled in the Statewide Waiver Program for Persons who are Elderly and/or who have Physical Disabilities (hereinafter referred to as the SWW).

Among these new services is Assisted Care Living Facility (ACLF) Services. ACLF Services are defined in the SWW as “personal care services, homemaker services and medication oversight (to the extent permitted under State law) provided in a home-like environment in a licensed Assisted Care Living Facility (ACLF).”

Implementation of ACLF Services as a covered benefit under the SWW was delayed due to concern regarding the Department of Health’s (DOH) ACLF licensure requirements, specifically whether the ACLF statute and regulations permit persons who have been determined to require the level of care provided in a Nursing Facility to be served in an ACLF. (Pursuant to federal law and the State’s approved 1915(c) Waiver, *only* persons who need the level of care provided in a Nursing Facility may be enrolled in the SWW.)

TNAHSA helped to initiate legislation to address this issue, and on March 29, 2007, Senate Bill 1156 and House Bill 1349 were passed and subsequently signed into law, amending subdivision (5) of Tennessee Code Annotated Section 68-11-201 to clarify that such provision should **not** be interpreted to prohibit a person enrolled in the SWW (or other HCBS waiver) from being admitted to or retained for services in an ACLF so long as: 1) such services are consistent with the enrollee’s Plan of Care; and 2) such admission/retention is not otherwise prohibited under the law.

The DOH completed a legal analysis of the new statutory language and provided confirmation that persons enrolled in HCBS waivers (who meet Nursing Facility level of care) may be served in ACLFs so long as such persons otherwise qualify as “ACLF residents” under the Regulations of Health and Related Facilities at TCA 68-11-201(5).

Specifically, such regulations identify an “Assisted-care living facility resident” as “ambulatory.” The regulations further specify that, except under certain circumstances, an assisted-care living facility “shall not admit nor permit the continued stay of any person or assisted-care living facility resident if any of the following conditions exist:

- (i) The person is in the latter stages of Alzheimer's disease or related disorders;
- (ii) The person requires physical or chemical restraints;
- (iii) The person poses a serious threat to the person or to others;
- (iv) The person requires nasopharyngeal or tracheotomy aspiration;
- (v) The person requires initial phases of a regimen involving administration of medical gases;
- (vi) The person requires a nasogastric tube;
- (vii) The person requires arterial blood gas monitoring;
- (viii) The person is not able to communicate the person's needs;
- (ix) The person requires gastrostomy feedings;
- (x) The person requires intravenous or daily intramuscular injections or intravenous feedings;
- (xi) The person requires insertion, sterile irrigation and replacement of catheters, except for routine maintenance of Foley catheters;
- (xii) The person requires sterile wound care; or
- (xiii) The person requires treatment of extensive stage 3 or stage 4 decubitus ulcer or exfoliative dermatitis.

If any of the above conditions are present upon request for admission, such admission will be denied. If such conditions present following admission, the individual must be “transfer[red]...to a licensed nursing home or hospital.”

The regulations further specify the timelines by which such transfer must occur depending on the type of condition present.

Provision (B) of that section provides, however, that as long as “the person otherwise qualifies under the definition of an assisted living facility resident, the person's medical condition and overall health status are stable, the person is able to care for...[his/her] condition without the assistance of facility personnel or home health care, and the person has a documented history of self-care for...[his/her] medical condition for at least one (1) year, which is documented by the patient's treating physician and made part of such

person's medical record, then any assisted-care living facility may accept for admission and allow the continued stay of a person who:

- (a) Has in place a gastrostomy or percutaneous endoscopic gastrostomy (PEG) tube;
- (b) Requires a nasopharyngeal suctioning or has a tracheostomy tube;
- (c) Has in place a catheter that is such person's sole physical means of elimination of waste; or
- (d) Requires the routine administration of oxygen; provided, however, with respect to this requirement, that no such documented history of self-care for a person's medical condition for at least one (1) year shall be required for the continued stay of an assisted-care living facility resident.”

