

## Final Rule CMS 2249-F and CMS 2296-F

### **Title: Medicaid Program; State Plan Home and Community-Based Services, 5-Year Period for Waivers, Provider Payment Reassignment, and Home and Community-Based Setting Requirements for Community First Choice (Section 1915(k) of the Act) and Home and Community-Based Services (HCBS) Waivers (Section 1915(c) of the Act)**

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#### **Intent of the Final Rule**

- To ensure that individuals receiving long-term services and supports through home and community based service (HCBS) programs under the 1915(c), 1915(i) and 1915(k) Medicaid authorities have full access to benefits of community living and the opportunity to receive services in the most integrated setting appropriate
- To enhance the quality of HCBS and provide protections to participants
- Combined response to public comments on two proposed rules published in the Federal register – April 15, 2011 and May 3, 2012
- More than 2000 comments received from states, providers, advocates, employers, insurers, associations, and other stakeholders

#### **Highlights of the Final Rule**

- The HCBS settings rules create new requirements for HCBS programs that have never before been articulated by CMS
- Defines, describes, and aligns home and community-based setting requirements across three Medicaid authorities
- Defines person-centered planning requirements for persons in HCBS settings under 1915(c) HCBS waiver and 1915(i) HCBS State Plan authorities
- Implements regulations for 1915(i) HCBS State Plan benefit
- Provides option to combine multiple target populations within one 1915(c) waiver
- Provides CMS with additional compliance options for 1915(c) waiver programs
- Establishes five-year renewal cycle to align concurrent authorities for certain demonstration projects or waivers for individuals who are dual eligible
- Includes a provider payment reassignment provision to facilitate certain state initiatives

#### **ADA And Olmstead Requirements**

- Requires states to offer services in “the most integrated setting,” which is defined as “a setting that enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible.” *Reference: 28 C.F.R. pt. 35 app. A.*
- Department of Justice (DOJ) describes integrated settings as “those that provide individuals with disabilities opportunities to live, work, and receive services in the greater community, like individuals without disabilities.”
- Integrated settings are “located in mainstream society; offer access to community activities and opportunities at times, frequencies and with persons of an individual’s choosing; afford individuals choice in their daily life activities; and, provide individuals with disabilities the opportunity to interact with non-disabled persons to the fullest extent possible.”

- In contrast, DOJ has described segregated settings as often having “qualities of an institutional nature.” They “include, but are not limited to: (1) congregate settings populated exclusively or primarily with individuals with disabilities; (2) congregate settings characterized by regimentation in daily activities, lack of privacy or autonomy, policies limiting visitors, or limits on individuals’ ability to engage freely in community activities and to manage their own activities of daily living; or (3) settings that provide for daytime activities primarily with other individuals with disabilities.” *Reference: DOJ Olmstead Enforcement Statement at 3.*
- DOJ and numerous courts have found that the ADA creates an obligation for states to provide services in the most integrated settings; it does not create a requirement to offer a choice of services in segregated settings. *Reference: See Illinois League of Advocates for the Developmentally Disabled v. Quinn, No. 13-cv-1300, 2013 WL 3168758 (N.D.Ill. June 20, 2013); Sciarrillo ex rel. St. Amand v. Christie, No. 13-03478, 2013 WL 6586569 (D.N.J. Dec. 13, 2013); statements of interest filed by the Department of Justice in Illinois League (available at [http://www.ada.gov/olmstead/documents/iladd\\_soi.pdf](http://www.ada.gov/olmstead/documents/iladd_soi.pdf)); Sciarrillo (available at <http://www.ada.gov/olmstead/documents/sciarrillo-christie-soi.pdf>)*

## **FINAL RULE OVERVIEW**

### **Institutional Setting**

- Institutions have never been allowed to be funded under Medicaid’s HCBS programs, which serve as an alternative to institutional services.
- The HCBS settings rules presume that (1) services provided in a facility that also provides inpatient institutional treatment, (2) settings on the grounds of, or immediately next to, a public institution and (3) settings with the effect of isolating individuals from the broader community of individuals, not receiving Medicaid HCBS are not home and community based settings.
- These settings must be transitioned out of a state’s HCBS program unless CMS finds through a “heightened scrutiny” process that the specific setting does not have the quality of an institution and meets all of the rules’ requirements for home and community-based settings.
- The heightened scrutiny process may only be initiated by a state and is based on evidence presented by the state with input from the public. *Reference : Tabs- Heighten Scrutiny & Flow Chart - “Steps to Compliance for HCBS Settings Requirements,” available at <http://www.medicaid.gov/medicaid-chip-program-information/by-topics/long-term-services-and-supports/home-and-community-based-services/downloads/hcbs-1915c-waiver-compliance-flowchart.pdf>*

