

Home and Community Based Services Settings Rule Implementation Update

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Update on the Home and Community Based Services Settings Rule Implementation

Strong implementation of the Home and Community Based Services (HCBS) Settings Rule² will further the mission of State Councils on Developmental Disabilities to promote self-determination, integration and inclusion for all people in the United States with developmental disabilities. DD Councils have a unique and important role to play in their states' implementation of the HCBS Settings Rule given their dual roles as an advisor to the Governor and state leadership and as a convener of people with developmental disabilities and their families. This fact sheet provides recent updates on implementation of the HCBS Settings Rule and strategies for Councils in ongoing implementation.

I. HCBS Settings Rule Refresher

The HCBS Settings Rule, released by the Centers for Medicare & Medicaid Services (CMS) in January 2014, is intended to ensure that programs funded with Medicaid HCBS dollars³ provide people with disabilities opportunities to live, work and receive services in integrated settings where they can fully participate in community life. The HCBS Settings Rule applies to all Medicaid-funded HCBS residential and non-residential (day) settings.

The HCBS Settings Rule uses an outcome-oriented definition of integration, focused on the nature and quality of individuals' experiences. It includes requirements that all HCBS settings:

- Are integrated in and support access to the greater community, and facilitate relationships with people without disabilities (other than paid providers and staff)
- Optimize individual initiative, autonomy and independence in daily life choices, such as control over personal resources, what to eat, when to go to sleep, and with whom to visit
- Ensure individuals' rights of privacy, dignity, respect and freedom from coercion and restraint
- Facilitate individual choice from among service options and providers, including non-disability specific settings
- Provide opportunities to seek and work in competitive employment and to receive services in the community to the same extent as individuals not receiving HCBS
- For provider-owned settings, additional requirements include that residents have a lease or other legally enforceable agreement, choice of roommate, and control over their schedule



² The Settings Rule is available at:

<https://www.medicaid.gov/medicaid/hcbs/guidance/index.html>.

³ The Settings Rule applies to any settings funded under HCBS Medicaid authorities, including: 1915(c) waiver, 1915(i) State Plan Services, 1915(k) Community First Choice, and any HCBS services in 1115 demonstration waivers.

The HCBS Settings Rule requires state Medicaid agencies to partner with other relevant state agencies (i.e., the state’s Developmental Disabilities, Aging and Mental Health agencies), stakeholder groups, and members of the public to develop a statewide transition plan (STP) that lays out the state’s approach to assuring that its state policies, laws, and HCBS settings all align with the new HCBS requirements. As part of the STP, all HCBS settings must be assessed to determine their compliance with the Rule. Those which are not currently compliant must be capable of achieving compliance with modifications. Institutional settings – nursing homes, Intermediate Care Facilities (ICFs), hospitals and Institutions for Mental Disease (IMDs) – can never meet the HCBS requirements. Other settings are defined as “presumptively institutional,” and are subject to a federal review process known as heightened scrutiny if a state wishes to continue to fund these settings using Medicaid HCBS funds.

CMS has identified three types of settings that are presumed to be institutional: **1)** settings in facilities providing inpatient services; **2)** settings on the grounds of, or adjunct to, a public institution; and **3)** settings which have the effect of isolating HCBS recipients from the broader community.⁴

CMS provided the following examples of residential settings which require heightened scrutiny: **1)** disability specific farms; **2)** gated communities; **3)** residential schools; and **4)** congregate, disability-specific settings that are co-located and operationally related. CMS has not provided a similar list of presumptively institutional non-residential (day) settings.⁵



Implementation of the HCBS Settings Rule will assist states with coming into compliance with the Americans with Disabilities Act (ADA) and the Supreme Court’s decision in *Olmstead v. L.C.* by providing services in the most integrated setting. However, State obligations under the ADA may extend beyond the requirements of the Rule.

II. Recent Guidance from CMS: Three Year Extension of the Compliance Deadline

On March 17, 2017, Health and Human Services (HHS) Secretary Price and CMS Administrator Verma sent a letter to Governors offering new flexibilities available to states in their Medicaid programs. Regarding the HCBS Settings Rule, the letter stated that

“[i]n recognition of the significance of the reform effort underway, CMS will work toward providing additional time for states to comply.”

⁴ Settings that isolate are often designed for, and comprised primarily of, individuals with disabilities. They offer multiple services in one site, provide limited interactions with the broader community, and use restrictive interventions. See <https://www.medicaid.gov/medicaid/hcbs/downloads/settings-that-isolate.pdf>.

