Conflict of Interest Part II and Medicaid HCBS Case Management

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This presentation is offered through the CMS HCBS-TA contract with New Editions Consulting, Inc. www.hcbs-ta.org

Today's webinar will cover:

- Brief review of what constitutes conflict of interest (COI)
- Brief review of the HCBS rules regarding COI
- Assessing your case management system
- Using data to inform stakeholders and decision-making
- Developing and implementing a corrective action plan (CAP)

Conflict of Interest Defined

A “real or seeming incompatibility between one’s private interests and one’s public or fiduciary duties.”*

*Black’s Law Dictionary, Eighth Ed., Thomson West, St Paul, MN (2004)

Why COI Matters…
An illustrative example affecting choice

According to National Core Indicators (NCI ™)* data, one state that allowed direct service providers to supply case management services found that:

- Individuals or their representatives indicated satisfaction with their case managers.
- 90% say case manager helped with getting what they need or want.
- ***But only 33% indicated they can make changes to their services and budget if needed – versus the national average of 73%.***
- ***Although the state's system is based on full freedom of choice of case management agency, only 53% of respondents indicated they chose their case manager."***

* NCI™ is a voluntary effort by 47 states (and one multi-county) public developmental disabilities agencies to measure and track their own performance: *https://www.nationalcoreindicators.org/*

Case Management Activities and COI

When the same entity helps individuals gain access to services, monitors those services *and* provides services to that individual, there is potential for COI in:

- Assuring and honoring free choice
- Overseeing quality and outcomes
- The “fiduciary” (financial) relationship

COI and Potential Effects on Choice and Quality

- **Choice**
  - A case manager's job is to help the individual and family become well-informed about *all* choices that may address the needs and outcomes identified in the plan, but COI may promote conscious or unconscious “steering” (to particular services or service providers)
  - Steering or self-referral, can also have the effect of limiting the provider pool
- **Quality**
  - Case managers play a pivotal role in ensuring that individuals are receiving the supports and services included in their service plan in a manner consistent with what is important to and important for the individual.
  - Self-policing occurs when an agency or organization is charged with overseeing its own performance. This puts the case manager in the difficult position of:
    - Assessing the performance of co-workers and colleagues within the same agency
    - Potentially having to report concerns to their mutual supervisor or executive director.

COI and Potential Fiduciary Conflicts

Fiduciary conflicts of interest can contribute to a host of issues, including:

- Incentives for either over- or under-utilization of services
  - Person is “costing too much” or “we’re not being paid enough”

- Possible pressure to steer the individual to their own organization for the provision of services

- Possible pressure to retain the individual as a client rather than promoting choice, independence, and requested or needed service changes

Medicaid HCBS Authorities and COI Regulatory Scope

- **COI requirements apply to case management activities provided to individuals *enrolled in***:
  - 1915(c) HCBS Waivers found at: 42 CFR 431.301(c)(1)(vi)
  - 1915(i) State plan HCBS found at: 42 CFR 441.730(b)
  - 1915(k) Community First Choice (CFC) found at: 42 CFR 441.555(c)
  - HCBS delivered under an 1115 research and demonstration waiver*

- **Federal Register** January 16, 2014,Volume 79 No.11, "Medicaid Program; State Plan Home and Community-Based Services, 5- Year Period for Waivers, Provider Payment Reassignment, and Home and Community-Based Setting Requirements for Community First Choice and Home and Community-Based Services (HCBS) Waivers"

- ***What triggers the COI requirements is <u>enrollment</u> in the HCBS authorities, 1915 (c), (i), and (k). It is important to note that the COI requirements apply no matter what type of funding stream is used for case management activities.***

*We will not cover 1115 waivers today but will do so at a later date

A note about using the term case management

- We will use the term "case management activities" to include the various functions specified in regulations with the assumption that these activities may be performed by individuals or entities other than the case manager or designated case management entity. In some programs/benefits, the entities who perform these functions *may or may not be a case manager.*
  - 1915(i) regulations do not specify COI related to "case management", but rather to specific functions
  - 1915(c) regulations specify, "case management or develop the person-centered service plan"
  - 1915(k) identifies, "performing the assessment of need and developing person-centered service plan"
- .