In short, it is possible that a person may qualify for enrollment in the SWW and still **not** qualify to receive ACLF Services because s/he does **not** meet the definition of an ACLF resident under the DOH statutory and regulatory licensure requirements. **The only SWW enrollees who may receive ACLF services are those who qualify (and continue to qualify) as ACLF residents.**

Rules of the Tennessee Department of Health, Board for Licensing Health Care Facilities, Chapter 1200-08-25 (available at

<http://www.tn.gov/sos/rules/1200/1200-08/1200-08-25.20091223.pdf>) will be modified to ensure consistency with the new statutory language. In the interim, licensure surveys will be conducted in accordance with the new statutory language, permitting persons enrolled in the SWW to receive ACLF services so long as such enrollees otherwise qualify as ACLF residents.

Questions regarding ACLF licensure requirements should be directed to:

Ann Thompson
Director of Licensure
Tennessee Department of Health
Ann.Thompson@tn.gov
615-532-6595

Accessing Reimbursement for ACLF Services under the SWW

In addition to qualifying as an ACLF resident, **all** of the following requirements must be met in order to qualify for Medicaid reimbursement of ACLF services under the SWW. (Included with each qualification is the procedure for meeting such qualification.)

1. **The person must qualify for and be enrolled in the SWW.** This includes determination of categorical and financial eligibility for Medicaid by the Department of Human Services (DHS), as well as determination of medical (i.e., level of care) eligibility for Nursing Facility care by TennCare. Point of entry into the SWW is through the Area Agencies on Aging and Disability (AAADs), who assist applicants with financial and medical eligibility application processes. Persons interested in enrolling in the SWW in order to access ACLF Services should be referred to their local AAAD.

Pursuant to TennCare Rule 1200-13-1-17 (1)(c) and 1200-13-1-17(6)(a), Caregiver services are needed “to meet the needs of the Enrollee during the hours when Waiver Services are not being provided by the Administrative Lead Agency.” Because ACLF Services are provided 24 hours per day, **a Caregiver Agreement is not required for persons receiving this service under the SWW;**

2. **The ACLF must qualify for and be enrolled as a SWW provider.** AAADs also assist potential providers with the provider enrollment process. ACLFs interested in enrolling as SWW providers should contact their local AAAD; and
3. **ACLF services must be ordered by the enrollee’s Physician and specified in an approved SWW Plan of Care.** AAAD Intake Staff are responsible for obtaining *initial* Physician’s Orders (to facilitate enrollment into the SWW). *New* persons applying to enroll into the SWW in order to access ACLF Services should advise AAAD Intake Staff accordingly. Contracted Case Management providers are responsible for obtaining periodic/modified Physician’s Orders and for the development, modification, implementation, and monitoring of the Individual Plan of Care. *Current* SWW enrollees interested in receiving ACLF Services should contact their Case Manager to request these services.

Room and Board *Excluded* from ACLF Services/Reimbursement under the SWW

The scope of the defined ACLF Services benefit that a qualified enrollee may access under the SWW does **not** include room and board. Federal regulations at CFR 42 Section 441.310(a)(2) prohibit States from covering room and board as a component of HCBS.

Examples of costs that are considered to be **room and board** which are **not covered** under the SWW include:

- Rent, mortgage payments, title insurance, mortgage insurance;
- Property and casualty insurance;
- Property taxes;
- Utilities, resident phone, cable TV, etc.;
- Building and/or grounds maintenance;
- Residents’ “raw” food costs including individual special dietary needs (the cost of preparing, serving, and cleaning up after meals may be covered under the SWW);
- Household supplies and equipment necessary for the room and board of the individual; and
- Furnishings used by the individual (does not include office furnishings).

Federal Financial Participation (FFP) is provided under the SWW *only* for costs pertaining to actual “care,” i.e., personal care services, homemaker services and medication oversight that is provided to the enrollee in the ACLF.

