

## **Questions and Answers About**

### **The Home and Community Based Services (HCBS) Settings Rules**

In January 2014, the Centers for Medicare & Medicaid Services (CMS) released final rules regarding the settings of Home and Community-Based Services (HCBS). These rules require HCBS settings to provide opportunities for participants to engage in community life, have access to the community, control their personal resources, and seek employment and work in competitive settings. The purpose of these rules is to enhance the quality of HCBS, provide additional protections to HCBS program participants, and ensure that individuals receiving services through HCBS programs have full access to the benefits of community living.<sup>1</sup> The final HCBS settings rules took into account thousands of public comments reflecting a wide range of perspectives that were gathered over five years of multiple proposed rules.

The HCBS settings rules give states and providers time to implement the new requirements through a transition process that “supports continuity of services for Medicaid participants and minimizes disruptions in service systems during implementation.”<sup>2</sup> **States have up to five years (until March 2019) to come into compliance with the rules.** This means that any necessary changes will occur over several years with protections for HCBS program participants. States must develop a transition plan describing how they will come into compliance, seek public input on the plan, and submit it to CMS for approval.

Stakeholders may have questions about the HCBS settings rules. Below are some common questions and answers about the rules:

**Q: Which programs do the HCBS settings rules apply to?**

**A:** The HCBS settings rules apply to Medicaid-funded programs that are designated home and community-based services. These specific programs are 1915(c) waivers (generally known as “waiver programs”), 1915(i) state plan HCBS, 1915(k) Community First Choice state plan option, and 1115 demonstration waivers that include HCBS. The HCBS settings rules do not apply to services that are not funded by Medicaid (such as state-funded or privately-funded services) or to services funded under non-HCBS Medicaid authorities (such as institutional services or general state plan services).

**Q: Do the HCBS settings rules prohibit funding for institutions?**

**A:** No. Nursing facilities, Intermediate Care Facilities,<sup>3</sup> Institutions for Mental Disease, and hospitals may continue to be funded by Medicaid authorities designated for institutional services

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<sup>1</sup> See “Informational Bulletin: Final Rule – CMS 2249-F – 1915(i) State Plan Home and Community-Based Services, 5-Year Period for Waivers, Provider Payment Reassignment, Setting Requirements for Community First Choice, and CMS 2296-F 1915(c) Home and Community-Based Services Waiver,” (“Informational Bulletin”) at 1, available at <http://www.medicaid.gov/Federal-Policy-Guidance/Downloads/CIB-01-10-14.pdf>.

<sup>2</sup> See Informational Bulletin at 1.

<sup>3</sup> Intermediate Care Facilities (ICFs) are Medicaid funded and licensed institutions for individuals with intellectual disabilities. They range from large state-operated facilities to smaller privately operated facilities. For more

or by state funding. Institutions have never been allowed to be funded under Medicaid's HCBS programs, which serve as an alternative to institutional services. In addition, the HCBS settings rules presume that services provided in a facility that also provides inpatient institutional treatment, or settings on the grounds of, or immediately next to, a public institution are not home and community based settings. These settings must be transitioned out of a state's HCBS program unless CMS finds through a "heightened scrutiny" process that the specific setting does not have the quality of an institution and meets all of the rules' requirements for home and community-based settings.<sup>4</sup> The heightened scrutiny process may only be initiated by a state and is based on evidence presented by the state with input from the public.

