



PPP Notes on CMS Commentaries on the January 2014 HCBS Residential Settings Final Ruling

The changes related to clarification of HCBS settings will maximize the opportunities for waiver participants to have access to the benefits of community living and to receive services in the most integrated setting, and will effectuate the law's intention for Medicaid home and community-based services to provide alternatives to services provided in institutions.

Comments were supportive of our interest in setting forth requirements regarding person-centered service and support plans that reflect what is important to the individual.

We agree that the setting options in which an individual resides should be an element in the person-centered service plan. We have included it as a separate item under the list of "Person-Centered Planning Process" requirements at § 441.301(c)(1)(ix). It reads: "Records the alternative home and community-based settings that were considered by the individual." We respond to all of the setting issues, such as landlord/tenant relationship, in our discussion of that section of the rule. As all the comments on this subject make clear, the process of choosing among the housing and service options actually available to a particular waiver participant is an extraordinarily multi-faceted issue. A truly person-centered planning process as required in this rule is the best venue for facilitating this important choice.

The state must ensure that the setting chosen by the individual is integrated in, and supports full access of individuals receiving Medicaid HCBS to the greater community, including opportunities to seek employment and work in competitive integrated settings, engage in community life, control personal resources and receive services in the community to the same degree of access as individuals not receiving Medicaid HCBS.

The clarification and request for input was partially in response to instances in which states or other stakeholders expressed interest in using HCBS waivers to serve individuals in segregated settings or settings with a strong institutional nature, for example, some proposed settings on campuses of institutional facilities, segregated from the larger community. These settings often do not allow individuals to choose whether or with whom they share a room; limit individuals' freedom of choice on daily living experiences such as meals, visitors, activities; and limit individuals' opportunities to pursue community activities.

We are moving away from defining HCB settings by what they are not, and towards defining them by the nature and quality of beneficiaries' experiences. These final regulations establish a more outcome-oriented definition of HCB settings, rather than one based solely on a setting's location, geography, or physical characteristics.

Comment: Several commenters shared the sentiment that true community integration is more than being in the community, but rather truly participating in that community through working

side by side with others without disabilities in community activities, such as jobs, clubs and other civic activities.

Response: We agree with this comment and believe that the changes in the text of the final rule address tenets of community integration. A home and community-based setting must be integrated in, and supports full access of individuals receiving Medicaid HCBS to the greater community, including opportunities to seek employment and work in competitive integrated settings, engage in community life, control personal resources, and receive services in the community, to the same degree of access as individuals not receiving Medicaid HCBS.

Comment: A number of individual commenters shared personal stories expressing satisfaction with their current living arrangements and displeasure that new regulations might force them to move or dictate where they should live. One person wrote, “Please allow Medicaid waivers to continue to pay for services in planned communities similar to retirement communities. I want to live in a community with my friends.” Another noted, “I believe this proposed rule would . . . deny access to residential care and assisted living for those who need it most.” Many commenters talked about the importance of retaining freedom of choice. One commenter stated, “. . . what I am advocating is CHOICE. We should be expanding options rather than narrowing possibilities and options, and we should ask those with disabilities and their families what they want, not what others think they want.” Finally, quite a few commenters echoed a warning to stay away from a “one size fits all” approach in defining HCBS and to embrace more flexibility: “The needs and circumstances of each individual are too diverse to warrant an outright ban on HCBS funding for individuals who might need specialized care.” They further challenged CMS that housing and setting options should not be arbitrarily limited by defining HCBS through physical and geographic structures, but rather through the person-centered plan, personal outcomes and satisfaction.

Response: We very much appreciate hearing personal stories as they help us better understand how our proposed actions will affect individuals receiving services under the HCBS waiver program. We believe that individual choice is important and have worked to promote choice in the final rule. In addition, it is important to note that HCBS waiver funding is only one way in which federal Medicaid finances long term services and supports; a setting that may not meet the HCB definition may still qualify for Medicaid financing, but not as a home and community based service.

We agree that the definition we included in the proposed rule for HCBS settings may have had the result of restricting the settings in which HCB waiver services can be provided in a way that we did not intend and in narrowing choices for participants. The final rule is more flexible and less prescriptive in that it does not preclude certain settings per se but rather establishes affirmative, outcome-based criteria for defining whether a setting is or is not home and community-based. The language in the final rule specifies that any setting that is located in a building that is also a publicly or privately operated facility that provides inpatient treatment, or in a building on the grounds of, or immediately adjacent to, a public institution, or any other setting that has the effect of isolating individuals receiving Medicaid HCBS from the broader community of individuals not receiving Medicaid HCBS, will be presumed to be a setting that has the qualities of an institution unless the Secretary determines, through heightened scrutiny,

based on information presented by the state or other parties, that the setting does not have the qualities of an institution and that the setting does have the qualities of home and community-based settings. Therefore, states and others have the opportunity to refute this categorization by providing sufficient evidence that the individuals in the facility are, in fact, integrated in the community in a manner that overcomes any institutional appearance of the setting. This means that we will continue to be discerning about what types of settings qualify for waiver funds. We are including language in the final rule that focuses on the critical role of person-centered planning and addresses fundamental protections regarding freedom, dignity, control, daily routines, privacy and community integration.

Specifically, we have chosen to be somewhat less prescriptive regarding physical and geographical characteristics of settings and to focus instead on the critical role of person-centered service planning and on characteristics that are associated with independence, control, daily routines, privacy and community integration.

This rule applies to all settings where individuals are receiving HCBS and does not single out assisted living environments. It is intended to assure, consistent with the statute, that Medicaid financing provided through HCBS waivers is available to participants who are receiving services in settings that are true alternatives to institutional care.

Home and community-based settings do not include the following:

- (i) A nursing facility;
- (ii) An institution for mental diseases;
- (iii) An intermediate care facility for individuals with intellectual disabilities;
- (iv) A hospital providing long-term care services; or
- (v) Any other locations that have qualities of an institutional setting, as determined by the Secretary. Any setting that is located in a building that is also a publicly or privately operated facility that provides inpatient institutional treatment, or in a building on the grounds of, or immediately adjacent to, a public institution, or any other setting that has the effect of isolating individuals receiving Medicaid HCBS from the broader community of individuals not receiving Medicaid HCBS will be presumed to be a setting that has the qualities of an institution unless the Secretary determines through heightened scrutiny, based on information presented by the State or other parties, that the setting does not have the qualities of an institution and that the setting does have the qualities of home and community-based settings.

(ii) The setting is selected by the individual from among setting options, including non-disability specific settings and an option for a private unit in a residential setting. The setting options are identified and documented in the person-centered service plan and are based on the individual's needs, preferences, and, for residential settings, resources available for room and board.

Link to text: <http://www.gpo.gov/fdsys/pkg/FR-2014-01-16/pdf/2014-00487.pdf>

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