NSCLC
National Senior Citizens Law Center

PROTECTING THE RIGHTS OF LOW-INCOME OLDER ADULTS

February 6, 2013

Jane Ogle, Deputy Director, Health Care Delivery Systems
Department of Health Care Services
Sacramento, CA

Delivered via e-mail to: info@CalDuals.org

Dear Ms. Ogle,

The National Senior Citizens Law Center submits these comments on California's "Draft Policy for Demonstration Plans Offering Additional Home- and Community-Based Services (HCBS)," shared with stakeholders via email on January 27, 2013.

We appreciate the administration's intent "to expand the availability and use of HCBS," and to "create a structure and culture where HCBS are broadly available." Draft HCBS Policy at 1. In our view, however, the current draft policy is not the way to achieve that goal, and could in fact have the reverse effect of reducing access to needed home and community based services for seniors and persons with disabilities.

Our core objection to the proposed HCBS policy is the Department's decision not to include the additional HCBS benefits currently available through waivers (including respite, nutritional assessment, counseling, supplements, home or environmental adaptations, habilitation, transition assistance, supplemental home health and personal care, and other services) as required elements of the covered benefit package, which form the basis for capitated rates paid to plans. Similarly, for the reasons described below, we disagree with the exclusion from the covered benefit package of Community Care Transitions (CCT) services, as well as the draft policy's lack of commitment to the Multipurpose Senior Services Program (MSSP) waiver beyond the legislatively required 19 month funding period.

Failure to include these types of additional HCBS services as part of the covered benefit package sends a signal to plans that additional or supplemental HCBS are optional rather than mandatory, even for those who need them to avoid nursing home or other less-inclusive living arrangements. As a former health plan executive recently explained, the difference between covered and non-covered benefits in managed care is

traditionally "a fairly bright line, and if it is not our service, if the service or product in question is not a benefit, then it is highly unlikely that managed care will provide it."[1]

At best, giving complete discretion to plans to decide whether to offer waiver-level HCBS turns these important services into a 'hidden' benefit. Members of a dual demonstration plan may not know that these benefits exist. These beneficiaries will be denied access to the appeals and other due process protections currently available to waiver participants. And without strong reporting requirements, neither DHCS, nor the legislature, nor stakeholders will know whether plans are in fact providing these HCBS benefits.

We understand that the draft policy is based on the assumption that because managed care plans will have the financial incentive to avoid more costly institutional care, they will provide all waiver-level HCBS to those who need it. If this financial incentive is truly sufficient, however, there is no reason *not* to formally include these services in the agreed-upon benefits package. Inclusion in the benefit package will ensure that plan rates are sufficient to provide the services; that plans establish a network of providers to deliver the services; and that plans actually offer these services to beneficiaries that need them to live in the community.

California's policy to exclude these benefits runs counter to a national trend among states to include HCBS waiver services in the required benefit package. Our review of other states' contracts with managed care organizations shows that a significant number of states with existing managed LTSS programs (including Arizona, Minnesota, Tennessee, Texas and Wisconsin) explicitly identify HCBS waiver services as part of the benefit package in their contracts with managed care organizations.

Waivers are currently an important part of California's plan for meetings its obligations under the Americans with Disabilities Act, pursuant to *Olmstead v. LC*, 527 U.S. 581 (1999). *See* California's Olmstead Plan at 27- (describing Medi-Cal Waivers). The current waivers offer participants a necessary venue for enforcing their rights under *Olmstead*, namely the state fair hearing process. DHCS' current proposal would essentially eliminate that right for future recipients of waiver-like services enrolled in the duals demonstration.

Furthermore, California's Olmstead plan rightly describes the waiver's purposes as not merely avoidance of institutionalization, but "to ensure the provision of all services that are necessary to ensure *successful community living*." Id. at 28 (emphasis added). Yet

[1] Bruce Chernof, The SCAN Foundation, "TSF Webinar: Managed Care 101- Presenting the Fundamentals of Integrating Long-Term Services and Supports into a Managed Care Model," Dec. 14, 2012, available at http://www.thescanfoundation.org/tsf-webinar-managed-care-101-presenting-fundamentals-integrating-long-term-services-and-supports.

nothing in the current draft document explains how managed care plans will be incentivized to meet this objective, or how their success at this objective will be measured.

Finally, we are very concerned that the draft policy would deny Medi-Cal only seniors and persons with disabilities, and dually eligible individuals, from the benefits of supplemental HCBS. While we understand and appreciate that DHCS intends to preserve the waivers themselves, these waivers are and would continue to be oversubscribed. The non-Medicare options for those enrolled in a duals demonstration plan versus those enrolled only in Medi-Cal managed care should be fairly aligned. Moreover, the administration of two separate benefits for groups with the same level of need would generate significant confusion and logistical difficulty.

