

# HCBS Final Rule

## HCBS Conference

### HCBS Final Rule: Current Issues and Future Direction

August 2017

# 2014 HCBS Final Rule

- Published January 2014 – Effective March 17, 2014
- Addressed HCBS requirements across:
  - ❖ 1915(c) waivers
  - ❖ 1915(i) state plan
  - ❖ 1915(k) Community First Choice
  - ❖ 1115 Demonstrations
- Requirements apply whether delivered under a fee for service or managed care delivery system
- Guidance issued in May 2017 extended the transition period for settings in existence as of the effective date of the final regulation from March 2019 to March 17, **2022**. Extension of the transition period recognizes the significant reform efforts underway and is intended to help states ensure compliance activities are collaborative, transparent and timely.

# Key Themes

- The regulation is intended to serve as a catalyst for widespread stakeholder engagement on ways to improve how individuals experience daily life
- The rule is not intended to target particular industries or provider types
- FFP is available for the duration of the transition period
- The rule provides support for states and stakeholders making transitions to more inclusive operations
- The rule is designed to enhance choice

# HCBS State Transition Plans: Status of STP Reviews

- Four states have received final approval from CMS (TN, KY, AR, OK).
- 35 states have received Initial Approval.
- The majority of states who have not received Initial Approval are scheduled to update their STPs and resubmit to CMS within the next 6 months.
- Technical assistance continuing to support states
  - ❖ Individual calls
  - ❖ SOTA Calls
  - ❖ Effective Models of Key STP Components

# HCBS Setting Criteria

Is integrated in and supports access to the greater community

Provides opportunities to seek employment and work in competitive integrated settings, engage in community life, and control personal resources

Ensures the individual receives services in the community to the same degree of access as individuals not receiving Medicaid HCBS

Is selected by the individual from among setting options including non-disability specific settings

Ensures an individual's rights of privacy, respect, and freedom from coercion and restraint

Optimizes individual initiative, autonomy, and independence in making life choices

Facilitates individual choice regarding services and supports and who provides them

***\*\*Additional Criteria for Provider-Controlled or Controlled Residential Settings\*\****

# Home and Community-Based Setting Criteria

## Provider Owned and Controlled Settings – Additional Criteria

- Specific unit/dwelling is owned, rented, or occupied under legally enforceable agreement
- Same responsibilities/protections from eviction as all tenants under landlord tenant law of state, county, city or other designated entity
- If tenant laws do not apply, state ensures lease, residency agreement or other written agreement is in place providing protections to address eviction processes and appeals comparable to those provided under the jurisdiction's landlord tenant law

# Home and Community-Based Setting Criteria

## Provider Owned and Controlled Settings – Additional Criteria

- Each individual has privacy in their sleeping or living unit
- Units have lockable entrance doors, with appropriate staff having keys to doors as needed
- Individuals sharing units have a choice of roommates
- Individuals have the freedom to furnish and decorate their sleeping or living units within the lease or other agreement
- Individuals have freedom and support to control their schedules and activities and have access to food any time
- Individuals may have visitors at any time
- Setting is physically accessible to the individual

# Home and Community-Based Setting Criteria

## Provider Owned and Controlled Settings – Additional Criteria

- Modifications of the additional criteria must be:
  - ❖ Supported by specific assessed need
  - ❖ Justified in the person-centered service plan
  - ❖ Documented in the person-centered service plan

# Home and Community-Based Setting Criteria

## Provider Owned and Controlled Settings – Additional Criteria

- Documentation in the person-centered service plan of modifications of the additional criteria includes:
  - ❖ Specific individualized assessed need
  - ❖ Prior interventions and supports including less intrusive methods
  - ❖ Description of condition proportionate to assessed need
  - ❖ Ongoing data measuring effectiveness of modification
  - ❖ Established time limits for periodic review of modifications
  - ❖ Individual's informed consent
  - ❖ Assurance that interventions and supports will not cause harm

