Home and Community-Based Services Regulations Q&A: Settings Presumed to be Institutional & the Heightened Scrutiny Process[1]

This Q&A provides an overview of the requirements of 2014 federal regulations that any setting receiving Medicaid home and community-based services (HCBS) funding must have certain community qualities and not be institutional in nature.[2] It also covers when a setting presumed to have institutional qualities may be approved to continue providing Medicaid HCBS through a process called "heightened scrutiny."[3]

Why does it matter if a setting is not considered community-based?
Medicaid-funded HCBS cannot be used in settings that do not have the qualities of a community setting. The 2014 regulations by the federal Medicaid agency, the Centers for Medicare & Medicaid Services (CMS), require states to take a closer look at settings receiving HCBS funding and figure out if each HCBS setting meets the new standards. This closer look, usually referred to as the settings assessment process, is one of the first steps in a state's transition plan to bring their HCBS programs into compliance with the 2014 regulations. The transition plan may take up to five years or until 2019. During this transition period, the state is expected to review HCBS settings, change state policies, transition settings into compliance, and where necessary, transition individuals from non-compliant settings into compliant ones.

What are the characteristics of a community-based setting?
A community-based setting is integrated with the surrounding community and provides people in the setting the same degree of access to the community as people not receiving HCBS. This full access to the broader community must include opportunities for each HCBS participant to work in competitive integrated employment, engage in community life, control personal resources, and receive services in the community.

Importantly, individuals receiving HCBS must have the same degree of access to the larger community as compared to individuals in the community who do not receive Medicaid HCBS.

Other features of a community-based setting include that it:

- Is selected by the individual from among setting options, including non-disability specific settings (such as a typical job in the community or living in one's own home) and an option for a private unit in a residential setting;

[1] This Q&A was created in October 2015 by the following national disability and aging organizations: American Network of Community Options and Resources, Association of University Centers on Disabilities, Autistic Self Advocacy Network, Bazelon Center for Mental Health Law, Justice in Aging (formerly National Senior Citizens Law Center), National Association of Councils on Developmental Disabilities, National Disability Rights Network, National Health Law Program, and The Arc of the United States.

[2] For this Q&A, a setting is any location in which an individual receives home and community-based services under a Medicaid 1915(c) waiver, 1915(i) or 1915(k) state plan amendment, and 1115s that incorporates such HCBS programs.

[3] For more information about the assessment and heightened scrutiny process, see CMS, FAQ: Heightened Scrutiny Review Process and Other Home and Community-Based Settings Information (June 26, 2015); CMS, Q&A: Home and Community-Based Settings (Dec. 2014); and other resources on the CMS HCBS webpage.

- Ensures an individual's rights to privacy, dignity and respect, and freedom from coercion and restraint;
- Optimizes, but does not regiment, individual initiative, autonomy, and independence in making life choices, including but not limited to, daily activities, physical environment, and with whom to interact;
- Facilitates individual choice regarding services and supports and who provides them; and
- When owned or controlled by a provider, a residential setting must have additional qualities.[4]

What makes a setting institutional?
A setting is considered institutional if it keeps people with disabilities away from, or segregated from, the larger community and people without disabilities. This includes having rules or procedures that limit access to the community to only certain times or only as part of a group, or restrict choice of community activities and places to visit.

Under the regulations, certain settings are considered institutions under Medicaid and cannot provide HCBS, nor can they go through the heightened scrutiny process to qualify to provide HCBS. These settings are nursing facilities, institutions for mental diseases, intermediate care facilities for individuals with intellectual disabilities (ICF/IIDs), hospitals, or any other locations that have qualities of an institutional setting, as determined by the Secretary. The regulations also identify settings "presumed" to have the qualities of an institution: These include settings, which are:

- Located in a building that is also a publicly or privately operate facility that provides inpatient institutional treatment;
- Located in a building on the grounds of, or immediately adjacent to a public institution; or
- Isolating individuals receiving Medicaid HCBS from the broader community of individuals not receiving Medicaid HCBS. This would include settings that may not look isolating, but because of rules and procedures followed at the setting, have the effect of isolating residents. In guidance, CMS has identified potential examples of settings that isolate, including farmsteads, gated or secured communities for people with disabilities, residential schools, and multiple settings clustered together and operationally related.[5]

Can a setting that is presumed to have institutional qualities still provide HCBS?
If a state thinks a setting that is presumed to have institutional qualities (discussed in previous answer) is actually a community setting, the state may submit evidence to CMS through a process called heightened scrutiny. The evidence must show that the setting provides community integration for people with disabilities and that it does not have institutional qualities. If CMS agrees that the evidence adequately shows the setting supports full community integration and is not actually institutional in nature, the state can continue to use HCBS funds in that particular setting. Any approval from CMS is limited to the specific setting that went through the heightened scrutiny process. The

[4] *See, e.g.,* 42 C.F.R. § 441.301(c)(4)(vi).
[5] CMS, Guidance on Settings that have the Effect of Isolating Individuals Receiving HCBS from the Broader Community (Mar. 2014).

approval of one setting does not mean that other similar settings will also be approved In addition, CMS has said that the state may not make significant changes to the setting (such as increasing capacity or changing rules or characteristics of the setting) without having to go through the CMS' heightened scrutiny process again.

