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## Home and Community-based Setting Requirements

June 26, 2015

### Heightened Scrutiny

**Q1. When should a state consider submitting information to CMS to enable the agency to conduct heightened scrutiny of a setting?**

**A1.** States may submit information for 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 located on the grounds of, or immediately adjacent to, a public institution, which the state believes overcomes the institutional presumption and meets the requirements of a home and community based setting.

Importantly, any setting regardless of location that has the effect of isolating individuals receiving Medicaid home and community-based services (HCBS) from the broader community of individuals not receiving HCBS is also presumed to be institutional, and therefore requires information from the state to overcome that presumption and describe how the HCBS settings requirements are met.

States have an obligation to identify settings that are presumed institutional. 42 CFR 441.301(c)(5)(v) in the final HCBS regulation and at 441.530(a)(2)(v) in the final regulation for 1915(k) describes the process of “heightened scrutiny” that states can use to rebut or overcome this presumption. In particular, the regulations indicate that a settings described above “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.”

Any setting presumed to have institutional qualities will not be approved as a home and community-based setting through heightened scrutiny unless the Secretary determines that the state has submitted sufficient information to explain and document that the setting does not have qualities of an institution and does have the qualities of a home and community-based setting.

**Q2. What criteria does CMS use to review state requests for heightened scrutiny?**

**A2.** CMS reviews the information presented by the state as part of its request for “heightened scrutiny,” in order to determine that the setting has the qualities of a home and community-based setting and does not have institutional qualities.

When a state makes a request to CMS to use the heightened scrutiny process for a particular setting or settings, CMS reviews all information presented by the state and other parties. CMS may solicit the input of federal partners. CMS, upon consultation with these federal partners, if appropriate, will review the information to determine whether each and every one of the qualities of a home and community based setting outlined in 42 CFR 441.301(c)(4)/ 441.530(a) are met, whether the state can demonstrate that persons receiving services are not isolated from the greater community of individuals not receiving Medicaid HOME AND COMMUNITY-BASED SERVICES, and whether CMS concludes that the information indicates that there is strong evidence the setting does not meet the criteria for a setting that has the qualities of an institution.

When a state submits documentation for a heightened scrutiny review, CMS will review the information or documentation to ensure that all participants in that setting are afforded the degree of community integration required by the regulation and desired by the individual. Providing documentation that a percentage or “some” participants have community access will not be considered sufficient to show that the setting meets the regulations.

**Q3. What information should states submit in a heightened scrutiny process?**

**A3.** CMS expects the state to submit several types of information and documentation to support its position that a particular setting has the qualities of home and community-based services and does not have the qualities of an institution. Evidence of how a setting overcomes its presumed institutional qualities 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, not 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), such information should also include the information the state received during the public input process. CMS will also consider information provided by other parties. For 1915(k) Community First Choice (CFC) programs, information should be submitted as part of the state’s request for heightened scrutiny for any such settings included in the CFC State Plan Amendment (SPA).

The exploratory questions available in the Toolkit can also be helpful in determining the type of information that should be included in the documentation. Some additional examples might include:

- Licensure requirements or other state regulations for the setting that clearly distinguish it from institutional licensure or regulations, to demonstrate how the setting is integrated in and supports full access to the greater community.
- Residential housing or zoning requirements that demonstrate how the setting is

integrated in and supports full access to the greater community.

- Description of the proximity to and scope of interactions with community settings used by individuals not receiving Medicaid funded home and community-based services.
- Provider qualifications for staff employed in the setting that indicate training or certification in home and community-based services, and that demonstrate the staff is trained specifically for home and community-based support in a manner consistent with the HCB settings regulations.
- Service definitions that explicitly support the setting requirements. For example, definitions of employment supports that facilitate community-based integrated employment or, for facility-based programs, maximize autonomy and competitive employment opportunities.
- Documentation that the setting complies with the requirements for provider-owned or controlled settings at §441.301(c)(4)(vi)A through D, and if any modifications to these requirements have been made, such modifications are documented in the person-centered plan(s) consistent with the requirements at §441.301(c)(4)(vi)(F)
  - Note that for 1915(i), the relevant requirements are found at §441.710((a)(1)(vi)(A)through (D), and at §441.710(a)(1)(vi)(F)
  - Note that for 1915(k) the relevant requirements are found at §441.530(a)(1)(vi)(A) through (D), and at §441.530(a)(1)(vi)(F)
- Procedures in place by the setting that indicate support for activities in the greater community according to the individual's preferences and interests, staff training materials that speak of the need to support individuals' chosen activities, and a discussion of how schedules are varied according to the typical flow of the local community (appropriate for weather, holidays, sports seasons, faith-based observation, cultural celebrations, employment, etc.).
- Documentation that the individuals selected the setting from among setting options, including non-disability-specific settings.
- Description of the proximity to avenues of available public transportation or an explanation of how transportation is provided where public transportation is limited.
- Pictures of the site and other demonstrable evidence (taking in consideration the individual's right to privacy).