# HCBS Transition Plan Implementation Status

Hold for Map – under  
development

# Site Specific Assessment and Remediation

- States' Approach to Assessing HCBS Compliance of Individual Settings
- State Validation Strategies
- Settings Remediation

# Distinguishing between Settings under the HCBS Rule

Settings that are not home and community-based

- Nursing Facilities
- Institution for Mental Diseases (IMD)
- Intermediate care facility for individuals with I/DD (ICF/IID)
- Hospitals

Settings presumed not to be home and community-based

- Settings in a publicly or privately-owned facility providing inpatient treatment
- Settings on grounds of, or adjacent to, a public institution
- Settings with the effect of isolating individuals receiving Medicaid HCBS.\*

Settings that could be home and community-based with modifications

- Settings that require modifications at an organizational level, and/or modifications to the PCP of specific individuals receiving services within the setting.
- Settings that engage in remediation plans with the state, and complete all necessary actions no later than March 2022.

Settings presumed to be home and community-based and meet the rule without any changes required

- Individually-owned homes
- Individualized supported employment
- Individualized community day activities

# Settings Assessment for HCBS Compliance:

## *Scope*

- States must identify all types of home and community based program settings in their state where HCBS are provided.
  - ❖ States should first list out all major categories of services provided under their various HCBS authorities.
  - ❖ Then, states should identify all settings in which each category of service(s) are provided.

# Settings Assessment for HCBS Compliance: *Threshold*

- States are responsible for assuring that all HCBS settings comply with the final HCBS rule.
- Quality thresholds should not be used to reduce the state's requirement to assure compliance across all settings.

# Review of HCBS Settings under Final Rule: *Key Components*

Assessment

Validation

Remediation

# Review of HCBS Settings Compliance: *Initial Assessment*

- Most states opted to perform an initial provider self-assessment
  - ❖ States that did not receive 100% participation of providers in self-assessment process must identify another way the assessment process will be conducted.
  - ❖ Providers responsible for more than one setting need to complete an assessment of each setting.
- States must provide a validity check for provider self-assessments. A viable option for states that choose to initiate a provider self-assessment is to conduct a beneficiary/guardian assessment (or other method for collecting data on beneficiary experience) that mirrors or is similar to the provider assessment in order to have a comparable set of data from the beneficiary perspective.

# Review of HCBS Settings Compliance: *Initial Assessment (continued)*

- Most states formulated their assessment tools using the Exploratory Questions for Residential and Non-Residential Settings published by CMS.
  - ❖ Questions in these documents are examples of ones that states could be asking of settings, but a state may use additional questions or methods to determine whether a setting complies with the settings criteria.

# Highlighting Effective Practices in Assessing Setting Compliance: *State Examples*

Effective Practice/Strategy	State Examples
<b>Provides clear, easy to understand listing of all HCBS authorities and categories of settings across state</b>	Iowa  Pennsylvania
<b>Developed unique comprehensive assessment tools based on type of setting and target respondent</b>	Maine  South Carolina
<b>Clearly laid out the specific details of the state's approach to the assessment process (including sample sizes). Also discussed how the state addressed any non-respondents.</b>	Arkansas  Oregon
<b>Summarized assessment results in a digestible manner (based on the main requirements of the rule and additional provider-owned and controlled setting criteria) so as to inform state's strategy on remediation.</b>	Iowa  South Dakota

# Review of HCBS Settings Compliance: Validation

- The state must assure at least one validation strategy is used to confirm provider self-assessment results, and should also identify how the independence of assessments is ensured where an MCOs validates provider settings.
- Validation strategies vary across states and can include several options
  - ❖ Onsite visits, consumer feedback, external stakeholder engagement, state review of data from operational entities, like case management or regional boards/entities
- The more robust the validation processes (incorporating multiple strategies to a level of degree that is statistically significant), the more successful the state will be in helping settings assure compliance with the rule.

