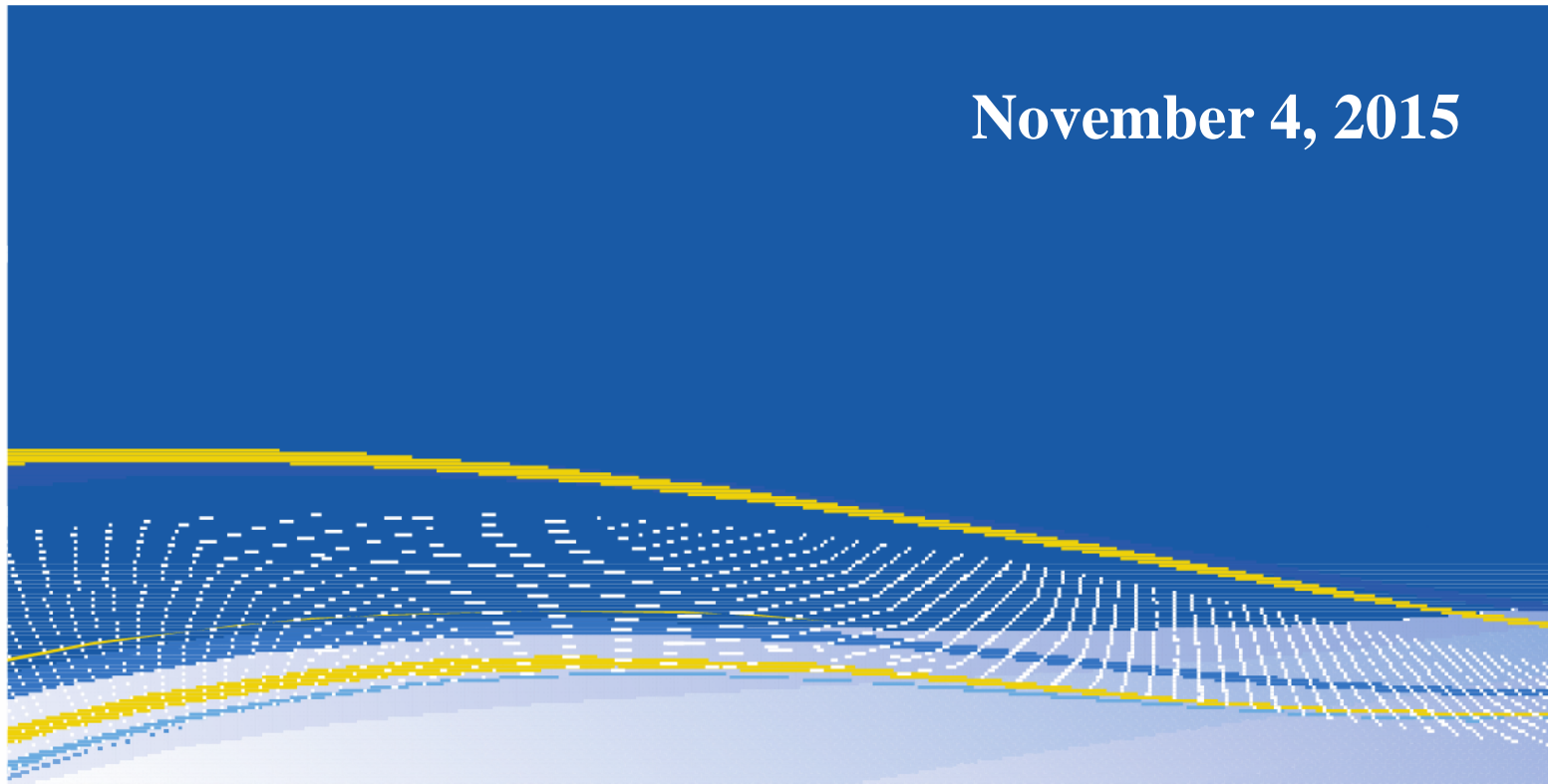




# Home and Community-Based Settings, Excluded Settings, and the Heightened Scrutiny Process

November 4, 2015



# Overview

- Background – Home and Community-Based Setting Requirements
- Excluded Settings
- Settings Presumed to Have the Qualities of an Institution
  - Settings with the Effect of Isolating Individuals
- Heightened Scrutiny Process
- Questions

