Susan Mosier, M.D., Director
Kansas Department of Health and Environment
Division of Health Care Financing
900 SW Jackson Street, Room 900N
Topeka, KS  66612

RE:  Kansas’ Capable Person Policy Clarification

Dear Dr. Mosier:

In recent months, the Kansas City Regional Office of the Centers for Medicare & Medicaid Services (CMS) has received a number of questions and concerns regarding the Kansas Department for Aging and Disability Services (KDADS) Standard Policy E2016-006, posted March 8, 2016 with an effective date of February 2, 2016. This policy is colloquially known as the “capable person policy.” It defines who cannot be paid for providing personal care services (PCS) and similar services, and exceptions to that prohibition.

We reviewed the capable person policy, and found a number of corrections and improvements we would like to suggest. We also compared the capable person policy to each of Kansas’ HCBS waivers that include personal care or similar services. We found a number of inconsistencies between the approved waivers and the capable person policy. When the capable person policy disagrees with an approved waiver, the waiver is the authority regarding the services and providers for which Federal Financial Participation (FFP) matching funds can be claimed. Correcting these inconsistencies will require amendment of either the policy, or the waivers.

The enclosure to this letter contains the results of our review of the capable person policy and each of the six waivers that include PCS or similar services. After reviewing the entire document, please let us know whether you intend to amend the capable person policy or the waivers, and the date(s) by which you expect to revise the documents.

Please also be advised that until the waiver amendments are approved by CMS, KDADS must halt implementation of the capable person policy as currently written. Implementation of the capable
person policy prior to approval of amendments that reconcile the waivers and the policy may result in compliance action by CMS.

If you have any questions, please contact Karen Hatcher or Michala Walker at (816) 426-5925.

Sincerely,

James G. Scott
Associate Regional Administrator
for Medicaid and Children’s Health Operations

Signed by: James G. Scott -A

Enclosure

cc:
Mike Randol, Director
Fran Seymour-Hunter
Tim Keck
Brandt Haehn
In late Spring/early Summer 2016, KDADS announced its intention to begin enforcing the above-captioned policy, colloquially known as the “capable person” policy. State spokespeople explained that the policy was already in Kansas’ Medicaid home- and community-based services waivers, but had not previously been strictly enforced. In response to questions and concerns from stakeholders, the Kansas City Regional Office of the Centers for Medicaid and Children’s Health Operations undertook a review of the policy. We identified a number of inconsistencies and concerns that we would like to suggest revisions to.

In general terms, the capable person policy defines a group of people who cannot be paid for providing personal care services (PCS) and similar services to waiver participants. It states that a capable person living in the home of the participant with whom he or she has a significant relationship shall not be paid to provide PCS or similar services for Instrumental Activities of Daily Living (IADLs) that the capable person would ordinarily perform or be responsible to perform. It also states exceptions to that general restriction. The policy also states a different set of exceptions governing when legally responsible individuals can be paid for providing PCS and similar services.

The most significant issue identified by our review of the “capable person” policy is an internal contradiction regarding whether PCS can be paid for when a capable person is in the participant’s home but refuses to perform tasks related to IADLs. On page 6, the policy states that the participant’s managed care organization (MCO) may authorize PCS if the family member or informal support refuses to complete IADL tasks for the participant informally. In this situation, another provider could be paid for providing PCS to assist the participant with the tasks that the capable person (i.e., the “family member or informal support”) refuses to perform. No stipulations regarding the reasons why the capable person might refuse to perform such tasks are made in relation to the exception on page 6. However, on page 9, the policy states, “If the capable person with whom the participant lives chooses to refuse to perform any, or all of the above tasks outlined within the participant’s ISP, and does not provide a valid reason as noted above, the HCBS waiver programs shall not pay for PCS specific to the participant’s needs related to the refusal” (emphasis added). Valid reasons include the capable person being unavailable due to employment or school attendance, being unable to sleep 8 hours out of every 24, or having a physical condition that prevents performance of the task.

- The policy should be clarified with regard to whether PCS can be paid by HCBS waiver programs for tasks related to IADLs that a capable person is available, but refuses, to perform. If Kansas wishes to stipulate the reasons why a refusal may be considered valid, those reasons should also be clearly and consistently stated.

