



HCBS Final Rule

Current Issues and Future Directions September 2016



2014 HCBS Final Rule

- Published January 2014 – Effective March 17, 2014
- Addressed HCBS requirements across:
 - 1915(c) waivers
 - 1915(j) state plan
 - 1915(k) Community First Choice
 - 1115 Demonstrations
 - 1915(b)(3) waiver services
- Requirements apply whether delivered under a fee for service or managed care delivery system
- States have until March 17, 2019 to achieve compliance with requirements for home and community-based settings in transition plans for existing programs.



Key Themes

- The regulation is intended to serve as a catalyst for widespread stakeholder engagement on ways to improve how individuals experience daily life
- There is no HHS initiative to shut down 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

- One state (Tennessee) has received final approval from CMS.
- Five additional states have Initial Approval (KY, OH, DE, IA, PA)
- The majority of STPs are scheduled to be updated and resubmitted to CMS through September 2016 for review to determine if initial and/or final approval can be made.
- Rolling out of additional technical assistance to support states
 - Individual calls
 - Small Group State TA
 - SOTA Calls
 - Effective Models of Key STP Components



HCBS Setting Requirements



****Additional Requirements for Provider-Controlled or Controlled Residential Settings****



Home and Community-Based Setting Requirements

Provider Owned and Controlled 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



Home and Community-Based Setting Requirements

Provider Owned and Controlled Settings –

Additional Requirements

- 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 Requirements

Provider Owned and Controlled Settings –

Additional Requirements

- 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



Home and Community-Based Setting Requirements

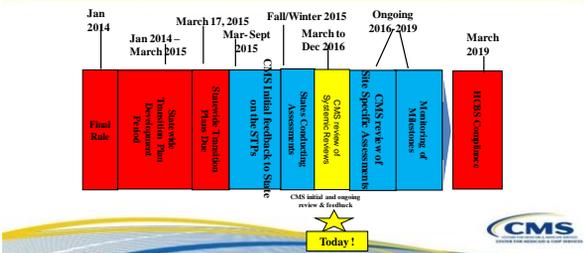
Provider Owned and Controlled Settings –

Additional Requirements

- 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



Looking Forward: HCBS Transition Plan Implementation Timeline



Systemic Assessment & Remediation: Overview

- States are required to conduct a systemic assessment, which is the state's assessment of the extent to which its regulations, standards, policies, licensing requirements, and other provider requirements ensure settings are in compliance.
- This process involves reviewing and assessing all relevant state standards to determine compliance with the federal home and community-based setting regulations.
- States must review state standards related to all setting types in which HCBS are provided.



Systemic Assessment & Remediation: Requirements

- States must ensure that the language in their state standards is fully consistent with the requirements in the federal setting regulations:
 - 42 CFR 441.301(c)(4) for 1915(c) waivers
 - 42 CFR 441.710 (a)(1) for 1915(i) state plan programs
 - 42 CFR 441.530(a)(1) for 1915(k) state plan programs
- The federal regulations set the floor for requirements, but states may elect to raise the standard for what constitutes an acceptable home and community-based setting.
- States must assure that each element under the HCBS federal regulations is adequately addressed in every relevant state standard for which the specific federal requirement is applicable.

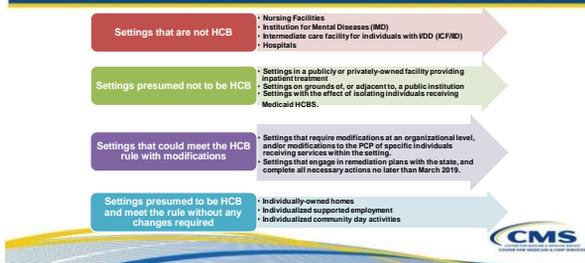


Highlighting Effective Practices in Systemic Assessment & Remediation: State Examples

Effective Practice/Strategy	State Examples
Clear list of all relevant state standards reviewed in the systemic assessment, including titles, codes/citations, and links	South Carolina, Vermont, or Iowa
Detailed analysis/justification of state's determination of compliance	Vermont
Detailed remediation required, action steps and timeline	Ohio- (Crosswalk with remediation required, action steps and timeline) Connecticut- (Developed strong template language covering all aspects of the rule, to then be used uniformly to address key gaps/compliance issues across various state standards in remediation strategy)



Distinguishing between Settings under the HCBS Rule



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 was conducted on all settings including where a provider self-assessment was not 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 including consideration of:
 - a beneficiary/guardian assessment or other method for collecting data on beneficiary experience
 - validation with case managers, licensing staff or others trained with the requirements of the settings rule.