# Background – Final Rule

- The final home and community-based services (HCBS) regulations (known as the “Final Rule”) were published in the Federal Register on January 16, 2014; they became effective March 17, 2014
- Designed to enhance the quality of HCBS, provide additional protections, and ensure full access to the benefits of community living

# Background – Home and Community-Based Setting Requirements in Final Rule

- Establishes requirements for the qualities of settings where individuals live and/or receive Medicaid-reimbursable HCBS provided under sections 1915(c), 1915(i), 1915(k), 1915(b)(3), and 1115 of the Social Security Act
- Focus on the quality of individuals' experiences
- The intent is that individuals receiving Medicaid-funded HCBS have the opportunity to receive these services in a manner that protects individual choice and promotes community integration

# Background – Home and Community-Based Setting Qualities

Any residential or non-residential setting where individuals live and/or receive HCBS must have the following five qualities by March, 2019:

- 1) Is integrated in and supports full access of individuals to the greater community
  - Provides opportunities to seek employment and work in competitive integrated settings, engage in community life, control personal resources, and
  - Ensures that individuals receive services in the community, to the same degree of access as individuals not receiving HCBS

# Background – Home and Community-Based Setting Qualities (cont'd)

- 2) Is selected by the individual from among setting options including non-disability specific settings and options 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, resources available for room and board

# Background – Home and Community-Based Setting Qualities (cont'd)

- 3) Ensures an individual's rights of privacy, dignity and respect, and freedom from coercion and restraint
- 4) Optimizes individual initiative, autonomy, and independence in making life choices, including, but not limited to, daily activities, physical environment, and with whom to interact
- 5) Facilitates individual choice regarding services and supports, and who provides them

# Background – Home and Community-Based Setting Qualities (cont'd)

- A residential setting that is provider-owned or controlled is subject to additional requirements
  - A setting is provider-owned or controlled when the setting in which the individual resides is a specific physical place that is owned, co-owned, and/or operated by a provider of HCBS
  - Additional requirements relate to ensuring tenant protections, privacy, and autonomy for individuals receiving HCBS who do not reside in their own private (or family) home



# Background – Home and Community-Based Setting Requirements

- States were required to submit a Statewide Transition Plan for existing 1915(c) and 1915(i) programs
  - Describes the state’s process for ensuring compliance with home and community-based setting requirements
- New 1915(c) waivers or new 1915(i) or 1915(k) state plan amendments must be compliant as of the effective date of the waiver or state plan amendment approved by CMS
- States must be in full compliance no later than March 17, 2019

# Home and Community-Based Settings – Private home

- A state may presume that an individual's private home or a relative's home where an individual resides meets the home and community-based settings requirements
- However, it is still the state's responsibility to ensure that individuals living in a private home or a relative's home have opportunities for full access to the greater community

# Home and Community-Based Settings – Private home (cont'd)

- If the state presumes that private homes meet the setting requirements, the state needs to confirm that the homes were not purchased or established in a manner that isolates the individual from the community of individuals not receiving Medicaid-funded home and community-based services. For example, did a group of families purchase an isolated property solely for their family members with disabilities using waiver services?

# Excluded Settings

Settings that are not home and community-based are specified in the Final Rule:

- Nursing Facility
- Institution for Mental Disease
- Intermediate Care Facility for Individuals with Intellectual Disabilities
- Hospital
- Other locations that have qualities of an institutional setting, as determined by the Secretary

# Settings Presumed to Have the Qualities of an Institution

- The regulations identify other settings that are presumed to have institutional qualities and do not meet the requirements for Medicaid home and community-based settings:
  - Settings in a publicly or privately operated facility that provides inpatient institutional treatment
  - Settings in a building on the grounds of, or adjacent to, a public institution
  - Settings with the effect of isolating individuals receiving Medicaid HCBS from the broader community of individuals not receiving Medicaid HCBS