Federal requirements to prevent and mitigate potential COI under 1915(c) HCBS Waiver

- 42 CFR 441.301(c)(1)(vi) requires that providers of HCBS for the individual must not provide case management activities or develop the person-centered service plan.

- 42 CFR 431.10, referenced in the 1915(c) Waiver Application, Appendix A: Waiver Administration and Operation, requires that the State Medicaid Agency (SMA) be responsible for eligibility determinations and eligibility determination *can only be delegated to another governmental agency* with SMA oversight.

Federal requirements to prevent and mitigate potential COI under 1915(c) HCBS Waiver, cont.

- Case management activities must be independent of service provision. An entity agency or organization (or their employees) cannot provide both direct service and case management activities to the same individual except in very unique circumstances set forth in regulation.

- Conflict occurs not just if they are a provider but if the entity has an interest in a provider or if they are employed by a provider.

Federal requirements to prevent and mitigate potential COI under 1915(i) State Plan HCBS

- As with 1915(c), 1915(i) as per 42 CFR 431.10, also requires that the State Medicaid Agency (SMA) be responsible for eligibility determinations and eligibility determination *can only be delegated to another governmental agency* with SMA oversight.

- Under no circumstances can a direct service provider determine eligibility: this applies to financial and service eligibility

Federal requirements to prevent and mitigate potential COI under 1915(i) State Plan HCBS (cont.)

- 42 CFR 441.730(b) requires that:
- Individuals or entities that evaluate eligibility or conduct the independent evaluation of eligibility for State plan HCBS, who are responsible for the independent assessment of need for HCBS, or who are responsible for the development of the service plan *cannot:*
  - Be related by blood or marriage to the individual or to any paid caregiver of the individual;
  - Be financially responsible for the individual;
  - Be empowered to make financial or health related decisions for the individual; or
  - Have a financial interest in any entity paid to provide care to the individual

Federal requirements to prevent and mitigate potential COI under 1915(k) Community First Choice

- Individuals or entities performing the assessment of need and developing the person-centered service plan *cannot be:*
  - Related by blood or marriage to the individual or a paid caregiver
  - Financially responsible for the individual
  - Empowered to make health-related decisions
  - Individuals who would benefit financially from service provision
  - Providers of State plan HCBS to the individual

Under the HCBS authorities, if COI is present and will continue, the state must:

- Demonstrate to CMS that the “only willing and qualified” entity or provider of case management activities is also, or affiliated with, a direct service provider

- Establish safeguards to ensure individual choice and the availability of a “clear and accessible alternative dispute resolution process”

More on this later….

1915(k) CFC 42 CFR 441.540 (a)(5) Person-centered planning COI standards
1915(i) State plan HCBS: 42 CFR 441.730(b)(5) “Only willing and qualified entity”
1915(c) HCBS waiver: 42 CFR 441.301(c)(1)(vi) Only willing and qualified entity