⁵ *Id.*

It also noted that “[w]e will be examining ways in which we can improve our engagement with states on implementation of the HCBS settings rule, including greater state involvement in the process of assessing compliance of specific settings.”⁶

On May 9, 2017, CMS issued an Informational Bulletin **extending the deadline for compliance** with the Rule by three years, to March 17, 2022.⁷ Important points in this letter include:

- CMS’s statement that “promoting community integration remains a high priority” and its acknowledgement of the “important work underway at the state level in implementing” the Rule
- The extension for compliance only applies to settings operating before March 17, 2014 (the HCBS Settings Rule’s effective date); any new settings that want to receive HCBS funding after that date must completely comply with the Rule to begin receiving HCBS funding (i.e., no transition period), consistent with previous CMS guidance
- STPs must receive final approval by CMS by the original deadline of March 17, 2019; the extra three years is only for additional time to implement the STP
- The three extra years for implementation of STP should be “helpful to states to ensure compliance activities are collaborative, transparent and timely;” this means more opportunity for public engagement
- CMS committed to ongoing technical assistance to states and other stakeholders

This Informational Bulletin makes clear that CMS intends to move forward with implementation of the HCBS Settings Rule. In fact, as discussed below, CMS has continued approving STPs. While this Informational Bulletin only addresses the timeframe for implementation and not any substantive standards or process for implementation of the Rule, the March 17 letter from Secretary Price and Administrator Verma suggests that CMS may be issuing additional guidance in the future, likely around strategies and promising practices for states to consider in assessing and validating setting compliance with the federal HCBS requirements. NACDD will keep you updated on any additional guidance.⁸

⁶ March 17, 2017 letter to Governors from Secretary Price and Administrator Verma, available at <https://www.hhs.gov/sites/default/files/sec-price-admin-verma-ltr.pdf>.

⁷ May 9, 2017 CMCS Informational Bulletin: Extension of Transition Period for Compliance with Home and Community Based Settings Criteria, available at <https://www.medicaid.gov/federal-policy-guidance/downloads/cib050917.pdf>.

⁸ CMS has issued numerous guidance documents and FAQs regarding implementation, all available as part of its “Settings Requirements Compliance Toolkit” at <https://www.medicaid.gov/medicaid/hcbs/guidance/index.html>. The most recent addition to the toolkit is the Dec. 15, 2016 FAQs Regarding Medicaid Beneficiaries in Home and Community-Based Settings Who Exhibit Unsafe Wandering or Exit Seeking Behavior.



III. Updates on State Plan Approval Process

CMS has established a multiple step process for approval of STPs: **1)** initial approval; **2)** final approval; and **3)** heightened scrutiny review process.

A. Initial Approvals of STPs

The initial approval focuses on a state's systemic assessment of all relevant rules, regulations, licensing, provider manuals, etc. for compliance with the HCBS Settings Rule so as to ensure that states have a policy framework in place that aligns with the federal HCBS requirements. A state must identify any necessary remediation steps it will take (like promulgation of new rules or changes in licensing standards). As of June 30th, 31 states have received initial approval of their STPs, and three of these states have received both initial and final approval.⁹

B. Final Approvals of STPs

Thus far, three states' STP – Tennessee, Arkansas and Kentucky have received final approval.¹⁰

In order to get final approval of their STPs, states must:

- Complete comprehensive site-specific assessments of all HCBS settings, implement necessary strategies for validating the assessment results, and include the outcomes of these activities within the STP;
- Draft remediation strategies and a corresponding timeline that will resolve issues that the site-specific settings assessment process and subsequent validation strategies identified by the end of the HCBS Settings Rule transition period;

⁹ The states that have received initial approval of their STPs include AK, AL, AR, CT, DE, HI, IA, ID, IN, KY, LA, MN, MO, MS, MT, ND, NE, NM, OK, OR, OH, PA, RI, SC, SD, TN, UT, VA, WA, WV, WY. Tennessee, Arkansas and Kentucky have received both initial and final approval from CMS.

¹⁰ For more information on Tennessee's approved final STP, see this summary:

<http://www.aucd.org/docs/policy/HCBS/references/TNProposedAmendedStatewideTransitionPlanCV.pdf> and the slides from this webinar:

<https://hcbsadvocacy.files.wordpress.com/2016/06/stp-advocacy-ppt-5-26-16-final.pdf>.

Arkansas' and Kentucky's recent final approval letters are available at

<https://www.medicare.gov/medicaid/hcbs/transition-plan/index.html>.

- Outline a detailed plan for identifying settings that are presumed to have institutional characteristics, including qualities that isolate HCBS beneficiaries, as well as the proposed process for evaluating these settings and preparing for submission to CMS for review under heightened scrutiny;
- Develop a process for communicating with beneficiaries that are currently receiving services in settings that the state has determined cannot or will not come into compliance with the HCBS Settings Rule by the end of the transition period; and
- Establish ongoing monitoring and quality assurance processes that will ensure all settings providing HCBS continue to remain fully compliant with the rule in the future.