The second most significant issue also occurs on page 9, and regards the exceptions under which a capable person can be paid to provide PCS or similar services. Pages 8 and 9 of the policy list three exceptions to the prohibition on payment of capable persons:

(a) the capable person can no longer continue providing informal supports due to:
   (1) employment,
   (2) school attendance,
   (3) not receiving at least 8 hours of sleep in 24, or
   (4) having a physical condition that prevents him her from providing the support;
(b) the capable person cannot complete housekeeping and laundry tasks for the participant because of documented incontinence issues that create excessive laundry or require excessive housekeeping; and
(c) the capable person cannot complete meal preparation because the participant’s meals are so different from the capable person’s meals due to a medically prescribed diet that the participant’s meals require entirely different preparation.

Item 3 on page 9 states, “If exceptions b. and/or c. are applicable and authorized by the MCO, the capable person may be paid through PCS to provide the specific supports identified under the exception.” However, the policy does not explicitly state whether PCS can be paid to a provider other than the capable person when exception (a) applies – that is, the policy does not say that someone else can be paid to provide PCS when the capable person cannot because of one of the four valid reasons.

- The policy should explicitly state that PCS can be paid to another provider when a capable person can no longer continue providing informal supports because of a valid reason, presuming that was State’s intention. One possible clarification would be to add a sentence such as the following to item 3 on page 9: “If exception a. applies and is authorized by the MCO, a provider other than the capable person may be paid through PCS to provide the specific supports identified under the exception.”

A third concern is the inconsistency of the terms used in several instances. On page 8, item 1 states that “a capable person…shall not be paid to provide PCS or similar services for IADLs….” However, page 1 defines PCS to include both ADLs and IADLs. And in other instances the document references PCS when describing the services that shall not be authorized when a capable person is available, such as in items H and I on page 5. Was the State’s intention to only prohibit the payment of capable persons for PCS related to performing IADLs? If so, then statements such as “A participant shall not be provided PCS for activities or tasks that in-home family or informal support would normally provide…” are too broad, as capable persons could be paid for providing PCS related to ADLs.

- Please clarify whether the prohibition on payment of capable persons is only for PCS related to IADLs, or PCS related to both ADLs and IADLs. If the prohibition only applies to PCS related to IADLs, please revise statements that generalize the prohibition to all PCS.

Another inconsistent term appears on pages 7-8, in item 2 under the heading “Legally Responsible Individuals.” Item 2 states “neither an adult participant’s spouse nor a minor participant’s parents shall be paid to provide HCBS services….” The first extraordinary care criterion states “The MCO shall furnish written documentation that the participant’s residence is so remote or rural that HCBS services are otherwise completely unavailable.” However, item 1 under this heading and the second extraordinary care criterion refer to PCS and IADLs, respectively. Is the prohibition on payment of legally responsible individuals meant to apply to all PCS, PCS related to IADLs only, or all HCBS?

- Please clarify whether the prohibition on payment of legally responsible individuals and related extraordinary care criteria is for all PCS, PCS related to IADLs only, or all HCBS.

A fourth area of concern is the multiple, inconsistent enumerations of the various exceptions to the prohibitions on payment of legally responsible individuals and capable persons. For example, the definition of a capable person, and the exceptions to the prohibition on paying capable persons, appear on pages 8-9. But on page 5, the policy references a prohibition to payment of PCS for activities that in-home family or informal support would normally provide. The first numbered item under this heading explains that a capable person may be paid to provide PCS when the IADL activity exceeds what the person would normally perform for the household. It gives the example of meal preparation when the participant requires a specialized diet. The one exception on pages 5-6 is inconsistent with the three exceptions listed on pages 8-9.
For another example, the definition of legally responsible individuals, and the exceptions to the prohibition on paying legally responsible individuals, appear on pages 7-8. However, another group of people who are prohibited from being paid to provide PCS appears on page 5, including spouses, parents of minors, guardians, conservators, persons with durable power of attorney, and individuals acting on behalf of a participant. The first numbered item under this heading on page 9 regards legally responsible individuals and references, but does not specify, the exceptions that can be authorized for them.