The information submitted may also include a report from an on-site visit to the setting conducted by the state (which as noted in previous Toolkit documents will facilitate the review), public input on the setting in question, consumer experience surveys that can be linked to the site for which evidence is being submitted, and any other

documentation made available. Supporting information could include participant interviews outside the presence of the provider conducted by an independent entity or state staff with demonstrated expertise and/or training working with the relevant population. If warranted, CMS may conduct an onsite review as well. Please note that, in accordance with provisions of the Health Information Portability and Accountability Act, no personally identifiable or other protected information should be submitted to CMS.

**Q4. How can a state demonstrate that settings in a publicly or privately-owned facility that provides inpatient treatment meet the home and community-based services (HCBS) characteristics?**

**A4.** The state must submit strong evidence that the setting presumed institutional has the characteristics of a HCBS setting and not an institutional setting. In addition to the guidance previously provided in the toolkit, 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. For example, the state can submit, and CMS will consider, documentation showing that the HCBS setting is not operationally interrelated with the facility setting, such as:

- Interconnectedness between the facility and the setting in question, including administrative or financial interconnectedness, does not exist or is minimal.
- To the extent any facility staff are assigned occasionally or on a limited basis to support or back up the HCBS staff, the facility staff are cross-trained to meet the same qualifications as the HCBS staff;
- Participants in the setting in question do not have to rely primarily on transportation or other services provided by the facility setting, to the exclusion of other options;
- The proposed HCBS setting and facility have separate entrances and signage;
- The setting is integrated in the community to the extent that a person or persons without disabilities in the same community would consider it a part of their community and would not associate the setting with the provision of services to persons with disabilities:
- The individual participates regularly in typical community life activities outside of the setting to the extent the individual desires. Such 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; community activities should 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.

**Q5. How can a state demonstrate that a building located on the grounds of or immediately adjacent to a public institution meets the home and community-based services (HCBS) characteristics?**

**A5.** The state must submit strong evidence that the setting presumed institutional has the characteristics of a HCBS setting and not an institutional setting. In addition to the guidance previously provided in the toolkit, the state should, at a minimum, submit information documenting that there is a meaningful distinction between the institution and the community-based setting such that the latter is integrated in and supports full access of individuals receiving HCBS services. For example, the state can submit, and CMS will consider, documentation showing that the HCBS setting is not operationally interrelated with the institutional setting, such as:

- Interconnectedness between the institution and the setting, including administrative or financial interconnectedness, in question does not exist or is minimal;
- To the extent any institutional staff are assigned occasionally or on a limited basis to support or back up the HCBS staff, the institutional staff are cross-trained to meet the same qualifications as the HCBS staff; and
- Participants in the setting in question do not have to rely primarily on transportation or services provided by the institutional setting, to the exclusion of other options.
- The setting is integrated in the community to the extent that a person or persons without disabilities in the same community would consider it a part of their community and would not associate the setting with the provision of services to persons with disabilities.
- The individual participates regularly in typical community life activities outside of the setting to the extent the individual desires. Such 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; community activities should 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.

**Q6. How can a state demonstrate that a setting does not have the effect of isolating individuals receiving home and community-based services (HCBS) from the broader community of individuals not receiving HCBS?**

**A6.** The state has several options for the type of evidence it can submit to overcome the presumption that a setting is isolating. The evidence should support the following qualities:

- The setting is integrated in the community to the extent that a person or persons without disabilities in the same community would consider it a part of their community and would not associate the setting with the provision of services to persons with disabilities.
- The individual participates regularly in typical community life activities outside of the setting to the extent the individual desires. Such 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; community activities should 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.

For additional information on examples of settings that isolate individuals receiving HCBS, see the following link: <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>

**Q7. What tools are available for states to collect documentation and information to be submitted to permit CMS to conduct heightened scrutiny?**

**A7.** States may consider using the [Exploratory Questions for Residential Settings](#) and/or [Non-Residential Settings](#) as a framework against which to examine settings. The questions are designed to elicit information through review of documents and/or site visits. States are free to develop their own tools for collecting and evaluating the information received. In addition, states are expected to solicit public input on settings the state has flagged for heightened scrutiny, as part of a Statewide Transition Plan, a waiver-specific transition plan, or a waiver or state plan amendment filing submitted to CMS. This public reaction will facilitate the state's understanding of how the community at large views the settings in question.