# Highlighting Effective Practices in Validating Setting Compliance: *State Examples*

Effective Practice/Strategy	State Examples
State outlines multiple validation strategies that addressed concerns and assured all settings were appropriately verified. Validation process included multiple perspectives, including consumers/beneficiaries, in the process.	District of Columbia Tennessee
State relied on existing state infrastructure, but laid out solid, comprehensive plan for training key professionals (case managers, auditing team) to assure implementation of the rule with fidelity.	Delaware Tennessee
State used effective independent vehicles for validating results.	Michigan New Hampshire
State clearly differentiated and explained any differences in the validation processes across systems.	Connecticut Indiana

# Settings Assessment for HCBS Compliance: Remediation

- Statewide training & technical assistance is a strong option for states to consider.
  - ❖ State lays out clear plan within the STP of how it will strategically invest in the training and technical assistance needed to help address system-wide remediation actions of specific settings, as well as how it intends to build the capacity of providers to comply with the rule.
- Setting-Specific Remediation
  - ❖ Corrective Action Plans
  - ❖ Tiered Standards

# Highlighting Effective Practices in HCBS Settings Remediation: *State Examples*

Effective Practice/Strategy	State Examples
<p>State simultaneously provided a comprehensive template for a corrective action or remediation plan to all providers as part of the self-assessment process.</p>	<p>Arkansas Tennessee</p>
<p>State has outlined a process for following up with settings that require remediation to comply with the rule, including but not limited to the negotiation of individual corrective action plans with providers that address each area in which a setting is not currently in compliant with the rule.</p>	<p>Indiana North Dakota Pennsylvania</p>
<p>State has outlined a comprehensive approach to apply tiered standards to elevate the quality and level of integration of one or more categories of HCBS settings.</p>	<p>Indiana Ohio Tennessee</p>
<p>State has identified those settings that cannot or will not comply with the rule and thus will no longer be considered home and community-based after the transition period. State has also established an appropriate communication strategy for affected beneficiaries.</p>	<p>Ohio North Carolina</p>

# Implementation: Tiered Standards

- States have flexibility to set different standards for existing and new settings.
- Existing settings must meet the minimum standards set forth in the HCBS rules but the state “may suspend admission to the setting or suspend new provider approval/authorizations for those settings”
  - ❖ State may set standards for “models of service that more fully meet the state’s standards” for HCBS and require all new service development to meet the higher standards
  - ❖ The tiered standards can extend beyond the transition plan timeframe to allows states to “close the front door” to settings/services that only meet the minimum standard.

[Reference: [CMS FAQs dated 6/26/2015](#); page 11, Answer to Question #16]

# STP Review: Key Questions

- Did the state accurately and clearly lay out all of the settings in each HCBS authority where HCBS is delivered?
- Are there any categories of settings for which a state is presuming to automatically meet all of the criteria of the HCBS rule? Are there any categories of settings that the state is automatically determining will require remediation to comply with the rule? Are there any categories that automatically rise to the level of heightened scrutiny?
- How are specific categories of settings structured in the state (for example, are there any that are required to be co-located inside of or on the grounds of an institutional setting)?

# STP Review: Key Questions

## ■ Remediation Questions

- ❖ How does the state propose working with providers of settings that are not currently compliant with the rule but could be with appropriate remediation?
- ❖ Has the state proposed using tiered standards?
- ❖ What investments is the state making to provide technical support to help providers come into compliance?

# HCBS Final Rule for Person-Centered Planning

- Final rule relating to person-centered planning became effective on March 17, 2014
- Final rule includes changes to the provisions regarding person-centered service plans for HCBS waivers under 1915(c) and HCBS state plan benefits under 1915(i)
- Requires a person-centered service plan for each individual receiving Medicaid HCBS
- Person-centered planning principles also apply in 1915(k) Community First Choice state plan programs, and for HCBS provided in 1115 demonstrations

# Person-Centered Thinking, Planning, and Practice

- **Person-centered thinking** helps to establish the means for a person to live a life that they and the people who care about them have good reasons to value
- **Person-centered planning** is a way to assist people needing HCBS to construct and describe what they want and need to bring purpose and meaning to their life
- **Person-centered practice** is the alignment of service resources that give people access to the full benefits of community living and ensure they receive services in a way that may help them achieve individual goals and preferences