**Q: Do the HCBS settings rules prohibit all provider-owned or congregate residential settings, such as group homes?**

**A:** No. The rule does not prohibit all provider-owned residential settings like group homes. However, in addition to meeting the rules' general requirements, these settings have additional conditions to ensure the rights of people living in those settings, such as privacy in living units/bedrooms, control over their schedules and activities, allowing visitors when they choose, and protections from evictions. The rules also do not prohibit all disability-specific settings (that is, settings where all participants are people with disabilities). But the rules do require that all HCBS participants be offered a choice of a non-disability specific setting in their person-centered planning process. In addition, the HCBS settings rules establish a set of minimum requirements for participation in the HCBS programs. CMS has made clear that states have the authority to develop specific requirements for HCBS settings in their HCBS programs, such as requirements regarding size, location, design, or the range and scope of services offered.<sup>5</sup>

Some disability-specific, provider-owned, or congregate settings may have characteristics of "settings that isolate" (see question below). States must outline in their transition plans whether and how some settings may need to update their practices to come into compliance with the rules. Some states' plans may need to include steps to create additional capacity so all participants can be offered a choice of a non-disability specific setting. CMS has created a set of "Exploratory Questions" to assist states in evaluating residential settings for compliance with the rules.<sup>6</sup>

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information on ICFs, see [http://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/CertificationandCompliance/Downloads/ICFMR\\_Background.pdf](http://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/CertificationandCompliance/Downloads/ICFMR_Background.pdf).

<sup>4</sup> For more information about the heightened scrutiny process, see "Steps to Compliance for HCBS Settings Requirements," available at <http://www.medicare.gov/Medicare-CHIP-Program-Information/By-Topics/Long-Term-Services-and-Supports/Home-and-Community-Based-Services/Downloads/HCBS-1915c-waiver-compliance-flowchart.pdf>.

<sup>5</sup> For more information about residential settings, see "HCBS Final Regulations 42 C.F.R. Part 441: Questions and Answers Regarding Home and Community-Based Settings" ("Q&A Regarding HCB Settings"), at 3-9, available at <http://www.medicare.gov/medicaid-chip-program-information/by-topics/long-term-services-and-supports/home-and-community-based-services/downloads/q-and-a-hcb-settings.pdf>.

<sup>6</sup> See "Exploratory Questions to Assist States in Assessment of Residential Settings," available at <http://www.medicare.gov/Medicare-CHIP-Program-Information/By-Topics/Long-Term-Services-and-Supports/Home-and-Community-Based-Services/Downloads/Exploratory-questions-re-settings-characteristics.pdf>.

**Q: Do the HCBS settings rules apply to day service settings?**

**A:** Yes. The HCBS settings rules apply to any setting in which HCBS services are provided – both residential and non-residential. CMS has created a set of “Exploratory Questions” to assist states in assessing non-residential settings for compliance with the rules.<sup>7</sup> As with residential settings, all non-residential settings must comply with the rules’ requirements that the setting provide opportunities for participants to engage in community life, have access to the community, control their personal resources, and seek employment and work in competitive settings.

**Q: Do the HCBS settings rules prohibit all facility-based day programs?**

**A:** No. The HCBS settings rules do not prohibit all facility-based day programs. But all settings, including facility-based day programs, must meet the rules’ requirements for home and community-based settings. Depending on the structure of the program, some facility-based settings may have characteristics that isolate participants from the broader community (see question below). In addition, the HCBS settings rules establish a set of minimum requirements for participation in the HCBS programs. CMS has made clear that states have the authority to decide whether and when to offer facility-based day programs. CMS has also noted that pre-vocational services need not be facility-based and may be offered in a variety of settings in the community.<sup>8</sup>

**Q: What are “settings that isolate”?**

**A:** The HCBS settings rules identify certain settings that are presumed to have institutional qualities and do not meet the rules’ requirements for home and community-based settings. These settings include those “that have the effect of isolating individuals receiving Medicaid-funded HCBS from the broader community of individuals not receiving Medicaid-funded HCBS.” Settings that isolate may have some or all of the following characteristics: (1) settings designed specifically for people with disabilities, and often even for people with a certain type of disability; (2) the individuals in the setting are primarily or exclusively people with disabilities and the staff that provides services to them; (3) settings designed to provide people with disabilities multiple types of services and activities on-site, including housing, day services, medical, behavioral and therapeutic services, and/or social and recreational activities; (4) people in the setting have limited, if any, interaction with the broader community; or (5) settings that use practices that are used in institutional settings or are deemed unacceptable in Medicaid institutional settings (e.g. seclusion or restraint).<sup>9</sup> A state may only include such a setting in its

