

March 29, 2022

Representative Diana DeGette
2111 Rayburn House Office Building
Washington, DC 20515

Representative Fred Upton
2183 Rayburn House Office Building
Washington, DC 20515

Dear Representatives DeGette and Upton:

On behalf of the National Association of State Directors of Developmental Disabilities Services, ADvancing States, Applied Self-Direction, and the National EVV Consumer Employer Coalition, we are writing you in response to the legislative text of the 21st Century Cures 2.0 Act. Our groups represent a diverse range of participants, state agencies, and private companies involved in long-term services and supports (LTSS) for older adults and people with disabilities in every state and territory. We believe that the broad perspectives of the various groups included on this letter represents the strength of our coalition and the resulting value of our proposed changes to Cures 2.0.

As you know, Section 409 of the Cures 2.0 Act contains language that would ban the use of geolocation services and biometrics from the electronic visit verification (EVV) systems that states are developing and implementing to meet the requirements contained in the original Cures Act. Our organizations have vastly different perspectives on the current proposal in Section 409 and joined together to develop a potential compromise that meets the needs of individuals who receive services as well as government agencies tasked with administering LTSS and the companies that support individuals who receive self-directed services. We have spent significant time discussing the various priorities and concerns of our respective groups and we have developed a proposal that we believe will meet the needs of all of the stakeholders we collectively represent.

The central point of our proposal focuses on promoting the autonomy, control, and privacy of participants in the Medicaid program while also recognizing that states and LTSS providers need to manage their programs and have already spent considerable resources developing EVV. A summary of our intent of these changes is to:

- Acknowledge the difference between self-directed services and agency-provided services within home and community-based services (HCBS) and the need to approach them differently for EVV;
- Continue to require EVV for agency-provided services while making EVV optional for states to use in self-directed services;
- Prohibit the use of GPS and Biometrics in EVV for self-directed services for those states that elect to use EVV in those services; and
- Provide states with a variety of options to use in lieu of GPS and Biometrics for self-direction.

We have included two attachments to this letter. One of the attachments contains potential language to replace the existing Section 409. The other is a markup of the Social Security Act that demonstrates the intended outcome of our proposed language. We believe that this represents a reasonable compromise that will maintain the spirit of promoting participant autonomy, control over life and choices, and

privacy in HCBS while also giving states the tools to continue using existing systems and to manage program integrity in their systems.

We are pleased that our organizations were able to work together to develop this compromise and we all strongly encourage you to adopt this proposal, or something very similar that achieves the same goals, instead of the problematic language included within the current legislative drafts. If you have any questions regarding this letter, please feel free to contact Damon Terzaghi at dterzaghi@advancingstates.org, Dan Berland at dberland@nasddds.org, Molly Morris at molly@appliedselfdirection.com, or Charles Carr at CharlesCarr@dpcma.org.

Sincerely,



Charles Carr
National EVV Consumer
Employer Coalition



Katherine Murray
Principal
Applied Self-Direction



Martha A. Roherty
Executive Director
ADvancing States



Mary Sowers
Executive Director
NASDDDS

Cc: Members of Congress

Attachment 1: Suggested Language for Sec. 409

Sec. 409 – Enhancing Participant Privacy and Autonomy in Self-Direction

- (a) Section 1903(l) of the Social Security Act (42 U.S.C. 1396b(l)) is amended—
- (1) By striking “requiring” in paragraph (1) and inserting “that are not self-directed and that require” before “an in-home visit”;
 - (2) By inserting “, subject to subsection (6),” after “means” in paragraph (5);
 - (3) By inserting a new subsection (D) below subsection (5)(C)— “(D) The term “self-directed services” has the meaning ascribed in section 1915(k)(6)(B) of this title.”
 - (4) By redesignating paragraph (6) as paragraph (7);
 - (5) By inserting a new paragraph (6) after paragraph (5)— “(6) In the case of a state that elects to use an electronic visit verification system for self-directed services, such system:
 - (A) May verify the location of service (as required by paragraph (5)(A)(iv)) using any of the following:
 - (i) Electronic dual verification timesheets;
 - (ii) An electronic random number generator regardless of whether it is in a fixed location;
 - (iii) Telephonic verification; and
 - (iv) An alternative methodology proposed by the state and approved by the secretary.
 - (B) May not utilize any Global Positioning System or biometrics.”
- (b) EFFECTIVE DATE.—The amendments made by this section shall apply with respect to calendar quarters beginning on or after June 1, 2023.