**Q8. What does CMS expect regarding public notice associated with settings for which the state is requesting heightened scrutiny?**

**A8.** At a minimum, the notice about any submission for heightened scrutiny should:

- Be included in the Statewide Transition Plan, either initially or as an update to the plan. If the setting is not associated with a transition plan, it should comprehensively be addressed in the waiver or state plan amendment filing submitted to CMS;
- Be widely disseminated with the intent of reaching home and community-based services participants, families and the community;
- List the affected settings by name and location and identify the number of individuals served in each setting;
- Include any and all justifications from the state as to why the setting is home and community-based services and not institutional. This would include any reviewer reports, interview summaries, etc.;
- Provide sufficient detail such that the public has an opportunity to support or rebut the state's information;
- Be subject to a public comment period. CMS expects that states will provide responses to those public comments to CMS when they submit the proposed transition plan. These responses should include explanations as to why the state is or is not changing its decision.

**Q9. What should states consider when performing a site visit?**

**A9.** CMS does not have a specific protocol for a site visit, which is highly recommended in order for CMS to evaluate the evidence. A site visit should include a significant amount of time that is observational in nature. The purpose of this type of site visit is to observe the individual's life experience and the presence or absence of the qualities of home and community-based settings. Record reviews and interviews are supplemental, but we believe are important to corroborate adherence to requirements, and should align with observations. In order to provide strong evidence, states should consider some of the following activities:

- Gather information from stakeholders with relevant information about the setting, such as the state Protection and Advocacy Organization, or other organizations or individuals that raised concerns in the public comment process;
- Conduct visits with individual(s) who have expertise with the community at large (to facilitate an understanding of local routines and interactions), and have training and/or experience in interviewing relevant populations;

- Review staff logs or other daily records of the setting, including any instances of seclusion and/or restraint; facility policies and procedures on resident/participant rights, person-centered service plans and records of how those plans are met; documentation regarding participants' selection of the setting from among setting options, including non-disability-specific settings.
- Evaluate participants' access to the broader community including the availability of transportation and geographic proximity to other community resources, including shopping, entertainment, worship, etc.;
- Look for evidence that settings have institutional characteristics, such as cameras; individual's schedules or other personal information posted; lack of uniqueness in room décor; indicators of seclusion or restraint such as quiet rooms with locks, restraint chairs, or posters of restraint techniques; regimented meal times and other daily activities; and barriers that inhibit community member involvement, such as fences or gates;
- Conduct interviews that generally:
  - Include as many participants as possible selected by the interviewers without influence by the provider or staff;
  - Include staff, specifically including direct support staff because they implement the program policies and procedures on a day-to-day basis, outside of the presence of the supervisor or administrator;
  - Have specific questions/goals based on the exploratory questions; and
  - Avoid leading questions that suggest the preferred answer and instead use questions that are open-ended, yet sufficiently specific to elicit a description of how the setting operates and the individual's experience in it.

**Q10. How will CMS respond to the state's submission of information for heightened scrutiny of a setting?**

**A10.** CMS will respond in writing as part of our review of the action pending – whether in response to a Statewide Transition Plan, new waiver, or SPA. If the CMS review determines that all regulatory requirements are met by the setting in question, and the information submitted to CMS -- which could include information collected in response to CMS exploratory questions -- is sufficient to overcome the presumption of institutional or isolating qualities, the setting will be determined to be home and community based.

If the CMS review determines that not all regulatory requirements are met, and the setting is included in the state's Statewide Transition Plan, the state can use the remaining transition period to bring the setting into compliance with all requirements,



transition individuals from that setting to a compliant setting, transition the coverage authority to one not requiring provision in a home or community based setting, or transition to non-Medicaid reimbursement. If CMS has further questions, CMS may conduct a site visit.

If the CMS review determines that not all regulatory requirements are met, and the setting is included in a new 1915(c) waiver, new 1915(i) state plan amendment, or new 1915(k) CFC SPA, Federal reimbursement for services provided to individuals in that setting will not be available unless or until the setting achieves compliance with all requirements. Once compliant with home and community-based services criteria, the setting can be added to the new program and Federal reimbursement for services provided to individuals in that setting can be claimed.