In a number of initial approvals to states, CMS provided detailed guidance about the specific steps which will be required to obtain final approval and fully implement the requirements of the Rule.¹¹ **Below are six key themes from these letters:**

1. Validation of assessments/modifications: Most states have allowed providers to conduct self-assessments of their settings' compliance with the federal HCBS requirements. CMS has required states to validate each provider self-assessment with at least one independent validation strategy. This could include, for example, participant surveys or assessments by case managers or licensing/recertification entities. States also must provide evidence of training for individuals who are completing site assessments and/or interviewing individuals who receive HCBS services. Participant surveys must be tied to specific settings, and states must outline how discrepancies between provider self-assessment results and participant surveys will be addressed by the provider. Detailed remediation plans must be developed for settings that are not in compliance with the Rule.
2. All congregate settings must be evaluated for compliance: In general, states may presume that individuals living in their own private home or the home of a family member complies with the HCBS Settings Rule. However, states cannot presume privately-owned or rented homes comply if they are congregate or in a disability-specific community that could isolate individuals with disabilities. Similarly, all non-residential

¹¹ This additional guidance is contained in an "Appendix II" to the initial approval letters. The majority of recent STPs receiving initial approvals in 2017 have not contained written Appendix II letters, which have been separately sent to states. DD Councils and other state advocates are strongly encouraged to request that their state entities responsible for HCBS Settings Rule implementation share any written feedback they have received from CMS detailing additional steps for final approval.

(day) settings must be evaluated if they are congregate, including group supported employment or work crews.

3. Heightened scrutiny: The process for identifying settings that isolate must be broken down into two categories: settings that are co-located with an institution, and settings that have the effect of isolating individuals receiving HCBS from the rest of the community. Simply evaluating the location of a setting is not sufficient to identify settings that isolate HCBS recipients. In addition, the fact that someone chooses a presumptively institutional setting does not make the setting compliant with the Rule. Only if the state has thoroughly evaluated a setting and determined that it can overcome the institutional presumption and complies with all aspects of the Rule, should it be submitted to CMS for a heightened scrutiny review.
4. Accessing the broader community: Reverse integration – inviting people without disabilities into settings primarily or exclusively with people with disabilities – will not be sufficient alone to comply with the Rule’s requirements. Hiring, recruiting, or inviting individuals without disabilities into a disability-specific setting are not strategies to meet the Rule’s requirement that settings provide access to the broader community. Instead, the focus must be on providing opportunities for people to participate in activities of their choosing in the broader community.
5. Capacity building: States must provide each individual with an option of a non-disability specific setting, such as living in one’s own apartment or home instead of a group home, or working in a typical workplace in the community instead of in a congregate day program. States must develop and implement a plan to expand their capacity to offer these types of settings so people have real choices to receive HCBS within the broader community. In addition, states must ensure that service definitions and provider rates incentivize the provision of more integrated services, including for employment and living in non-disability specific settings.
6. Public engagement: Ongoing stakeholder engagement and input is required, including when substantive changes are made to STPs, such as setting evaluation results or heightened scrutiny submissions. States must give specific responses to public comments, and include a summary of the public comments and state responses to those comments within the final STP.

IV. Roles for State DD Councils

It is critical that disability stakeholders – including people with disabilities and their families, advocates, and providers – stay informed and engaged in their states’ implementation of the HCBS Settings Rule. State DD Councils have an important and unique role to play because of their work advising state officials and convening and educating people with disabilities and their families. Below are some suggested activities for DD Councils:

Educate state officials and stakeholders:

- Continue to educate stakeholders, particularly self-advocates and their families, about the importance of the Rule
- Address any misinformation or concerns by stakeholders
- Meet with state officials about the Rule. Discuss why it is important to the disability community. Bring self-advocates and family members to share their vision for implementation.
- Keep updated on the status of your state's STP and federal guidance, and regularly update stakeholders

Participate in planning and implementation activities:

- Participate in or help lead stakeholder implementation groups; if your state doesn't have one, encourage them to start one
- Help self-advocates and families make their voices heard in the planning process
- Work with state and local leadership on a vision for implementation of the Rule encourage them to connect it with other initiatives in the state, such as Employment First initiatives or *Olmstead* implementation
- Work with your state on designing, implementing and monitoring participant surveys
- Whenever there is a formal opportunity to comment on revised STPs, comment not only as a DD Council but encourage and help DD stakeholders to give their input; set up phone calls and meetings to explain the changes and how to comment, create model comments, etc.

In short, it is critical that the DD Councils stay informed and continue to be actively engaged in their states' implementation of the HCBS Settings Rule. Additional information about the Rules can be found at: www.medicaid.gov/hcbs and <http://hcbsadvocacy.org/>. NACDD will continue to be a resource to DD Councils as they work to ensure successful implementation of the HCBS Settings Rule in their states.

