



CMS' New Home & Community Based Services (HCBS) Rule: What it Means for States & Providers

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Medicaid Home and Community-Based Services (HCBS) represent important opportunities for states to utilize Medicaid funding to provide flexible person-centered community based services and supports that enable people with disabilities to live fully integrated lives in the community. On January 16, 2014, the U.S. Centers for Medicare and Medicaid Services' (CMS) published its final rule for HCBS.¹ The new rule implements important features of the Affordable Care Act (ACA) and clarifies the types of settings in which Medicaid-funded HCBS may be delivered, while emphasizing the ability of people receiving HCBS to exercise choice about where they live and the services they receive.

The new requirements went into effect March 17, 2014 and apply to HCBS provided through Medicaid's 1915(c) HCBS Waiver program, 1915(i) HCBS State Plan Option, and 1915(k) Community First Choice State Plan Option. CMS will also include requirements in the special terms and conditions of 1115 demonstrations that impact individuals receiving HCBS services. The requirements are intended to align CMS' policies regarding reimbursement for HCBS across Medicaid programs, and to align with the community integration mandate of Title II of the Americans with Disabilities Act (ADA) and the U.S. Supreme Court's *Olmstead* decision.² The ADA and *Olmstead* affirm the rights of people with disabilities to live and receive services in the most integrated, least restrictive settings appropriate to their needs. The new HCBS setting and person-centered planning requirements are also more closely aligned with evidence-based principles for permanent supportive housing (PSH).³ Thus, while the new rule does not

specifically apply to services provided under other Medicaid programs (e.g., Rehab Option), its requirements closely reflect best practice in community integration for people with disabilities and the policy direction of federal agencies charged with ensuring full access to community living opportunities for people with disabilities. As such, the new CMS HCBS rules represent principles and strategies that are important for states to consider as part of their overall community integration efforts.

This policy brief summarizes newly defined requirements for settings in which HCBS may be provided; person-centered planning requirements established for individuals receiving HCBS under 1915(c) and 1915(i)⁴ which in part require an individual's choice of setting be documented; and a transition process for states to comply with the new HCBS setting requirements.

Home and Community-Based Settings Requirements

The final rule establishes requirements for the qualities of settings that are eligible for reimbursement for Medicaid HCBS. CMS considered extensive feedback⁵ from stakeholders, states and federal partners before arriving at a definition that differentiates community-based settings from institutional settings such as nursing facilities, institutions for mental disease (IMDs), intermediate care facilities for individuals with intellectual disabilities (ICF-IDDs), and hospitals, which are excluded from the provision of Medicaid HCBS. The result is a set of qualifications for home and community-based settings that are based on the experience and outcomes of individuals receiving HCBS rather than physical or other characteristics of a particular setting.

¹ See: <https://www.federalregister.gov/articles/2014/01/16/2014-00487/medicaid-program-state-plan-home-and-community-based-services-5-year-period-for-waivers-provider>

² *Olmstead v. L.C.*, 527 U.S. 581 (1999) in which the Court affirmed a state's obligations to provide covered program services to eligible individuals with disabilities in the most integrated setting appropriate to their needs.

³ Substance Abuse and Mental Health Services Administration. *Permanent Supportive Housing Evidence-Based Practices (EBP) Kit*. Rockville, MD: 2010.

⁴ As explained on a recent CMS webinar on the new HCBS rule, while person-centered planning requirements for 1915(k) will be established outside of this new rule, the requirements will be aligned.

⁵ Based on the comments received on the Advanced Notice of Proposed Rule Making (ANPRM) issued by CMS and proposed rules for 1915(c), 1915(i) and 1915(k).

Specifically, the final rule requires that all home and community-based settings must:

- Be integrated in and support full access to the greater community;
- Be selected by the individual from among setting options;
- Ensure individual rights of privacy, dignity and respect, and freedom from coercion and restraint;
- Optimize autonomy and independence in making life choices; and
- Facilitate choice regarding services and who provides them.

The final rule also includes additional requirements for settings in which the provider of HCBS also owns or operates an individual's residence, which may in part require providers to change certain operational policies and protocols to enhance the experience of community living for the individuals they serve. In these settings, an individual must:

- Have a lease or other legally enforceable agreement providing similar protections;
- Have privacy in their unit including lockable doors, choice of roommates and freedom to furnish or decorate the unit;
- Control his/her own schedule including access to food at any time;
- Be able to have visitors at any time; and
- Have a setting that is physically accessible.