Identification of COI in the Services System

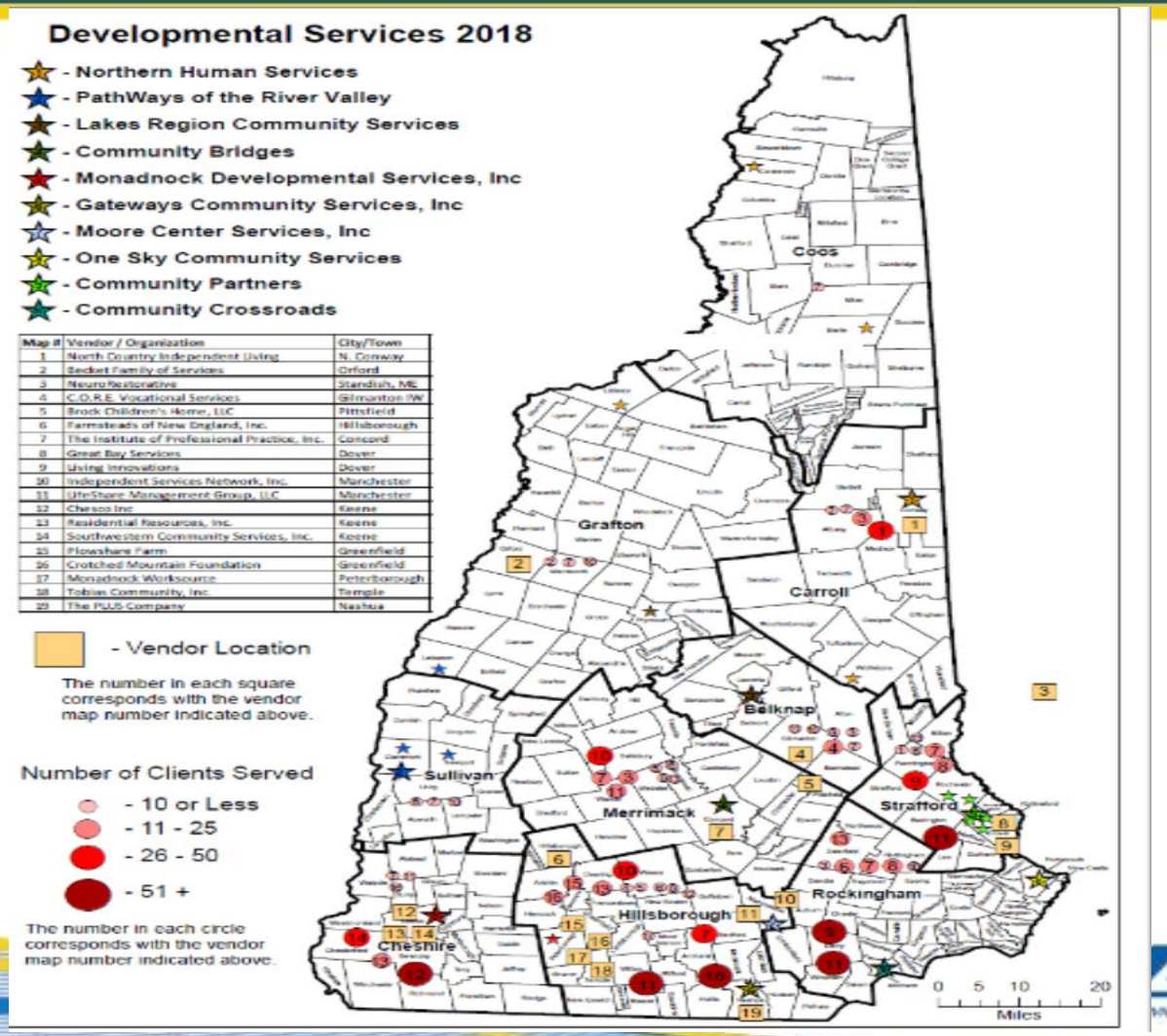
Structural review	*Functional review*	*Regulatory Review*
How are case management activities and direct services delivered presently? Are case management activities and direct services delivered by the same entity to the same individuals? Do case management providers/entities have an interest in a provider or are they employed by a provider? How many agencies or organizations are affected?	What are case manager and direct service provider responsibilities? Do providers develop the person-centered plan? Do providers conduct evaluations of eligibility or make HCBS eligibility determinations? What is the case manager role in establishing eligibility? Do case managers have a role in assigning budgets?	Do current practices comport with the requirements that the SMA, or a designated governmental agency make eligibility determinations? Do current state statutes, standards, and guidance (manuals) comport with the Federal requirements to prevent against and mitigate potential conflict of interest? What changes are needed?

Mapping the Services System

- Mapping can give a picture of COI across the system by identifying the impacts of the COI requirements on your current system
- Mapping can identify who is impacted and how
  - How many agencies are affected?
  - What type of organizations (sub-state, providers)?
  - Where are agencies/entities located? Urban/rural?
  - How many individuals served may be impacted by the COI rules?
  - Where are they located?
  - What distinct cultural or minority populations are affected? How many individuals?
  - What is the non-case management provider capacity in each of the geographic areas within the state?

New Hampshire's System Map: Agencies and Clients Served

In order to ascertain the scope and impact of moving to a conflict free system of case management, New Hampshire undertook a detailed systemic mapping, including review of their case management entities and provider capacity throughout every jurisdiction in the state.