# HCBS Person-Centered Service Plan: Approach

- Person-centered approach means the person will lead the process where possible and will play the largest role in planning their services
- Conducted to reflect what is important to the person to ensure delivery of services in a manner reflecting personal preferences and desired outcomes
- The person-centered service plan must be developed through a person-centered planning process

# HCBS Person-Centered Service Plan: Process

- The person-centered planning process is driven by the person
- Includes people chosen by the person for whom the plan is being developed- if the person has selected providers they should be included
- Provides necessary information and support to the person to ensure that they direct the process to the maximum extent possible
- Is timely and occurs at times/locations of convenience to the person

# HCBS Person-Centered Service Plan

- Reflects cultural considerations
- Uses plain language and is understandable to the person
- Includes strategies for solving disagreements
- Offers choices to the person regarding services and supports they receive and from whom
- Provides methods to request updates

# HCBS Person-Centered Service Plan: Documentation

- The written plan reflects:
  - ❖ That the setting is chosen by the person and is integrated in, and supports full access to the greater community
  - ❖ Opportunities to seek employment and work in competitive integrated settings
  - ❖ Opportunity to engage in community life
  - ❖ Control personal resources
  - ❖ That the person receives services in the community to the same degree of access as individuals not receiving Medicaid HCBS

# HCBS Person-Centered Service Plan: Documentation

- The written plan:
  - ❖ Reflects the person's strengths and preferences
  - ❖ Reflects clinical and support needs
  - ❖ Includes goals and desired outcomes
  - ❖ Reflects services/supports, including unpaid supports provided voluntarily in lieu of waiver or state plan HCBS
  - ❖ Includes purchase/control of self-directed services if applicable

# HCBS Person-Centered Service Plan: Documentation

- The written plan includes:
  - ❖ Risk factors and measures in place to minimize risk
  - ❖ Individualized backup plans and strategies when needed
  - ❖ Individuals/ entities important in supporting the person
  - ❖ Who is responsible for monitoring the plan
  - ❖ Informed consent of the person in writing
  - ❖ Signatures of all individuals and providers responsible for its implementation and is distributed to the person and others involved in the plan

# HCBS Person-Centered Service Plan: Documentation

- The written plan:
  - ❖ Excludes unnecessary or inappropriate services and supports
  - ❖ Is not a checklist of services
  - ❖ Will look different for each person
  - ❖ Must be reviewed, and revised upon reassessment of functional need as required every 12 months, when the person's circumstances or needs change significantly, and at the request of the person.

# HCBS Person-Centered Service Plan: Modifications

- Any modifications needed to the home and community-based settings criteria applicable to provider owned or controlled settings must be supported by a specific assessed need and justified in the person-centered plan.
- The following must be documented in the plan:
  - ❖ A specific and individualized assessed need
  - ❖ Positive interventions and supports used prior to modification
  - ❖ Less intrusive methods tried
  - ❖ A description of the condition that is directly proportionate to the specified need
  - ❖ Regular collection and review of data to review effectiveness
  - ❖ Established time limits for periodic review to determine if modification is still needed
  - ❖ Informed consent of the individual
  - ❖ Assurance interventions and supports will cause no harm

# HCBS Person-Centered Service Planning Conflict of Interest Requirements

- Providers of HCBS for the individual must not provide case management or develop the person-centered service plan for that individual
- The only exception is when it is demonstrated that the only willing and qualified entity to provide case management/ develop the plan in a geographical area also provides HCBS.