In addition to these general comments, we also include some specific suggestions in the attached comment template. Please do not hesitate to contact us with any additional questions. We look forward to continued participation in the stakeholder process.

Sincerely,

Kevin Prindiville
Deputy Director

Anna Rich
Senior Staff Attorney

Comment Template

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COMMENTS TO DRAFT POLICY FOR DEMONSTRATION PLANS OFFERING ADDITIONAL HOME-AND COMMUNITY-BASED SERVICES (HCBS) JANUARY 24, 2013	Title	"Additional Home and Community-Based Services (HCBS)"	The use of HCBS as an acronym to refer to services provided in lieu of those otherwise available to waiver participants is confusing, because "HCBS" typically is a broad term, often used to refer to all non-institutional Long Term Supports and Services (LTSS). We suggest a special acronym, such as "E-HCBS" (Extra or Enhanced HCBS), or a suitable alternative.
P. 1	Introduction	N/A	See accompanying letter for suggestions for how to better ensure provision of E-HCBS. If DHCS' intention is that CCI participants who opt out of the duals demonstration plans will continue to receive E-HCBS through waivers, this should be made clear in the introduction.

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p. 2	Purpose of this Paper	This particular guidance is focused on the provision of a limited number of additional HBCS that are listed in the authorizing legislation for the duals demonstration, which "may include": 1. Respite care: in home or out-of-home; 2. Additional Personal Care and Chore Type Services beyond those authorized by IHSS; 3. Habilitation ; 4. Nutrition: Nutritional assessment, supplements and home delivered meals; 5. Home maintenance and minor home or environmental	We recommend that this policy list all services currently offered under HCBS waivers and special programs, and make it clear that plans are authorized and encouraged to offer such services as an alternative to institutional care. These services include, in addition to those listed in the authorizing legislation: MSSP; CCT; Case Management/Coordination; Habilitation Services; Home Respite; Community Transition Services; Continuous Nursing and Supportive Services; Environmental Accessibility Adaptations; Facility Respite; Family/Caregiver Training; Medical Equipment Operating Expense; Personal Emergency Response (PERS) Systems, Installation and Testing; Private Duty Nursing - Including Home

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		adaptation; and, 6. Other services (the list provided by legislation is permissive.) [4]	Health Aide and Shared Services; Transitional Case Management; and Assisted Living Services
p. 2	Purpose of this Paper	4 The legislation allows for "other services," which could include Personal Emergency Response Systems (PERS), assistive technology, In-home skilled nursing care, and other items. DHCS invites comment on additional services to be listed.	See comment directly above.
P. 3	Duals Demonstration Vision for HCBS	At the same time, demonstration plans will have the incentive to offer the six additional HCBS discussed in this paper in order to keep persons in the home and community,	1. Unless the demonstration plans and members understand that the menu of services available under waivers are within their ability and discretion to provide, and they actually

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		resulting in a higher quality of life for their members and avoiding unnecessary and costly institution-based care.	provide them to individuals who would otherwise receive Waiver services, the CCI will not "eliminate the need for the waivers." The text should be modified to say "demonstration plans will have the incentive to offer the full range of HCBS in order to keep persons in the home and community…" 2. This section (or a new separate section) should make clear the measures that will be taken to evaluate whether demonstration plans do respond to these incentives appropriately, including transparent reporting of E-HCBS services provided to

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			former waiver participants and those eligible for waivers.
p. 3	Preparing for the Demonstration	• *Engage with plans and providers about the vision, goals, operations and potential partners of the new system.* There is an array of HCBS providers available to individuals who are dual eligible in addition to the programs being integrated into demonstration plan services, including, but not limited to, Area Agencies on Aging, Independent	1. In order for the CCI and duals demonstration to be successfully implemented, this process of engagement and education needs to have already begun. Based on our conversations with county level providers, however, while some plans are taking this obligation seriously, others are not. DHCS should check with plans and local HCBS providers to determine which counties are sufficiently far along in this process for a September enrollment to

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		Living Centers, Aging and Disability Resource Connections, and California Community Transition Lead Organizations. Starting in Spring 2013, DHCS will help facilitate a focused effort to help make sure that such providers are meeting with the demonstration plans and building relationships in order to develop a shared understanding of each entity's role.	be realistic, and should delay implementation of the duals demo where this process is not yet sufficiently underway. 2. While these providers may be "available" to plan members, there is no guarantee that their services are available. If providers have waiting lists for their services, or have no funding available to serve more individuals, there will be little for the plans to integrate. And while the CCT agencies will still be in place, if the plans do not pay for the services which the plans identify as needed for transition, the members will not be able to leave or avoid institutional