# Settings with the Effect of Isolating Individuals

- CMS' *Guidance on Settings that Have the Effect of Isolating Individuals Receiving HCBS from the Broader Community* states that the following two characteristics alone might, but will not necessarily, have the effect of isolating individuals:
  - The setting is designed specifically for people with disabilities, or for people with a certain type of disability
  - Individuals in the setting are primarily or exclusively people with disabilities and the on-site staff that provides services to them

# Settings with the Effect of Isolating Individuals (cont'd)

- 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 – Examples

The guidance provides a “non-exhaustive” list of examples of residential settings that have the effect of isolating people receiving HCBS from the broader community. These are listed on the following slides.



# Settings with the Effect of Isolating Individuals – Examples (cont'd)

- **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 medical and 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 – Examples (cont'd)

- 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 – Examples (cont'd)

- **Residential schools** that have the following characteristics:
  - The setting incorporates both the educational program and the residential program in the same building or in buildings in close proximity to each other so individuals do not travel into the broader community to live or to attend school
  - Individuals served in the setting typically interact only with other residents of the home and the residential and educational staff
  - Activities such as religious services are held on-site
  - Individuals' experience with the broader community is limited to large group activities on “bus field trips”

# Settings with the Effect of Isolating Individuals – Examples (cont'd)

- **Multiple settings co-located and operationally related** (i.e., operated and controlled by the same provider) which congregate a large number of people with disabilities together such that people's ability to interact with the broader community is limited
  - Depending on the program design, examples include:
    - Group homes on the grounds of a private ICF
    - Numerous group homes co-located on a single site or in close proximity, such as multiple units on the same street

# Heightened Scrutiny Process

- If a state identifies any settings that are presumed to have the qualities of an institution, 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 not have* the qualities of an institution and
  - *Does have* the qualities of a home and community-based setting

# Heightened Scrutiny Process (cont'd)

- A state may overcome the presumption that a setting has institutional qualities by **submitting evidence to CMS** demonstrating the setting does not have the qualities of an institution and that it does have the qualities of a home and community-based setting
- When the state submits this evidence to CMS, the state triggers a process known as “**heightened scrutiny**”
- Under the heightened scrutiny process, CMS reviews the evidence submitted by the state and makes a determination as to whether the evidence is sufficient to overcome the presumption that the setting has the qualities of an institution

# Heightened Scrutiny Process (cont'd)

**Evidence states should submit** in a heightened scrutiny process to demonstrate that a setting is home and community-based:

- Evidence should focus on the qualities of the setting and how it is integrated in and supports full access of individuals receiving home and community-based services into the greater community
- Evidence should not focus on the aspects and/or severity of the disabilities of the individuals served in the setting
- For heightened scrutiny requested under 1915(c) or 1915(i), evidence should also include the information the state received during the public input process

# Heightened Scrutiny Process (cont'd)

Submitting evidence for a **setting in a publicly or privately-owned facility that provides inpatient treatment:**

- At a minimum, states should submit 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
  - This could include documentation showing that the home and community-based setting is not operationally interrelated with the facility setting
- Examples of such evidence are included in the answer to **Question 4** in the June 2015 FAQs



# Heightened Scrutiny Process (cont'd)

Submitting evidence for a **building located on the grounds of or immediately adjacent to a public institution:**

- Evidence that a state might want to collect and submit to overcome the presumption of institutional qualities for these types of settings is similar to the evidence for settings in a publicly or privately-owned facility that provides inpatient treatment
- Examples of such evidence are included in the answer to Question 5 in the June 2015 FAQs

# Heightened Scrutiny Process (cont'd)

Demonstrating that a setting **does not have the effect of isolating individuals receiving HCBS from the broader community of individuals not receiving HCBS:**

- To overcome the presumption that a setting is isolating, a state should provide evidence of the following qualities:
  - The 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

# Heightened Scrutiny Process (cont'd)

To overcome the presumption that a setting is isolating, a state should provide evidence of the following qualities (cont'd):