Examples of costs that are considered to be **covered** components of ACLF Services under the SWW include:

- Salaries of personal care support employees, homemaker employees, other support staff and supervisors who provide oversight;
- The cost of preparing, serving, and cleaning up after meals (“raw” food costs are excluded);
- FICA, staff health insurance costs or other benefits, worker’s compensation, unemployment compensation (as apportioned to support and supervision).
- Staff travel;
- Resident travel (including vehicle depreciation);
- Administrative overhead costs of doing business, including: office supplies and furnishings, percentage of administrative staff salaries, office telephone, recruitment, audit fees, operating fees/permits/licenses, percentage of office space costs, data processing costs, legal fees;
- Staff liability insurance/agency liability insurance; and
- Staff training/development/education.

The current rate of reimbursement for **covered** ACLF Services under the SWW shall not exceed \$1,100 per month. Such rate *excludes* all costs pertaining to room and board.

A SWW Enrollee who qualifies to receive ACLF services and for whom such services are identified in an approved Plan of Care is obligated to use their own resources to pay the costs of room and board in the ACLF, or the costs may be supplemented from family or other outside resources up to the maximum allowable charges for room and board.

In setting a rate for room and board, the provider must calculate such rate based on documented costs for room and board specified in the list above. For SWW enrollees, such room and board charges may not exceed 80% of the Personal Needs Allowance (PNA) specified in the SWW application. The PNA is the amount of income exempt from Patient Liability calculations under the SWW (i.e., the amount of money a SWW enrollee is allowed to keep in order to meet community living expenses), and is currently 200% of the federal SSI benefit rate (\$1,246 per month for calendar year 2007). Thus, for 2007, the maximum monthly room and board charges for SWW enrollees cannot exceed 80% of \$1,246 or \$996.80 per month. This amount will be adjusted each year in accordance with the federal SSI benefit rate.

To be clear, the limitation for SWW enrollees is not 80% of the room and board costs, but 80% of the PNA. If the costs of room and board are less than or equal to 80% of the PNA (\$996.80 per month), the full costs of room and board may be billed to a SWW enrollee. Further, this limitation applies *only* to SWW enrollees, and not to other ACLF residents.

This limit on room and board charges is based on research of other state waiver programs and the *2004 State Residential Care and Assisted Living Policy* developed by the

Assistant Secretary for Planning and Evaluation (ASPE), the principal advisor to the Secretary of the U.S. Department of Health and Human Services on policy development. Arizona, Colorado, Delaware, the District of Columbia, Georgia, Hawaii, Idaho, Illinois, Indiana, Maryland, Minnesota, Mississippi, Montana, Nebraska, New Jersey, New Mexico, North Carolina, North Dakota, Oregon, Pennsylvania, South Carolina, South Dakota, Texas, Vermont, Washington, and Wisconsin all limit charges for room and board—most to 100% of the SSI payment plus a state supplement, when applicable, in order to guarantee that Medicaid beneficiaries can afford room and board costs.

ACLF providers should be aware that not all SWW enrollees have income up to 200% of the federal SSI benefit. Individuals who qualify for Medicaid-funded ACLF services often have income *below* the poverty level and will not be able to afford a room and board charge which exceeds their monthly income.

Medicaid beneficiaries with monthly income that *exceeds* the PNA must contribute excess income toward the cost of **covered** SWW services. This is referred to as Patient Liability. The Case Management provider under the SWW is responsible for collecting Patient Liability for SWW enrollees, when applicable. Patient Liability is used to offset the cost of covered SWW services, including **covered** ACLF Services. Such payments are *in addition to* ACLF room and board costs which must be paid to the ACLF provider by the enrollee.

ACLFs that enroll as SWW providers must break out the usual and customary monthly charges for ACLF services into two components: 1) **covered** ACLF Services which will be billed under the SWW program and reimbursed by TennCare up to a maximum of \$1,100 per month; and 2) **non-covered room and board** charges up to a maximum of 80% of the PNA, which the provider must collect directly from the SWW enrollee (or their family members).