### **Home and Community-Based Setting Requirements**

- The home and community based service (HCBS) settings rules establish a set of minimum requirements for participation and in the HCBS programs and funding. CMS has made clear that states have the authority to develop specific requirements for HCBS settings in their HCBS programs, such as requirements regarding size, location, design, or the range and scope of services offered. (*Reference : Tab Q& A #2 - “HCBS Final Regulations 42 C.F.R. Part 441: Questions and Answers Regarding Home and Community-Based Settings” <http://www.medicaid.gov/medicaid-chip-program-information/by-topics/long-term-services-and-supports/home-and-community-based-services/downloads/q-and-a-hcb-settings.pdf>*)
- The home and community-based setting requirements establish an outcome oriented definition that focuses on the nature and quality of individuals’ experiences
- The requirements maximize opportunities for individuals to have access to the benefits of community living and the opportunity to receive services in the most integrated setting
- The final rule defines, describes, and aligns setting requirements for home and community-based services provided under three Medicaid authorities -1915(c)-HCBS Waivers, 1915(i)- State Plan HCBS, and 1915(k)- Community First Choice

The final rule establishes:

- Mandatory requirements for the qualities of home and community-based settings including discretion for the Secretary to determine other appropriate qualities
- Settings that are not home and community-based
- Settings presumed not to be home and community-based
- State compliance and transition requirements

The Home and Community-Based setting:

- 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 home and community-based services
- Is selected by the individual from among setting options, including non-disability specific settings and an option for a private unit in a residential setting
  - Person-centered service plans document the options based on the individual's needs, preferences; and for residential settings, the individual's resources
- Ensures an individual's rights of privacy, dignity, 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

### **Facility-Based Day Programs**

- All settings, including facility-based day programs, must meet the rules' requirements for home and community-based settings.
- Depending on the structure of the program, some facility-based settings may have characteristics that isolate participants from the broader community (*see additional information on Settings that Isolate below*).
- They must demonstrate:
  - the qualities of HCB settings,
  - ensure the individual's experience is HCB and not institutional in nature, and
  - does not isolate the individual from the broader community.
- In particular, if the setting is designed specifically for people with disabilities, and/or individuals in the setting are primarily or exclusively people with disabilities and on-site staff provides many services to them, the setting may be isolating unless the setting facilitates people going out into the broader community.
- The HCBS settings rules establish a set of minimum requirements for participation in the HCBS programs.
- States have flexibility in determining whether or when to offer HCBS in facility-based or site-based settings, as the regulation only establishes a floor for federal participation. (*Additional information on settings that isolate at: <http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/LongTerm-Services-and-Supports/Home-and-Community-Based-Services/Home-andCommunity-Based-Services.html>*)
- CMS has made clear that states have the authority to decide whether and when to offer facility-based day programs.

## **Home and Community-Based Setting Requirements for Provider-Owned or Controlled Residential Settings**

Additional requirements:

- 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
- Each individual has privacy in their sleeping or living unit
- Units have lockable entrance doors, with the individual and 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

Modifications of the additional requirements must be:

- Supported by specific assessed need
- Justified in the person-centered service plan
- Documented in the person-centered service plan

Documentation in the person-centered service plan of modifications of the additional requirements 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

### **Settings that are NOT Home and Community-Based**

- Nursing facility
- Institution for mental diseases (IMD)
- Intermediate care facility for individuals with intellectual disabilities (ICF/IID)
- Hospital

### **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 from the broader community of individuals not receiving Medicaid HCBS

## **Settings with the EFFECT OF ISOLATING individuals**

- Some disability-specific, provider-owned, or congregate settings may have characteristics of “settings that isolate”.
- Settings that isolate may have some or all of the following characteristics:
  - 1) settings designed specifically for people with disabilities, and often even for people with a certain type of disability;
  - 2) the individuals in the setting are primarily or exclusively people with disabilities and the staff that provides services to them;
  - 3) settings designed to provide people with disabilities multiple types of services and activities on-site, including housing, day services, medical, behavioral and therapeutic services, and/or social and recreational activities;
  - 4) people in the setting have limited, if any, interaction with the broader community; or
  - 5) settings that use practices that are used in institutional settings or are deemed unacceptable in Medicaid institutional settings (e.g. seclusion or restraint).