The final rule also defines other settings presumed to have institutional qualities that are not in compliance with the HCBS setting requirement, including any setting that has the effect of discouraging integration of individuals receiving Medicaid-funded HCBS from the broader community of individuals not receiving such services. Should states decide to include any of these other settings in their Medicaid HCBS programs, CMS will exercise "heightened scrutiny," meaning the state must demonstrate, via a process that includes public input, that the setting does not have the qualities of an institution and does have the qualities of a community-

based setting as defined in the rule. The rule also clarifies that the home and community-based setting requirements apply to non-residential settings where HCBS are delivered such as day programs and pre-vocational training settings.

Figure 1 on the next page compares the requirements in the new HCBS rule to federal *Olmstead* principles as well as the evidence-based principles for permanent supportive housing (PSH).

The figure shows that by comparison the new rule does not define integrated settings as specifically as recent *Olmstead* compliance measures in settlement agreements with the U.S. Department of Justice (DOJ); that is, primarily non-disability specific housing where no more than a specific percentage of tenants are people with disabilities known to the state.⁶ The U.S. Department of Housing and Urban Development (HUD) Section 811 program, as amended by the Melville Act, similarly requires that no more than 25% of the units in a building receiving new 811 project rental assistance funding be set-aside for people with disabilities. The likely outcome of this is that states with pending *Olmstead* litigation or Settlement Agreements will consider abiding by the more stringent criteria for integration being enforced by DOJ. States should also be aware that although CMS will not require such specific criteria for HCBS settings, they may still employ this higher standard in their voluntary *Olmstead* planning and other community integration efforts.

Unlike *Olmstead* and evidence-based PSH principles, the new rule does not include a requirement for the separation of housing and services. Instead it defines additional requirements for provider owned or controlled housing and requires that any modification to these requirements must be supported by a specifically assessed need and justified in an individual's person-centered service plan.

⁶ Examples of DOJ settlements agreements that limit the number of people with disabilities who can reside in housing settings include Delaware, Georgia, New Hampshire, and Virginia. Settlement agreements can be found at: <http://www.justice.gov/crt/about/spl/findsettle.php>.

Figure 1 – TAC Analysis of HCBS Rule Compared to *Olmstead* & PSH Principles⁸

CMS HCBS Rule	Olmstead Guidance/Principles ⁷	Evidence-Based PSH Principles ⁸
The setting is selected by the individual from among setting options including non-disability specific settings; choice of setting must be documented in person-centered service plan. Individuals must have options available for both private and shared living; provider owned or controlled housing must facilitate choice regarding roommate selection.	People live in housing that they chose in a neighborhood in which they desire to live. They are not “placed” or “steered” to the housing by providers that may be associated with the housing unit or building.	People have a choice of housing options (i.e. housing type and unit) and of living arrangements (e.g., whether to live with someone and who that someone is)
Separation of housing and services is not required; choice regarding services including choice of provider in provider-owned housing must be addressed in person-centered service plan.	The housing owner/sponsor may not be the person’s representative payee, and may not require as a condition of tenancy that people have the rent directly deducted from the person’s income. ⁹	Housing management and service provision functions are functionally separate and not performed by the same provider/agency staff
CMS has no statutory authority with regard to housing affordability, so there is no reference in the final rule to affordability	People live in safe and affordable housing; they cannot be required to pay more than 30-40% of their income for housing costs, including utilities.	Housing is decent and safe (i.e. meets federal Housing Quality Standards), people pay no more than 30-40% of monthly income for housing/utility costs
The setting is integrated in and supports full access to the greater community; excluded from HCBS settings are those that have the effect of discouraging integration of individuals receiving Medicaid-funded HCBS from the broader community.	People live, work and socialize primarily with other people who do not have disabilities. Housing is not a “disability identified” setting; it is similar to the housing stock in the community, and is not identified or advertised as housing restricted to people with disabilities.	People live in housing units typical of the community, without clustering people with disabilities
The setting ensures individual rights of privacy, dignity and respect, and freedom from coercion and restraint. The setting has a specific physical place that can be owned, rented, or occupied under a legally enforceable agreement with the same responsibilities/ protections as tenants have under local landlord/tenant law. A lease or other legally enforceable agreement providing similar protections is required for individuals residing in provider-owned or controlled housing.	Tenancy may not be terminated for any reason other than violation of a standard lease consistent with state/local law. People cannot be “evicted” or “discharged” from their housing unit for violation of “program rules” or refusal to accept services offered by the housing provider or any other service provider. ¹⁰	People have leases or landlord/ tenant agreements that provide all tenancy rights allowable under state/local law; tenancy is not contingent on program compliance or limits on length of stay beyond that in a standard lease
The setting optimizes autonomy and independence in making life choices and facilitates choice regarding services and who provides them; these choices must be reflected in the person-centered service plan.		Services are consumer driven; people choose and modify the types of services they want and are not required to accept a standard service package. They may choose from an array of services, including the option of no services.