ACLFs that enroll as SWW providers are reminded that, pursuant to federal regulations, charges to the Medicaid program for ACLF services provided to participants in the SWW may **not** exceed the usual and customary charges for the same service delivered to ACLF residents who do not participate in the SWW program.

ACLFs that enroll as SWW providers must agree to accept the amount of reimbursement provided under the SWW for **covered** ACLF Services as “payment in full.” ACLFs that enroll as SWW providers may not bill SWW enrollees (or their family members) for *any* portion of the costs of **covered** ACLF Services; nor may ACLF providers shift any portion of the costs of **covered** ACLF Services to non-covered room and board charges.

The ACLF provider is responsible for collecting the room and board charge from the SWW enrollee. Neither the state nor its HCBS administrative entities are responsible for collecting or paying room and board charges. If the participant becomes delinquent in paying the room and board charge, the ACLF provider may, with proper notice, take appropriate steps to discharge the individual from its facility. At least 30 days advance notice of such discharge must be provided.

In such case, the AAAD and the enrollee's Case Manager should be promptly notified in order to help facilitate transition to another living arrangement. To the extent that such transition results in an adverse action pertaining to **covered** ACLF Services, the AAAD shall provide notice, pursuant to the *Grier* Revised Consent Decree, at least 10 days before the effective date of such action.

In summary, an ACLF that enrolls as a SWW provider shall:

- 1) Break out usual and customary monthly charges into **covered ACLF Services** which will be billed under the SWW and reimbursed by TennCare at a rate not to exceed \$1,100 per month, and **non-covered room and board** charges, which the provider must collect directly from the SWW enrollee at a rate not to exceed 80% of the PNA for SWW enrollees (currently \$996.80) per month;
- 2) Bill the Medicaid program *only* for **covered** ACLF Services, i.e., "personal care services, homemaker services and medication oversight" provided to a SWW enrollee in an ACLF;
- 3) Base such room and board rate *only* on the costs of room and board as defined herein;
- 4) Agree to accept the amount of reimbursement provided under the SWW for such **covered** ACLF Services as "payment in full";
- 5) Not "balance bill" an enrollee for any charges or costs pertaining to such **covered** ACLF Services, including amounts which exceed the level of reimbursement provided for **covered** ACLF Services under the SWW;
- 6) Not "shift" any charges or costs pertaining to **covered** ACLF Services to the rate established for room and board; and
- 7) Ensure timely and appropriate notice to the enrollee and to the AAAD prior to discharge from the ACLF when a SWW enrollee is delinquent in paying room and board charges.

Other Services that may be Accessed by ACLF Residents under the SWW

Individuals who receive ACLF Services through the SWW may also receive the following SWW services, as specified in an approved Plan of Care:

- Case Management
- Assistive Technology

Individuals who receive ACLF Services through the SWW are not eligible to receive the following HCBS services since these needs are the responsibility of the ACLF provider or are not applicable for ACLF residents:

- Personal Care Services
- Personal Care Assistant/Attendant
- Homemaker
- Home Delivered Meals
- Adult Day Care
- In-Patient and In-Home Respite
- Minor Home Modifications

- Personal Emergency Response System (PERS) Installation & Monitoring
- Pest Control

Going forward, the Bureau of TennCare and the Tennessee Commission on Aging and Disability will research the *possibility* of establishing “tiers” of ACLF Services in order to accommodate individuals who may need more intensive hands-on care than is typically provided in ACLF settings, or in allowing individuals with certain levels of need to receive Personal Care or other services *in addition to* the basic level of assistance that is typically provided under the ACLF Services benefit. Such changes would likely require an amendment of the State’s approved 1915(c) waiver application, as well as appropriations to support these changes, and cannot be implemented at this time.

Questions regarding coverage of ACLF Services under the SWW should be directed to:

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