- The individual participates regularly in typical community life activities outside of the setting to the extent the individual desires and these activities:
  - Do not include only those organized by the provider agency specifically for a group of individuals with disabilities and/or involving only paid staff
  - Do foster relationships with community members unaffiliated with the setting
- Services to the individual, and activities in which the individual participates, are engaged with the broader community

# Heightened Scrutiny Process (cont'd)

Criteria CMS uses to review state requests for heightened scrutiny:

- Whether all of the qualities of a home and community based setting outlined in the federal settings regulations are met
- Whether the state can demonstrate that persons receiving services are not isolated from the greater community of individuals not receiving HCBS
- Whether CMS concludes that there is strong evidence the setting does not meet the criteria for a setting that has the qualities of an institution

# Heightened Scrutiny Process (cont'd)

- Tools for states to use in collecting information for CMS' heightened scrutiny process:
  - The Exploratory Questions for Residential Settings and/or Non-Residential Settings (as a framework against which to examine settings)
  - The states' own tools for collecting and evaluating the information received
  - Public input on settings the state has flagged for heightened scrutiny as part of a Statewide Transition Plan or a waiver or state plan submission

# Heightened Scrutiny Process (cont'd)

- Public notice associated with settings for which the state is requesting heightened scrutiny should:
  - Be included in the Statewide Transition Plan or addressed in the waiver or state plan submission to CMS
  - List the affected settings by name and location and identify the number of individuals served in each setting
  - Be widely disseminated

# Heightened Scrutiny Process (cont'd)

- Public notice associated with settings for which the state is requesting heightened scrutiny should (cont'd):
  - Include all justifications as to why the setting is home and community-based
  - 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 responses to those public comments in the Statewide Transition Plan or submission to CMS

# Heightened Scrutiny Process (cont'd)

## Site visits

- To facilitate CMS review of the evidence presented for heightened scrutiny, a state should submit any site visit information
- The purpose is to observe the individual's life experience and the presence or absence of the qualities of home and community-based settings



# Heightened Scrutiny Process (cont'd)

CMS' response to the state's submission of evidence for heightened scrutiny of a setting:

- CMS will respond in writing as part of its review of the action pending – whether in response to a Statewide Transition Plan, new waiver, or state plan amendment
- CMS will make one of the following determinations:
  - All regulatory requirements are met by the setting in question, or
  - Not all regulatory requirements are met

# Heightened Scrutiny Process (cont'd)

CMS' response to the state's submission of evidence (cont'd):

- Not all regulatory requirements are met
  - If the setting is included in the Statewide Transition Plan, the state has several options (see the answer to Question 10 in the June 2015 FAQs)
  - If the setting is included in a new 1915(c) waiver, a new 1915(i) or 1915(k) state plan benefit, or as part of new services added to an existing waiver or state plan benefit, federal reimbursement for services in that setting will not be available until the setting has achieved compliance with all requirements

# Heightened Scrutiny Process (cont'd)

CMS' response to the state's submission of evidence (cont'd):

- Approval of a heightened scrutiny request pertains only to the individual setting or settings subject to the request
- Any material changes approved through heightened scrutiny 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 home and community-based qualities even after the transition period ends

# Questions

# Sources of Information

Link to CMS HCBS guidance <http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Long-Term-Services-and-Supports/Home-and-Community-Based-Services/Home-and-Community-Based-Services.html>

including:

- Federal Regulations: 1915(c) waiver: 42 CFR §441.301(c)(4); 1915(i) State Plan option: 42 CFR §441.710(a)(1); 1915(k) State Plan option: 42 CFR §441.530(a)(1)
- *Guidance on Settings that Have the Effect of Isolating Individuals Receiving HCBS from the Broader Community*
- *Frequently Asked Questions Regarding the Heightened Scrutiny Review Process and Other Home and Community-Based Setting Information (June 26, 2015)*

# For More Information

A mailbox to ask additional questions  
can be accessed at:

[hcbs@cms.hhs.gov](mailto:hcbs@cms.hhs.gov)