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<sup>7</sup> See “Exploratory Questions to Assist States in Assessment of Non-residential Home and Community-Based Service (HCBS) Settings,” (“Non-residential Exploratory Questions), available at <http://www.medicaid.gov/medicaid-chip-program-information/by-topics/long-term-services-and-supports/home-and-community-based-services/downloads/exploratory-questions-non-residential.pdf>.

<sup>8</sup> For more information about non-residential settings, see “Questions and Answers Regarding Home and Community-Based Settings” at 9-12.

<sup>9</sup> For more information on “settings that isolate,” see “Guidance on Settings that Have the Effect of Isolating Individuals Receiving HCBS from the Broader Community,” available at <http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Long-Term-Services-and-Supports/Home-and-Community-Based-Services/Downloads/Settings-that-isolate.pdf>. The guidance includes examples of residential settings that may

HCBS programs if CMS determines through a “heightened scrutiny” process that the state has proven that the setting meets the qualities for being home and community-based and does not have the qualities of an institution. The heightened scrutiny process may only be initiated by a state and is based on evidence presented by the state with input from the public.

**Q: If someone is receiving services in a setting that is determined to not be in compliance with the rule, will they lose those services as soon as that determination is made?**

**A:** No. States have until March of 2019 to bring settings into compliance. Some settings must make changes; others may be unable to come into compliance. States’ transition plans must outline proposed changes for settings that the state finds unable to come into compliance. If people will need to change service settings, the plan must outline how their rights and protections will be ensured through the relocation process. States may need to create new capacity to replace settings that cannot come into compliance and/or to ensure that all HCBS participants are offered a choice of non-disability specific settings. Participants will not be left without services as a result of the rule.<sup>10</sup>

**Q: Will the HCBS settings rules improve the quality of services?**

**A:** Yes. The HCBS settings rules create new requirements for HCBS programs that have never before been articulated by CMS. These include a detailed person-centered planning process, rights and protections for those living in provider-owned settings, and a choice of receiving services in a non-disability specific setting, and an option for a private unit in a residential setting. In addition, states must have a process for on-going monitoring of HCBS settings for quality and continued compliance with the rules.

**Q: What is the role of the public in commenting on state transition plans?**

**A:** The state must provide at least one 30-day opportunity to for the public to comment on the statewide transition plan. This will provide the public the opportunity to comment on their state’s process for assessing settings’ compliance with the rule, determinations about which settings do and do not comply, remediation plans, and timeframes and milestones for implementation. If the state makes any “substantive” changes – including, for example, assessments of specific settings or development of remediation plans that occur after the submission of the initial transition plan – the state must post the plan for comment again.

**Q: How do the HCBS settings rules relate to states’ obligations under the Americans with Disabilities Act, as interpreted by the Supreme Court’s decision in *Olmstead v. L.C.*?**

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isolate, including disability-specific farmsteads, gated communities for people with disabilities, and residential schools.

<sup>10</sup> For more information, see “Joint Statement by Joint Statement by NASDDDS, ANCOR and Disability and Aging Groups Regarding Continuity of Services During Implementation of the HCBS Rule,” available at <http://www.bazelon.org/LinkClick.aspx?fileticket=em42S5P9d7l%3d&tabid=58>.