Highlighting Effective Practices in Assessing Setting Compliance: State Examples

Effective Practice/Strategy	State Examples
Provides clear, easy to understand listing of all HCBS settings	Iowa Pennsylvania
Developed unique comprehensive assessment tools based on type of setting and target respondent	Delaware Maine South Carolina
Clearly laid out the specific details of the state's approach to the assessment process (including sample sizes, non respondents, etc.)	Kentucky Oregon
Summarized assessment results in a digestible manner (based on the seven key requirements of the rule and corresponding sub-elements) so as to inform state's strategy on remediation.	Iowa Michigan South Dakota

Review of HCBS Settings Compliance: Validation

- The state must assure that 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 re: levels of compliance within settings varies across states
 - 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.	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
State clearly differentiated and explained any differences in the validation processes across systems.	Indiana



Highlighting Effective Practices in HCBS Settings Remediation: State Examples

Effective Practice/Strategy	State Examples
State simultaneously provided a comprehensive template for a corrective action or remediation plan to all providers as part of the self-assessment process.	Tennessee
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.	Indiana North Dakota Pennsylvania
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 March 2019. State has also established an appropriate communication strategy for affected beneficiaries.	Ohio North Carolina

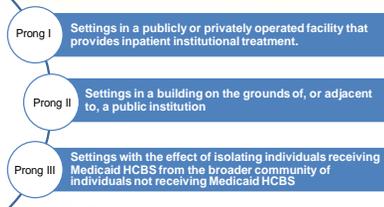
Implementation: Tiered Standards

- 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 allow 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)



Heightened Scrutiny Settings Presumed NOT to be HCB



Settings with the Effect of Isolating Individuals

- Settings that isolate individuals receiving HCBS from the broader community may have any of the following characteristics:
 - The setting is designed to provide people with disabilities multiple types of services/activities on-site such as housing, day services, medical, behavioral and therapeutic services, and/or social and recreational activities
 - People in the setting have limited, if any, interaction with the broader community
 - The setting uses/authorizes interventions/restrictions used in institutional settings or deemed unacceptable in Medicaid institutional settings (e.g. seclusion)



Settings with the Effect of Isolating Individuals: Farmsteads or Disability Specific Farming Community

- A **farmstead or disability-specific farm community** that has the following characteristics:
- Individuals who live at the farm typically interact primarily with people with disabilities and staff who work with those individuals.
 - Daily activities and non-home and community-based services, such as religious services, take place on-site so that an individual generally does not leave the farm
 - People from the broader community may sometimes come on site, but people from the farm seldom go out into the community as part of daily life



Settings with the Effect of Isolating Individuals: Gated/Secured Community (aka "Intentional Communities")

- A **gated/secured "community"** for individuals with disabilities that has the following characteristics:
- The community typically consists primarily of individuals with disabilities and the staff that work with them
 - Locations provide residential, behavioral health, day services, social and recreational activities, and long term services and supports all within the gated community
 - Individuals often do not leave the grounds of the gated community in order to access activities or services in the broader community



**Settings with the Effect of Isolating Individuals:
Multiple Settings Co-Located and Operationally Related**

Multiple settings co-located and operationally related (ie. operated and controlled by the same provider) which congregate a large number of people with disabilities together such that individuals' ability to interact with the broader community is limited

- Depending on the program design, examples may include:
 - Group homes on the grounds of a private ICF
 - Numerous residential settings co-located on a single site or in close proximity, such as multiple units on the same street