*Reference : Tab Isolating* - “Guidance on Settings that Have the Effect of Isolating Individuals Receiving HCBS from the Broader Community,” available at <http://www.medicaid.gov/medicaid-chip-program-information/by-topics/long-term-services-and-supports/home-and-community-based-services/downloads/settings-that-isolate.pdf>

- A state may only include such a setting in its HCBS programs if CMS determines through a “heightened scrutiny” process that the state has proven that the setting meets the qualities for being home and community-based and does not have the qualities of an institution.
- The heightened scrutiny process may only be initiated by a state and is based on evidence presented by the state with input from the public.
- CMS has created a set of “Exploratory Questions” to assist states in evaluating residential and non-residential settings for compliance with the rules. *Reference : Tabs Residential Questions and Non-Residential Questions* - “Exploratory Questions to Assist States in Assessment of Residential Settings,” available at <http://www.medicaid.gov/medicaid-chip-program-information/by-topics/long-term-services-and-supports/home-and-community-based-services/downloads/exploratory-questions-residential-characteristics.pdf> and <http://www.medicaid.gov/medicaid-chip-program-information/by-topics/long-term-services-and-supports/home-and-community-based-services/downloads/exploratory-questions-non-residential.pdf>

## **Heightened Scrutiny - Settings PRESUMED NOT to Be Home and Community-Based**

These settings may NOT be included in states’ 1915(c), 1915(i) or 1915(k) HCBS programs unless:

- A state submits evidence (including public input) demonstrating that the setting does have the qualities of a home and community-based setting and NOT the qualities of an institution; AND
- The Secretary finds, based on a heightened scrutiny review of the evidence, that the setting meets the requirements for home and community-based settings and does NOT have the qualities of an institution

## **Final Rule Changes to Address Major Comments of Concern in NPRMs**

- *Disability specific complex* – Phrase replaced with “any other setting that has the effect of isolating individuals receiving Medicaid HCBS from the broader community of individuals not receiving Medicaid HCBS ...”
- *Rebuttable presumption* – Settings presumed to have institutional characteristics will be subject to heightened scrutiny allowing states to present evidence that the setting is home and community-based
- *Choice of provider in provider owned and operated settings* – Clarified that choice of provider is intrinsic to the setting

- *Private rooms/roommate choice* – Needs, preferences, and resources are relevant to option of private versus shared residential unit. Providers must offer roommate choice for shared rooms.
- *Application of setting requirements to non-residential settings* – Rule applies to all settings where HCBS are delivered, not just to residential settings and CMS will provide additional information about how states should apply the standards to non-residential settings

### **Person-Centered Service Plans**

- Final rule includes changes to the requirements regarding person-centered service plans for HCBS waivers under 1915(c) and HCBS state plan benefits under 1915(i)
- Identical for 1915(c) and 1915(i)
- The person-centered service plan must be developed through a person-centered planning process
- The person-centered planning process is driven by the individual
- Includes people chosen by the individual
- Provides necessary information and support to the individual to ensure that the individual directs the process to the maximum extent possible
- Is timely and occurs at times/locations of convenience to the individual
- Reflects cultural considerations/uses plain language
- Includes strategies for solving disagreement
- Offers choices to the individual regarding services and supports the individual receives and from whom
- Provides method to request updates
- Conducted to reflect what is important to the individual to ensure delivery of services in a manner reflecting personal preferences and ensuring health and welfare
- Identifies the strengths, preferences, needs (clinical and support), and desired outcomes of the individual
- May include whether and what services are self-directed
- Includes individually identified goals and preferences related to relationships, community participation, employment, income and savings, healthcare and wellness, education and others
- Includes risk factors and plans to minimize them
- Is signed by all individuals and providers responsible for its implementation and a copy of the plan must be provided to the individual and his/her representative

### **Written Person-Centered Service Plan Documentation**

- Setting is chosen by the individual 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, and receive services in the community to the same degree of access as individuals not receiving Medicaid HCBS
- Reflects individual's strengths and preferences
- Reflects clinical and support needs
- Includes goals and desired outcomes
- Providers of services/supports, including unpaid supports provided voluntarily in lieu of waiver or state plan HCBS
- Risk factors and measures in place to minimize risk
- Individualized backup plans and strategies when needed
- Individuals important in supporting individual
- Individuals responsible for monitoring plan
- Plain language and understandable to the individual

- Who is responsible for monitoring the plan
- Informed consent of the individual in writing
- Signatures of all individuals and providers responsible
- Distributed to the individual and others involved in plan
- Includes purchase/control of self-directed services
- Exclude unnecessary or inappropriate services and supports
- Modification of the additional conditions as previously discussed in the home and community-based setting requirements
- Must be reviewed, and revised upon reassessment of functional need as required every 12 months, when the individual's circumstances or needs change significantly, and at the request of the individual.