- Please organize the policy so that each group – legally responsible individuals and capable persons – and the relevant exceptions are defined only once. If reference needs to be made to a particular group, or the exceptions for a particular group elsewhere in the policy, please refer to the section of the policy and/or page number containing the relevant exceptions, rather than describing the exceptions in a limited or inconsistent manner.

Finally, the definition of legally responsible person on page 14 does not actually define a legally responsible person. Rather, it reiterates the prohibition on paying legally responsible persons for provision of PCS. The policy does not include a definition of a legally responsible person as established in Kansas State law. The only reference to who is considered legally responsible is the parenthetical phrase on page 7, “spouse or parent of a minor child.”

- Please include the legal definition of a legally responsible person and cite the relevant Kansas State law in the policy.
0224 (I/DD)

- The waiver states that a qualified relative or legal guardian may provide supportive home care, personal assistant, and sleep cycle support services if such service are in the person-centered plan. With regard to supportive home care, the waiver specifies that if the client’s needs can be met by friends or relatives who live with the participant, they should be unless there are extenuating circumstances documented in the ISP. The waiver further specifies that if the capable person refuses or is unable to provide supports, supportive home care can be included in the service plan. No stipulations are made in the waiver as to the reasons for the refusal.
  - Supportive home care is included in the list of services defined as PCS in the capable person policy. The capable person policy has an inherent contradiction on this point, but page 9 indicates that PCS—supportive home care, in this instance—cannot be authorized when a capable person refuses to provide informal supports and does not have a valid reason. The capable person policy cannot override the approved waiver regarding whether supportive home care can be included on a participant’s service plan when a capable person refuses to provide informal supports. Either the waiver or the capable person policy should be amended so that the circumstances in which PCS can be included on a service plan when a capable person refuses to provide informal supports are consistent.

0303 (Frail Elderly)

- The waiver lists the specific services that are considered PCS in relation to IADLs and ADLs. The definition of PCS in the capable person policy is more expansive, and lists examples of services related to IADLs but specifies that the list is not exhaustive. Furthermore, we understand that the State is interpreting the definition of IADLs to include services such as transportation and community inclusion.
  - Because the waiver lists specific PCS services, in the context of Frail Elderly waiver participants, the capable person policy can only be applied to the services listed in the waiver.

- The waiver states that relatives other than spouses, individuals with durable power of attorney, and legal guardians can provide self-directed attendant care, comprehensive support, and enhanced care services; that relatives other than spouses and adult children can provide personal services and enhanced care services; that relatives and legal guardians can provide enhanced care services when one of three criteria is true; and that spouses can provide attendant care according to KAR 30-5-307. KAR 30-5-307 lists the four extraordinary care criteria established on pages 7-8 of the capable person policy. The waiver notes that providers of comprehensive support and enhanced care services must have a permanent residence separate and apart from the participant’s.
  - The capable person policy is more restrictive than the limitations specified in the waiver. The capable person policy cannot override the approved waiver regarding provision of self-directed attendant care, comprehensive support, and enhanced care services by relatives defined in the waiver for each service. Either the waiver or the capable person policy should be amended so that the limits on which relatives can be paid to provide PCS are consistent.

- The waiver states that if a capable person refuses or is unable to provide informal support for IADLs, PCS may be included in the plan of care. No stipulations are made in the waiver as to the reasons for the refusal. The capable person policy has an inherent contradiction
on this point, but page 9 indicates that PCS cannot be authorized when a capable person refuses to provide informal supports and does not have a valid reason.

- The capable person policy cannot override the approved waiver regarding whether PCS can be included on a participant’s service plan when a capable person refuses to provide informal supports. Either the waiver or the capable person policy should be amended so that the circumstances in which PCS can be included on a service plan when a capable person refuses to provide informal supports are consistent.

**0304 (Physical Disability) and 0320 (Serious Emotional Disturbance)**

- These waivers contradict themselves regarding whether legally responsible persons can be paid to provide PCS. Although item C-2-d is marked “no,” indicating that legally responsible relatives cannot be paid to provide PCS or similar services, the PCS service specifications state that “Kansas will allow payment to legally responsible persons for a participant under extraordinary circumstances per State program policy.”