Approval of any heightened scrutiny request only pertains to the individual settings subject to the request. CMS and the state will collaborate through the Statewide Transition Plan and the review of waiver and SPA actions to ensure implementation of a plan for ongoing monitoring and oversight to ensure continued compliance. In the approval of those documents, CMS will communicate the settings and the scope under which they are adjudicated to be home and community-based services, and indicate that any material changes to the settings approved through heightened scrutiny such as an increase in licensing capacity, the establishment of additional disability-oriented settings in close proximity (e.g., next door), or changes in the ways in which community integration is realized, will require the state to update CMS and may result in a reevaluation of the setting.

### **Respite Services**

- Q11. The preamble to the regulation appears to permit respite services to be provided in institutional settings. Are states required to assess all settings used for respite against the requirements for home and community-based services (HCBS) and report on their status?**
- A11.** No. Respite services are provided on a *short-term basis* because of the absence or need for relief of those persons who normally provide supports and services for the participant. These services support caregivers and help to preserve an individual's placement in the community. CMS, as indicated in the preamble to the regulation, intends to permit states to use institutional settings for the provision of respite services that typically do not exceed 30 days in duration. Therefore, states will not be required to assess their settings that are exclusively used for respite services for compliance with home and community based settings requirements.

## Tenancy

*In a provider owned or controlled setting, the state must ensure that a lease, residency agreement or other form of legally enforceable, written agreement will be in place for each participant; the document must provide protections that address eviction processes and appeals comparable to those provided under the jurisdiction's landlord/tenant laws.*

**Q12. If a provider is furnishing home and community-based services (HCBS) to all individuals in a setting in a property owned and leased by a third party, is this setting considered provider owned and controlled?**

**A12.** If the individual leases directly from the third party that has no direct or indirect financial relationship with the provider, the property is not considered provider-owned or controlled. If the HCBS provider leases from a third party or owns the property, this would be considered provider owned or controlled. If the provider does not lease or own the property, but has a direct or indirect financial relationship with the property owner, we would presume that the setting was provider controlled unless the property owner or provider establishes that the nature of the relationship did not affect either the care provided or the financial conditions applicable to tenants.

**Q13. Can a residential agreement between the individual and the entity that owns or controls the property have the same protections as a lease?**

**A13.** Yes, however the state must ensure that a lease, residency agreement or other form of written agreement will be in place for each HCBS participant, and the document provides enforceable protections that address eviction processes and appeals comparable to those provided under the jurisdiction's landlord tenant law.

## Visitors

**Q14. How will the regulation's requirement that an individual in a provider owned or controlled setting have access to visitors at any time be balanced against the rights and desires of others living in that setting?**

**A14.** The regulation requires that individuals in a provider owned or controlled setting experience the community in the same manner as individuals not receiving Medicaid-funded home and community-based services. While no restrictions on the ability to have visitors should be imposed for convenience purposes, the regulation does not supersede orders of protection or other parameters governing the movement or actions of individuals visiting the setting that may arise under landlord/tenant or other laws or the terms of the lease or rental agreement.

### **1915(b)(3) Services**

**Q15. Must home and community-based services (HCBS) authorized under section 1915(b)(3) of the Social Security Act adhere to the home and community- based settings requirements?**

**A15.** Yes. HCBS services (services that fit into the benefit package authorized under 1915(c), 1915(i) or 1915(k)) requested as part of new 1915(b)(3) managed care savings arrangements must adhere to the home and community- based settings requirements by the effective date of the waiver. To treat such services otherwise would not be consistent with the purposes of title XIX.

HCBS services that are currently approved under 1915(b)(3) authority are afforded the same transition flexibility (ending March 17, 2019) as exists for currently approved 1915(c) waivers. Settings in which these services are provided should be assessed for compliance with the settings requirements and described in the state's Statewide Transition Plan.

### **State Flexibility**

**Q16. May states establish requirements for that are more stringent than requirements in the federal regulation?**

**A16.** Yes. In addition, using their transition plan, a state may establish that certain settings currently in use in a home and community-based services waiver may continue within the waiver, as long as they will be able to meet the minimum standard set in the rule on or before the end of the transition period, but the state may suspend admission to the setting or suspend new provider approval or authorizations for those settings. Simultaneously, the state may establish or promote new or existing models of service that more fully meet the state's standards for home and community-based services. This arrangement, though established through the transition plan, may continue beyond the transition period. In this arrangement, all settings must meet the minimum standards established by CMS for home and community-based settings, but the state may identify a tiered standard so that only those meeting the optimal standards established by the state will be developed in the future.