Attachment 2: Desired Outcome of Proposed Changes to the Social Security Act

(l) (1) Subject to paragraphs (3) and (4), with respect to any amount expended for personal care services or home health care services that are not self-directed and that requiring-require an in-home visit by a provider that are provided under a State plan under this title (or under a waiver of the plan) and furnished in a calendar quarter beginning on or after January 1, 2020^[130] (or, in the case of home health care services, on or after January 1, 2023), unless a State requires the use of an electronic visit verification system for such services furnished in such quarter under the plan or such waiver, the Federal medical assistance percentage shall be reduced—

(A) IN THE CASE OF PERSONAL CARE SERVICES

- (i) for calendar quarters in 2020, ^[131] by .25 percentage points;
- (ii) for calendar quarters in 2021, by .5 percentage points;
- (iii) for calendar quarters in 2022, by .75 percentage points; and
- (iv) for calendar quarters in 2023 and each year thereafter, by 1 percentage point; and

(B) IN THE CASE OF HOME HEALTH CARE SERVICES

- (i) for calendar quarters in 2023 and 2024, by .25 percentage points;
- (ii) for calendar quarters in 2025, by .5 percentage points;
- (iii) for calendar quarters in 2026, by .75 percentage points; and
- (iv) for calendar quarters in 2027 and each year thereafter, by 1 percentage point.

(2) Subject to paragraphs (3) and (4), in implementing the requirement for the use of an electronic visit verification system under paragraph (1), a State shall—

(A) consult with agencies and entities that provide personal care services, home health care services, or both under the State plan (or under a waiver of the plan) to ensure that such system—

- (i) is minimally burdensome;
- (ii) takes into account existing best practices and electronic visit verification systems in use in the State; and
- (iii) is conducted in accordance with the requirements of HIPAA privacy and security law (as defined in section 3009 of the Public Health Service Act);

(B) take into account a stakeholder process that includes input from beneficiaries, family caregivers, individuals who furnish personal care services or home health care services, and other stakeholders, as determined by the State in accordance with guidance from the Secretary; and

(C) ensure that individuals who furnish personal care services, home health care services, or both under the State plan (or under a waiver of the plan) are provided the opportunity for training on the use of such system.

(3) Paragraphs (1) and (2) shall not apply in the case of a State that, as of the date of the enactment of this subsection, requires the use of any system for the electronic verification of visits conducted as part of both personal care services

and home health care services, so long as the State continues to require the use of such system with respect to the electronic verification of such visits.

(4)(A) In the case of a State described in subparagraph (B), the reduction under paragraph (1) shall not apply—

(i) in the case of personal care services, for calendar quarters in 2020;^[132] and

(ii) in the case of home health care services, for calendar quarters in 2023.

(B) For purposes of subparagraph (A), a State described in this subparagraph is a State that demonstrates to the Secretary that the State—

(i) has made a good faith effort to comply with the requirements of paragraphs (1) and (2) (including by taking steps to adopt the technology used for an electronic visit verification system); and

(ii) in implementing such a system, has encountered unavoidable system delays.

(5) In this subsection:

(A) The term “electronic visit verification system” means, subject to subsection (6), with respect to personal care services or home health care services, a system under which visits conducted as part of such services are electronically verified with respect to—

(i) the type of service performed;

(ii) the individual receiving the service;

(iii) the date of the service;

(iv) the location of service delivery;

(v) the individual providing the service; and

(vi) the time the service begins and ends.

(B) The term “home health care services” means services described in section 1905(a)(7) provided under a State plan under this title (or under a waiver of the plan).

(C) The term “personal care services” means personal care services provided under a State plan under this title (or under a waiver of the plan), including services provided under section 1905(a)(24), 1915(c), 1915(i), 1915(j), or 1915(k) or under a wavier under section 1115.

(D) The term “self-directed services” has the meaning ascribed in section 1915(k)(6)(B) of this title.

(6) In the case of a state that elects to use an electronic visit verification for self-directed services, such system:

_____ (A) May verify the location of service (as required by paragraph (5)(A)(iv)) using any of the following:

_____ (i) Electronic dual verification timesheets;

_____ (ii) An electronic random number generator regardless of whether it is in a fixed location;

_____ (iii) Telephonic verification; and

(iv) An alternative methodology proposed by the state and approved by the secretary.

(B) May not utilize any Global Positioning System -or biometrics.

~~(76)~~(A) In the case in which a State requires personal care service and home health care service providers to utilize an electronic visit verification system operated by the State or a contractor on behalf of the State, the Secretary shall pay to the State, for each quarter, an amount equal to 90 per centum of so much of the sums expended during such quarter as are attributable to the design, development, or installation of such system, and 75 per centum of so much of the sums for the operation and maintenance of such system.

(B) Subparagraph (A) shall not apply in the case in which a State requires personal care service and home health care service providers to utilize an electronic visit verification system that is not operated by the State or a contractor on behalf of the State.

(b) EFFECTIVE DATE.—The amendments made by this section shall apply with respect to calendar quarters beginning on or after June 1, 2023.