  - Item C-2-d in the waivers should be amended to indicate the response “Yes. The State makes payment to legally responsible individuals for furnishing PCS or similar services when they are qualified to provide the services.” The waiver should also specify the extraordinary circumstances under which legally responsible relatives can be paid.

- The waivers are inconsistent internally, and inconsistent with the capable person policy regarding whether relatives and legal guardians can be paid to provide other waiver services. Item C-2-e indicates that “The State makes payment to relatives/legal guardians under specific circumstances and only when the relative/guardian is qualified to furnish services.” and “Relatives other than spouses or parents of minor children may be providers of personal care services and/or enhanced care services.” Item C-2-e is supposed to further describe the circumstances in which a relative or guardian can be paid to provide other waiver services, and limits on when a relative or guardian can be paid to provide other waiver services. But the only circumstances specified in item C-2-e regard when having a relative or guardian as a provider is in the best interest of the participant. Further limits on the relatives who can be paid to provide PCS are described in the PCS and enhanced care services (ECS) service specifications. The limits in the PCS service specifications are consistent with the capable person policy, but the limits in the ECS service specifications are not.

  - Item C-2-e in the waivers should be amended to reflect the limits the State wishes to place on relatives and guardians providing other waiver services in addition to the controls that define when having a relative as a provider is in the best interest of the consumer.

- The enhanced care services specifications state that ECS cannot be provided by a “guardian or a person with activated durable power of attorney unless conflict of interest has been mitigated…” And “ECS cannot be provided by a participant’s legally responsible person (spouse or parent of minor child) or any individual residing in the home with the participant” except under extenuating circumstances. The extenuating circumstances defined in the ECS service specifications are different than the extraordinary circumstances described in the capable person policy.

  - The ECS service specifications conflate legally responsible relatives and other relatives living in the home and create one set of exceptions for them. The capable person policy differentiates between legally responsible relatives and other relatives and specifies two different sets of exceptions for them. Furthermore, the exceptions stated in the waiver are not consistent with either set of exceptions described in the capable person policy. The limits on which relatives can provide
ECS and the exceptions to those limits in item C-2-e, the waiver service specifications, and the capable person policy should be consistent.

4164 (Traumatic Brain Injury)

- The waiver establishes exceptions allowing relatives and legal guardians to be paid for providing PCS and ECS that do not match the exceptions stated in the capable person policy.
  - The waiver specifies that relatives or legal guardians may be reimbursed for providing PCS related to preparation of a specialized diet. The capable person policy provides that capable persons (other than spouses and parents of minors) can be paid to provide PCS related to housekeeping and laundry above normal tasks, and to different meal preparation due to a medically prescribed diet. Either the waiver or the capable person policy should be amended so that the exceptions are consistent.
  - The waiver specifies that relatives or legal guardians may be reimbursed for providing ECS when the consumer lives in a rural area and the relative is the only provider available; when the consumer lives alone and has a severe impairment or disability; or when the consumer has exhausted other support options and is at significant risk of institutionalization. The capable person policy provides that capable persons (other than spouses and parents of minors) can be paid to provide PCS related to housekeeping and laundry above normal tasks, and to different meal preparation due to a medically prescribed diet. Either the waiver or the capable person policy should be amended so that the exceptions are consistent.

4165 (Technology Assisted)

- The waiver indicates that legally responsible relatives can be paid to provide PCS or similar services, but the only service mentioned in the description related to this item is Specialized Medical Care. Specialized Medical Care requires nursing skills, and is not PCS or a similar service. The PCS service specifications say legally responsible relatives can be paid in extraordinary circumstances.
  - If the State intended to allow legally responsible relatives to provide PCS and similar services, the description related to item C-2-d should include the circumstances under which PCS can be provided by such relatives.
- The extraordinary circumstances under which PCS can be provided by a legally responsible relative established in in the PCS service specifications in the waiver are different from the exceptions listed in the capable person policy for legally responsible relatives.
  - Either the waiver or the capable person policy should be amended so that the exceptions for legally responsible relatives are consistent.