**A:** The Americans with Disabilities Act (ADA), as interpreted by the Supreme Court in *Olmstead*, prohibits unjustified segregation of people with disabilities.<sup>11</sup> One of the goals of the HCBS settings rules is to further states' compliance with the Americans with Disabilities Act (ADA) and *Olmstead*.<sup>12</sup> However, states' obligations under Medicaid (including the HCBS settings rules) and the ADA are separate and independent.<sup>13</sup> A determination that a setting complies with the HCBS settings rules does not necessarily mean that it is an "integrated setting" under the ADA, and CMS' approval of a state's transition plan does not necessarily mean that the state is in compliance with the ADA and *Olmstead*.<sup>14</sup> A state may violate the ADA when its service system is overly reliant on "segregated settings" or does not have the capacity to offer people with disabilities services in the most integrated settings. (see question below). States may use the HCBS settings rules to further compliance with the ADA and *Olmstead* by rebalancing their service systems away from providing services in segregated settings and towards integrated settings.

**Q: In what types of settings do the ADA and *Olmstead* require states to provide services?**

**A:** The ADA and *Olmstead* requires states to offer services in "the most integrated setting," which is defined as "a setting that enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible."<sup>15</sup> Guidance from the Department of Justice (DOJ), the agency charged with enforcing the ADA, describes integrated settings as "those that provide individuals with disabilities opportunities to live, work, and receive services in the greater community, like individuals without disabilities." Integrated settings are "located in mainstream society; offer access to community activities and opportunities at times, frequencies and with persons of an individual's choosing; afford individuals choice in their daily life activities; and, provide individuals with disabilities the opportunity to interact with non-disabled persons to the fullest extent possible." In contrast, DOJ has described segregated settings as often having "qualities of an institutional nature." They "include, but are not limited to: (1) congregate settings populated exclusively or primarily with individuals with disabilities; (2) congregate settings characterized by regimentation in daily activities, lack of privacy or autonomy, policies limiting visitors, or limits on individuals' ability to engage freely in community activities and to manage their own activities of daily living; or (3) settings that provide for daytime activities primarily with other individuals with disabilities."<sup>16</sup> DOJ and numerous courts have found that the ADA creates an obligation for states to provide services in the most integrated settings; it does not create a requirement to offer a choice of services in segregated settings.<sup>17</sup>

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<sup>11</sup> *Olmstead v. L.C.*, 527 U.S. 581 (1999).

<sup>12</sup> See Jan. 20, 2014 CMCS Informational Bulletin at 3.

<sup>13</sup> See Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and *Olmstead v. L.C.* ("DOJ *Olmstead* Enforcement Statement") (June 2011), at 5, available at [http://www.ada.gov/olmstead/q&a\\_olmstead.pdf](http://www.ada.gov/olmstead/q&a_olmstead.pdf).

<sup>14</sup> See Non-Residential Exploratory Questions at 2.

<sup>15</sup> 28 C.F.R. pt. 35 app. A.

<sup>16</sup> See DOJ *Olmstead* Enforcement Statement at 3.

<sup>17</sup> See *Illinois League of Advocates for the Developmentally Disabled v. Quinn*, No. 13-cv-1300, 2013 WL 3168758 (N.D.Ill. June 20, 2013); *Sciarrillo ex rel. St. Amand v. Christie*, No. 13-03478, 2013 WL 6586569 (D.N.J. Dec. 13,

For more information about the HCBS settings rules, see [www.HCBSadvocacy.org](http://www.HCBSadvocacy.org) or [www.Medicaid.gov](http://www.Medicaid.gov).

**This Q&A was created by the following national disability and aging organizations:**

Association of People Supporting Employment First

Association of University Centers on Disabilities

Autistic Self Advocacy Network

Bazelon Center for Mental Health Law

Coalition to Promote Self-Determination

National Association of Councils on Developmental Disabilities

National Disability Rights Network

National Health Law Program

National Senior Citizens Law Center (soon to be Justice in Aging)

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2013); statements of interest filed by the Department of Justice in *Illinois League* (available at [http://www.ada.gov/olmstead/documents/iladd\\_soi.pdf](http://www.ada.gov/olmstead/documents/iladd_soi.pdf)); *Sciarrillo* (available at <http://www.ada.gov/olmstead/documents/sciarrillo-christie-soi.pdf>)