# HCBS Person-Centered Service Planning Conflict of Interest Requirements

- When the exception is invoked, safeguards must include, at a minimum:
  - ❖ Separation of entity and provider functions
  - ❖ Full disclosure to participants and assurance they are supported with free of choice of providers
  - ❖ Clear & accessible alternative dispute resolution process
  - ❖ Direct approval of the state
  - ❖ State agency oversight of the process

# Multiple Target Populations

- The Final Rule provides the option to combine multiple target populations within one 1915(c) waiver.
- 42 CFR 441.301(b)(6) specifies that a waiver request must “be limited to one or more of the following target groups or any subgroup thereof that the State may define:
  - ❖ Aged or disabled, or both.
  - ❖ Individuals with Intellectual or Developmental disabilities, or both.
  - ❖ Mentally ill.”
- 42 CFR 441.302(a)(4) specifies that, if a state chooses the option to serve more than one target group under a single waiver, the state must assure that it is able to meet the unique service needs that each individual may have regardless of the target group.
- 42 CFR 441.302(a)(4)(i) requires that on an annual basis the state will include in the quality section of the CMS-372 form (or any successor form designated by CMS) data that indicates the state continues to serve multiple target groups in the single waiver and that a single target group is not being prioritized to the detriment of other groups.

# Considerations

- States are not required to do this.
- The option removes barriers and enhances flexibility by allowing states to design a waiver that meets the needs of more than one target population.
- Allows for administrative simplification
- This does not affect the cost neutrality requirement for section 1915(c) waivers, which requires the state to assure that the average per capita expenditure under the waiver for each waiver year not exceed 100 percent of the average per capita expenditures that will have been made during the same year for the level of care provided under the state plan had the waiver not been granted.

# Cost Neutrality

- Cost neutrality would not become problematic in waivers with combined target groups as it is calculated based on the relevant level of care group in the waiver, not by target population.
- For example: people with physical disabilities who meet nursing facility level of care (LOC) would need to meet that cost neutrality level and people with intellectual disabilities would still need to meet the cost neutrality for ICF/IID LOC.
- Multiple levels of care are an option currently in waivers where a particular target population may include multiple levels of care within the same waiver.

# Other Considerations

- All services in the waiver must be made available if there is a need for the service (for example, residential habilitation). Different sets of services or service packages based on target groups is not permissible.
- The state must assure CMS that the waiver meets the unique service needs of each individual regardless of target group so that individuals have equal access to all needed services.
- Annually the state has to include in the quality section of the 372 data that indicates that the state continues to serve multiple target groups in the waiver and that one target group is not being prioritized to the detriment of other groups.
- Including multiple target populations in one waiver does not change freedom of choice requirements that exist in Medicaid generally and in 1915(c) waivers specifically.
- States must still determine that without the waiver, participants will require the relevant institutional level of care.

# Examples of States with Consolidated Waivers

- Pennsylvania
- Virginia
- New York

\*Please Note - If a State is interested in consolidating waivers, please contact CMS early on so that we can discuss options, timing, and provide technical assistance.

# Resources

**Main CMS HCBS Website:** <http://www.medicaid.gov/HCBS>

- Final Rule & Sub-regulatory Guidance
- A mailbox to ask additional questions
- Exploratory Questions (for Residential & Nonresidential Settings)

**CMS Training on HCBS – SOTA (State Operational Technical Assistance) Calls:**  
<https://www.medicaid.gov/medicaid-chip-program-information/by-topics/long-term-services-and-supports/home-and-community-based-services/hcbs-training.html>

**Statewide Transition Plan Toolkit:**

<https://www.medicaid.gov/.../statewide-transition-plan-toolkit.pdf>

# Resources

- **Exploratory Questions**

- ❖ [Residential Settings](#)

- ❖ [Non-Residential Settings](#)

- **FAQs**

- ❖ [HCBS FAQs on Planned Construction and Person Centered Planning \(June 2016\)](#)

- ❖ [HCBS FAQs on Heightened Scrutiny](#) dated 6/26/2015

- ❖ [FAQs on Settings that Isolate](#)

- ❖ [Incorporation of HS in the Standard Waiver Process](#)

- **ACL Plain-Spoken Briefs on HCBS Rule & Person Centered Planning:**

- <http://www.acl.gov/Programs/CPE/OPAD/HCBS.aspx>

# Resources: CMS HCBS STP Contacts

## Central Office Contacts - Division of Long Term Services and Supports

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