⁷ Synthesized from recent *Olmstead* decisions and/or Federal *Olmstead* Guidance – for more info www.ada.gov/olmstead.

⁸ Substance Abuse and Mental Health Services Administration. *Permanent Supportive Housing Evidence-Based Practices (EBP) Kit*. Rockville, MD: 2010.

⁹ Tenants may voluntarily enter into an agreement to have the rent paid directly to the landlord, but this cannot be a condition of tenancy.

¹⁰ Note: People can voluntarily enter into agreements to abide by housing community standards, such as remaining sober or not bringing drugs or alcohol into the setting. However, provisions such as being required to go to a day program or otherwise receive specific services from the provider that also controls the housing – or any other provider – would constitute evidence of a restricted setting.

The new rule additionally requires that choice regarding services including choice of provider in provider-owned housing must also be addressed in the person-centered service plan. Thus the person-centered service planning requirement, discussed below, is in essence the tool for ensuring that services, the setting in which they are received, and who provides them all meet the assessed needs, goals, preferences, and choices of Medicaid HCBS participants.

Transition Planning

The final rule includes a one year transition period for states to ensure that settings included in their HCBS programs meet the new settings definition, while new waiver and state plan submissions must meet the new definition to be approved. Therefore, states will need to assess the degree to which current service settings, including residential, day program and employment settings meet the requirements of the new rule. States must develop a transition plan to bring existing services provided in non-integrated settings into compliance or risk the loss of Federal Financial Participation (FFP) for HCBS delivered in noncompliant settings.

Person-Centered Planning & Choice

The new rule specifies that service plans for Medicaid HCBS participants¹¹ must be developed through a person-centered planning process that is directed by the individual. An individual's person-centered service plan must: (a) reflect the clinical and long-term services and supports an individual needs as identified through an independent assessment process; and (b) reflect the individual's goals, preferences, and choices concerning the delivery of those services and supports. The independent assessment is conducted by independent and qualified individuals according to standards established by CMS and further defined by the state. The provider agency that delivers HCBS for the individual may not conduct the assessment or develop the person-centered service plan. Only in circumstances where the state determines such providers are the only

willing and qualified entity in a geographic area may this occur. If this is the case, the state must develop conflict of interest standards to ensure separation of assessment and provider functions within an agency deemed qualified to conduct independent assessments and service plan development to protect the interests of HCBS participants to have fair assessments and make informed choices.

The requirements for person-centered plans in the new rule ensure choice of setting, services, and service providers in a manner consistent with *Olmstead* and evidence-based PSH principles. Specifically, individuals receiving Medicaid-funded HCBS must be offered choices regarding:

- Setting options available to them including non-disability specific settings, a private room and roommate selection;
- Services and supports that meet independently assessed needs; and
- Choice of who provides the services and supports, including choice of provider in provider-owned or controlled housing.

The state is responsible to ensure that the above occurs and that individual plans of care document:

- The alternative HCB settings that were considered by the individual;
- That the setting in which the individual resides is chosen by the individual; and
- That any modifications to the HCBS setting requirements are justified and based on independently assessed need.

States will be responsible to monitor that fully informed participant choice is being exercised as part of the person-centered planning process and thus will need to be knowledgeable of the integrated setting and service options and alternatives that exist in their communities.

¹¹ Applies to 1915(i) and (c).



CMS Guidance Regarding Settings Requirements

CMS recently released a Home and Community-Based Settings Toolkit¹² to assist State Medicaid Agencies, Operating Agencies, and other stakeholders in complying with the new HCBS settings requirements. The toolkit provides summary information on regulatory requirements for compliant HCBS residential settings and settings which are excluded, as well as exploratory questions to help assess whether the characteristics that CMS expects to be present in all HCBS settings are present.

While CMS' intention is that these Toolkit resources will offer states and providers factors to consider when assessing both residential and non-residential settings, in the future CMS plans to offer additional guidance specific to non-residential settings.

In addition, the requirement for a Quality Improvement Strategy is a mechanism for states to ensure the availability of a continuous quality improvement process that includes monitoring, remediation, and quality improvement for the settings, person-centered planning, and other provisions in the rule.

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For additional information and related resources, visit www.tacinc.org.

¹² See: <http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Long-Term-Services-and-Support/Home-and-Community-Based-Services/Home-and-Community-Based-Services.html>