South Carolina COI Data Mapping

South Carolina

DSN Board or Privately Provided Case Management + No DSN Board Provided Services - No conflict

Waiver	Number of Participants
Community Supports	591
HASCI	755
ID/RD	2015

Privately Provided Case Management + DSN Board Provided Service(s) - No conflict

Waiver	Number of Participants
Community Supports	11
HASCI	0
ID/RD	102

DSN Board Case Management + Private Provider Service – No conflict

Waiver	Number of Participants
Community Supports	228
HASCI	32
ID/RD	1264

DSN Board Provided Case Management + DSN Board Provided Service(s) - Conflict

Waiver	Number of Participants
Community Supports	1704
HASCI	26
ID/RD	3886

Total Waiver Enrollment

Waiver	Number of Participants
Community Supports	2534
HASCI	813
ID/RD	7267

DSN: Disabilities & Special Needs Board

HASCI: Head and Spinal Cord Injury

ID/RD: Intellectual Disability & Related Disabilities

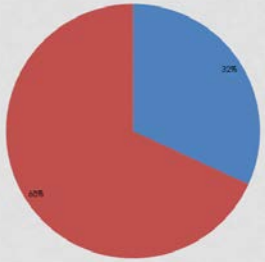
Alaska Data: Scope of COI

Region	Number of Care Coordinators	Number of Care Coordinator Agencies	Number of Clients	Number of Clients Served by Independent Care Coordinator	Percent of Clients Served by Independent Care Coordinator
Anchorage			**2,197**	**1,114**	**51%**
IDD	83	38	925	195	21%
ALI	87	62	1,144	882	77%
APDD	26	17	36	18	50%
CCMC	38	18	99	21	21%
Southcentral			**1,360**	**586**	**43%**
IDD	72	37	538	89	17%
ALI	76	54	716	471	66%
APDD	25	18	31	9	29%
CCMC	33	15	76	17	22%
Southeast			**320**	**64**	**20%**
IDD	31	16	192	34	18%
ALI	21	16	98	18	18%
APDD	4	3	6	4	67%
CCMC	13	9	24	8	33%
Interior			**326**	**47**	**14%**
IDD	24	14	206	16	8%
ALI	12	11	95	29	31%
APDD	5	3	5	1	20%
CCMC	10	4	20	1	5%
Northwest			**45**	**2**	**4%**
IDD	5	4	31	0	0%
ALI	2	2	2	2	100%
APDD	0	0	0	0	n/a
CCMC	4	2	12	0	0%
Southwest			**95**	**3**	**3%**
IDD	12	8	71	2	3%
ALI	3	3	4	1	25%
APDD	0	0	0	0	0%
CCMC	6	5	20	0	0%
Alaska Total			**4,343**	**1,816**	**42%**
IDD			1,963	336	**17%**
ALI			2,059	1,403	**68%**
APDD			78	32	**41%**
CCMC			251	47	**19%**

WHAT % OF RECIPIENTS RECEIVE CFCM CURRENTLY?

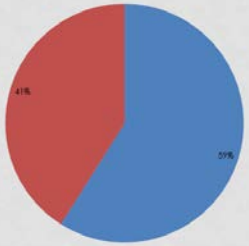
68% of ALI recipients

Alaskans Living Independently



41% of APDD recipients

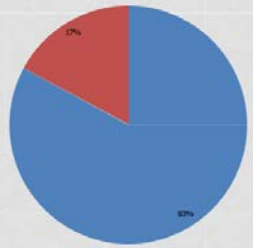
Adults with Physical and Developmental Disabilities



WHAT % OF RECIPIENTS RECEIVE CFCM CURRENTLY?