Heightened Scrutiny: Requirements

- If a state identifies settings that are presumed to have the qualities of an institution, such as characteristics that isolate HCBS beneficiaries, the state is obligated to identify them in the Statewide Transition Plan
- The settings regulations require that, in order to overcome the presumption that a setting has the qualities of an institution, CMS must determine that the setting:
 - *Does have* the qualities of a home and community-based setting and
 - *Does not have* the qualities of an institution



Heightened Scrutiny: Evidentiary Requirements (Prongs I & II)

- As part of the state's HS evidentiary package for settings under Prongs I or II, the state should include:
 - Information clarifying that there is a meaningful distinction between the facility and the community-based setting such that the latter is integrated in and supports full access of individuals receiving HCBS to the greater community
 - Services to the individual, and activities in which each individual participates, are engaged with the broader community
 - Examples of documentation that can be submitted as evidence for this prong can be found under [Question 4 in the June 2015 CMS FAQs](#)



Heightened Scrutiny: Evidentiary Requirements (Prong III: Settings that Isolate)

- As part of the state's HS evidentiary package for any setting that isolates (Prong III), the state should provide evidence of the following qualities:
 - Setting is integrated in the community to the extent that persons without disabilities in the same community would consider it a part of their community and not associate the setting with the provision of services to persons with disabilities
 - Services to the individual, and activities in which each individual participates, are engaged with the broader community
 - Beneficiaries participate regularly in typical community life activities outside of the setting to the extent the individual desires those activities



Heightened Scrutiny: Public Notice

- Public notice associated with settings for which the state is requesting HS should:
 - Be included in the Statewide Transition Plan or addressed in the waiver or state plan submission to CMS
 - List the affected settings by setting name and location and identify the number of individuals served in each setting
 - Be widely disseminated
 - Include the entire evidentiary package of information for each setting that the state is planning to submit to CMS



Heightened Scrutiny: Public Notice (continued)

- Public notice associated with settings for which the state is requesting HS should (continued):
 - Include all justifications as to why the setting:
 - is home and community-based, and
 - does not have institutional characteristics
 - Provide sufficient detail such that the public has an opportunity to support or rebut the state's information
 - State that the public has an opportunity to comment on the state's evidence
- CMS expects that states will provide a summary of responses to those public comments in the Statewide Transition Plan



HS Implementation:
What additional information should states submit in the HS process?

Examples of additional documentation that a state may wish to include in its evidentiary package for a setting under HS could include:

- ✓ Observations from on-site review.
- ✓ Licensure requirements or other state regulations
- ✓ Residential housing or zoning requirements
- ✓ Proximity to/scope of interactions with community settings
- ✓ Provider qualifications for HCBS staff
- ✓ Service definitions that explicitly support setting requirements
- ✓ Evidence that setting complies with requirements of provider-owned or controlled settings
- ✓ Documentation in PCP that individual's preferences and interests are being met
- ✓ Evidence individual chose the setting among other options, including non-disability specific
- ✓ Details of proximity to public transport or other transportation strategies to facilitate integration



Heightened Scrutiny:
CMS' Response on HS Determinations

When ALL Regulatory Requirements are Met	When All Regulatory Requirements are NOT Met
<ul style="list-style-type: none"> • Approval of a HS request pertains only to the individual setting or settings subject to the request • Any material changes to the parameters approved through HS will require the state to update CMS and may result in a reevaluation of the setting • The state must describe a monitoring process for ensuring that these settings and all settings continue to comply with setting requirements even after the transition period ends. 	<ul style="list-style-type: none"> • If the setting is included in the STP, the state has several options [See Q10 in July 2015 FAQs] • If the setting is included in a new 1915(c) waiver, or new 1915(i) or (k) state plan benefit, or as part of new services added to an existing program, federal reimbursement for services in that setting may not be available unless or until the setting has achieved compliance with all requirements



Heightened Scrutiny:
Options for Settings that Don't Comply

- Provider can implement necessary remediation to comply by the end of the transition period
- Provider can furnish Medicaid services that do not require their provision in a home and community-based setting
- Engage in communications with impacted beneficiaries to determine alternative compliant settings



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 Review Team Members

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Thank You

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