Who determines whether a setting is community-based or institutional?
The state Medicaid agency will make the initial determination about whether a setting is community-based or institutional, including whether to submit a presumed institutional setting to heightened scrutiny. If a state decides to submit a setting through the heightened scrutiny process, the final decision about whether that setting passes heightened scrutiny (and thus may continue to receive HCBS funding) is made by CMS. As part of its review of transition plans, CMS also examines a state's assessment process to determine whether it has qualities that should ensure settings are appropriately identified and evaluated, including those that should go through heightened scrutiny. CMS also looks at whether the state appropriately received and responded to public input. CMS's review primarily focuses on the state's process and the evidence states submit for individual settings subject to heightened scrutiny. This includes whether the state failed to identify settings that should be presumed institutional and possibly submitted for heightened scrutiny.

In the assessment process, states must follow the federal regulations and CMS guidance. States are using surveys, on-site assessments, and other information. The HCBS regulations focus on how the HCBS participant experiences a setting so it is very important that people who use HCBS services and their friends, families, and advocates provide information to the state about which settings are institutional, especially those that are "settings that isolate." In assessing settings, states may also establish higher standards for community-based settings than what the federal regulations require. For example, states may require prevocational programs to be community-based. States also may use a "tiered standard," where existing services meet the minimum federal standard but all new service capacity must meet a higher standard.

What happens if a setting is determined not to be community-based?
Settings that are not community-based will not be eligible to receive HCBS funding. Many settings will become compliant by changing policies to become less institutional in nature and satisfy the community requirements. A setting may do this in a variety of ways, but it will often involve changes to policies and procedures to make the day-to-day experience of setting participants much more focused on community integration and far less segregated and institutional. A few settings may not be able to make the needed changes or may not want to. People who use such settings for HCBS will be entitled to select and transfer to a more integrated setting before the end of the transition plan period. Some non-community-based settings may be eligible for Medicaid funding other than through HCBS. For example, they might seek Medicaid funding as intermediate care or nursing facilities.

How does a state show CMS a setting is community-based in the heightened scrutiny process?
CMS expects that states will submit several types of information and documentation as part of the heightened scrutiny process. The evidence must show how the setting provides community integration for <u>all participants</u> and can include:

- Descriptions of community interactions and how close a setting is to community activities and public transportation (or how transportation is provided for individuals in the setting)
- Procedures the setting uses that show support for activities in the community and that show individuals have activities of their choosing that meet their individual preferences and interests.
- Pictures and/or maps of the site, which may include nearby or related institutional or disability-specific sites.
- Descriptions of how the facility is connected, or not, with any related institutional facility. This could include information about finances, shared administration or other staff, and shared resources such as transportation and eating facilities.
- Evidence showing the general community considers the setting as part of the community and does not associate the setting only with providing services to people with disabilities.
- Evidence that participants are involved in the community outside of the setting.

The information provided by the state should not focus on the type or severity of disability of the participants in the setting, but should be about the community nature of the setting itself.

What can advocates do in the heightened scrutiny process?
A state is required to include information received during the public input process with any heightened scrutiny submission. This means that the state must provide public notice about proposed submissions for heightened scrutiny and provide an opportunity for comment about the settings in question. This will often be presented as an opportunity to comment on an updated transition plan. The state is required to provide a summary of their responses to those comments as part of their updated transition plans. Be aware that because the state only has to submit a summary of the comments and responses, comments about individual settings by advocates may not get to CMS by way of the state submission process. However, CMS will consider information provided directly by other parties, such as advocates.

It is very important that advocates comment on the state's results for its settings assessments, especially with regard to settings submitted for heightened scrutiny. Advocate comments should include as much information as possible about questionable settings, including any information about the experience of people who participate or live in that setting. Advocate comments should also point out any incorrect information in the state's evidence as well as anything that is missing or misleading, including any settings that may have escaped proper scrutiny. In particular, advocates should pay close attention to whether states are identifying all of the settings that isolate and thus should be identified as institutional. Advocates' information on settings is very important. For example, CMS letters to states in response to transition plans have cited specific settings to question the state's assessment process.

Advocates who want to find out when their state is posting plans for comment and where to submit comments should regularly check their state office of disability services or HCBSadvocacy.org. Requests for public comment must last at least 30 days.