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			placement. 3. DHCS' and managed care health plans efforts should also include collaborating with mental health plans and the Department of Developmental Services and regional centers to ensure that managed care enrollees have full and timely access to mental health and regional center services that they may require in addition to health plan benefits. 4. In addition, the list of organizations should be expanded to include direct HCBS service providers such as NF/AH Waiver providers (supported living providers and home health

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			agencies), Assisted Living Waiver providers, AIDS Waiver and MSSP providers, CBAS providers and others
p. 4	Plan Approach to Certain Home- and Community-Based Efforts	As a requirement for participating in the demonstration, and with regard to the six additional HCBS only, plans will: • Coordinate such services for beneficiaries who need them. • Refer beneficiaries to community providers to deliver services and to work with those providers as the plan deems appropriate. • Develop a care plan where the member has input into the	1. Again, reference to "the six additional HCBS only" ignores that "other" services could and should be considered to actually provide an alternative to institutional placement. 2. The four bullet points outlining plans' requirements are extremely vague about their obligations with respect to providing and coordinating and providing HCBS and otherwise preventing unnecessary institutionalization. The plans should be obligated to assess for and consider the full range of HCBS to minimize institutionalization, in a timely

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		services to be provided (for members requiring such a plan.) • Be authorized to deliver additional HCBS to beneficiaries at the plan's discretion. Plans will have the financial incentive to provide these additional HCBS; however, there is no obligation to offer the six additional services. Since the six additional services are not part of the core Medi-Cal program today, those services will not be subject to Medi-Cal grievance and appeals procedures if a plan	manner, to ensure that members are not needlessly placed in and do not needlessly remain in institutional placements. Please refer to previous comments submitted jointly by DRC and NSCLC regarding care coordination and LTSS for further detail on these concerns. 3. We strongly believe that there is no legal basis to omit HCBS from Medi-Cal rights to grievances and appeals. As part of the service package offered by managed care plans using Medi-Cal funds, particularly when individuals are not provided with a choice about whether to receive their Medi-Cal HCBS services through managed care or fee-for-service, members must retain

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		chooses to offer them. Plans will develop internal procedures as part of developing a care plan that is patient-centered. In contrast to the provision of the six additional HCBS services, health plans have very specific requirements to meet regarding the provision of key LTSS through IHSS, MSSP, CBAS, and nursing facilities, as set forth in separate guidance. For the LTSS benefits that are required to be offered under Medi-Cal, the grievance and appeals procedures that exist today will continue.	their due process rights that exist in the current Waiver programs. It is a misstatement to say that HCBS services are "not part of the core Medi-Cal program today." To the extent that services that are available through Medi-Cal HCBS Waivers, and are replacing such Waiver services, or are offered in institutional settings, members must retain their Medi-Cal rights to grievances and hearings for reduction, termination, denial, or suspension of such services.
p. 4-5	Readiness and Compliance	The provision of these certain HCBS will be a new	We would like to see much more specificity here regarding the

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		function for many demonstration plans. As such, the state will require that plans take a number of steps to prepare for implementation. More specifically, for the services discussed in this document, demonstration plans must create: 1. Policies and procedures that guide the demonstration plans' care coordinators, Interdisciplinary Care Teams, and primary care physicians in assessing the appropriate authorization of these services and/or benefits, in addition to the required community-based LTSS (i.e. CBAS and IHSS), including but	required components of plans' policies and procedures, timing, DHCS' monitoring, and compliance with state and federal laws protecting due process and disability rights. We repeat our previous requests for information about what functional assessments will be used, who will administer them and the connection between the assessment and the offer of services.

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		not limited to assessment tools and reassessment cycles. 2. Policies and procedures to identify members that may need HCBS, and to refer members to community-based organizations and other entities that provide these services, such as California Community Transitions organizations, Area Agencies on Aging, Independent Living Centers, or ADRCs where available. 3. A training curriculum and program for demonstration plan staff that provides for an orientation for all staff on the Americans with	

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		Disabilities Act, the Olmstead Decision and HCBS issues, and detailed training on community and county HCBS that maybe available.	
6-7	Appendix A	Population served and number of enrollees- column	DHCS should clarify that institutional deeming rules will continue to apply to recipients of E-HCBS who would be otherwise eligible for nursing facility care.