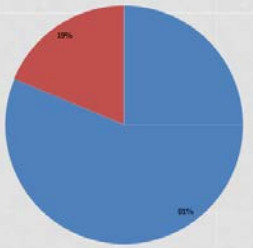
17%IDD recipients

Intellectual and Developmental Disabilities



19%CCMC recipients

Children with Complex Medical Conditions



CFCM: Conflict-free case management

www.eiseverywhere.com/file_uploads/e98c65b7ad8dcf5584a2da1147e5c33f_TRANSITION.pdf

Assessing Financial Impacts: Key Considerations

- What is the financial impact individually and collectively of addressing conflict of interest on:
  - Direct service providers
  - Case management agencies
  - Managing entities that provide case management (counties, community boards, area agencies)
  - Individual budgets
  - State agencies

- Will additional funds be needed?
- Does addressing COI affect rates paid to providers of either case management or direct services?
- What are potential sources of funding for system changes?
- How is need for additional resources affected by the state budget cycle?

NEW HAMPSHIRE MAPPING TOOL SAMPLE STRUCTURE (ACTUAL TOOL HAS MUCH MORE DETAIL)							
Area Agency Function Total Number of Individuals Served: Total Number of Waiver-eligible/enrolled Individuals Served:							
FY18 ANNUAL BUDGET:							
Direct Service	**Number of people using service**	**% provided by AA**	**% provided by vendor**	**Total Revenue by Service**			
Case Management							
Traditional Residential							
PDMS							
CSS							
CPS/DAY							
Supported Employment							
Medical Respite							
Respite							

Financial and Functional Considerations and Factors

As-Is Financial and Functional Analysis	Currently Reimbursed	Provided by	Percent of Job	Annual Compensation -	Comments
Intake/Eligibility:					
Conditional Eligibility Review:					
Benefits Management					
Assessments:					
Person Centered Planning Service Design: This section shows type of detail in actual mapping tool					
Transition Planning: Attending school/transition meetings, as needed					
Coordinate and arrange for Service Plan meeting, facilitate and document PCP initiatives via Service Agreements (Initial, 6-month, renewal, amendments for Service Agreements)					
Facilitate Service Plan Meeting					
Obtain all necessary signatures and releases					
Write Service Plan into HRST					
Develop progress notes, schedules, other essential documents for service delivery					
Distribute documents related to Service Plan					
Conduct Quarterly Satisfaction reviews					
Create and process amendments, as needed					
Service Development:					
Notifications					
Wait List Management:					
Budget:					
Certification:					
Committee Membership					

And there's more that’s important to know

- Based on the analysis, will legislative action be needed for rules and/or for budget increases?
- What is the timeframe within which regulatory changes could happen?
- If there are providers that currently comply with COI rules, what is their capacity to expand services?
- What are the gaps in provider capacity and where?
- Will the state need to seek permission for the “only willing and qualified entity” option?

All of which will help build the (road) map…..

Which brings us to, "Only Willing and Qualified Entity"

1915(i) State plan HCBS: 42 CFR 441.730(b)(5):**

"(5) Providers of State plan HCBS for the individual, or those who have an interest in or are employed by a provider of State plan HCBS for the individual, except when the State demonstrates that the only willing and qualified agent to perform independent assessments and develop person-centered service plans in a geographic area also provides HCBS, and the State devises conflict of interest protections including separation of agent and provider functions within provider entities, which are described in the State plan for medical assistance and approved by the Secretary, and individuals are provided with a clear and accessible alternative dispute resolution process.

*** Similar language for 1915(c) HCBS Waiver found at: 42 CFR 441.301(c)(1)(vi)*

- Regulations for the HCBS authorities recognize that there may be situations where the pool of available entities who can develop the service plan is limited
- The regulations lay out a series of requirements that states must meet if the only available entity to develop the service plan for an individual is also a service provider for this same individual
- These requirements are safeguards to assure that even in situations where there might be a potential conflict of interest, individuals served are offered a variety of protections

Request for “only willing and qualified” entity responsible for service plan development

- Examples
  - Rural/frontier area "naturally" limits pool of available entities
  - Cultural considerations
  - Linguistic considerations
- Supporting documentation for request
  - Data supporting request from mapping and other sources
- State assures capacity to meet safeguards

Federal requirements to prevent and mitigate potential COI:

- Under the HCBS authorities, if there is no other willing and qualified agent/entity to perform assessments and develop person-centered service plans, the state must devise COI protections.

- Individuals must be provided with a clear and accessible alternative dispute resolution process to dispute the state's assertion that there is not another entity who is not the individual's provider to develop their person-centered service plan.

1915(i) State plan HCBS: 42 CFR 441.730(b)(5)
1915(c) HCBS Waiver: 42 CFR 441.301(c)(1)(vi)

Federal requirements to prevent and mitigate potential COI (cont.):

- Assure that entities separate case management activities and service provision (different staff).
- Assure that entities provide case management activities and services *only* with the express approval of the state.
- Provide direct oversight and periodic evaluation of safeguards.

N.B.: The conflict of interest protections devised by the state must be approved by CMS

Firewalls?? Safeguards?? CMS says:

"In certain circumstances***, we may require that states develop "firewall" policies, for example, separating staff that perform assessments and develop person-centered service plans from those that provide any of the services in the plan; and meaningful and accessible procedures for individuals and representatives to appeal to the state."

****ONLY if the only willing and qualified provider exception is granted*

Final Rule CMS 2249 – F; CMS 2296 – F, p. 2993

Safeguards**

- Full disclosure to participants and assurance that participants are supported in exercising their right to free choice of providers and are provided information about the full range of waiver services, not just the services furnished by the entity that is responsible for the person-centered service plan development;

- An opportunity for the participant to dispute the state's assertion that there is not another entity or individual that is not that individual's provider to develop the person-centered service plan through a clear and accessible alternative dispute resolution process;

****HCBS Waiver Technical Guide, January 2015 p. 180-181**

Safeguards, cont.

- Direct oversight of the process or periodic evaluation by a state agency;
- Restricting the entity that develops the person-centered service plan from providing services without the *direct approval of the state*; and
- Requiring the agency that develops the person-centered service plan to administratively separate the plan development function from the direct service provider functions.

Engaging Stakeholders

- Don't wait, word gets out fast!
- Develop a planned communications strategy that:
  - Establishes your stakeholder committee with strong input from families and individuals
  - Is based on information transparency, that is sharing data and information gathered from mapping and any other surveys
  - Surveys stakeholders about their current experiences and future concerns to better understand the impacts of the COI regulations

Wyoming asked stakeholders and found these concerns to address in their planning

- Loss of income for the case manager
- Loss of either a case manager or a provider for the participant and guardian
- Loss of income from case management services for agencies that employed case managers
- Loss of benefits for case managers employed by agencies that had built up retirement and/or insurance
- Loss of case managers

Communication/Stakeholder Engagement

- Ohio
  - Webinar on new rules early on
  - FAQs
  - Featured articles in weekly Pipeline publication with distribution to 17,148 people
  - Quarterly scorecards on how COI remediation progressing

http://dodd.ohio.gov/PipelineWeekly/SiteAssets/default/Scorecard%20Q1-15%20Final.pdf#search=DODD%20scorecards

- South Dakota

"Community Conversations"-multiple regional meetings

https://dhs.sd.gov/developmentaldisabilities/docs/CFCM_Community_Conversation_Presentation_Final.pdf

  - Set up a dedicated website
  - Sent out regular 1-2 page communications *tailored to families, self-advocates, and providers*
  - On-going information provided

http://dhs.sd.gov/developmentaldisabilities/cfcm.aspx

What is a Corrective Action Plan (CAP)?

- When states are out of compliance with the regulation, CMS may require a detailed corrective action plan (CAP)
- Each CAP is individualized and tailored to the state's particular situation
- The CAP is the state's roadmap to coming into compliance. A number of states have CAPs related to COI requirements when CMS has identified COI in the state***

****But no need to wait for CMS, states can of course embark on changing their system without waiting for CMS to identify COI and require a CAP. States should work with CMS if waiver or State plan changes are needed or "only willing and qualified' option is desired.*

What is a Corrective Action Plan (CAP) cont.?

- Developing the CAP entails working closely with CMS and stakeholders to establish milestones and outcomes
- The CAP is the formal agreement with CMS on the activities and timelines the state will engage in to meet the COI requirements
- CMS uses a template to lay out the agreed-upon plan

HCBS Corrective Action Plan (CAP) Template

Effective Date:

1. **Section One - Completed by CMS** CMS describes the issue and any actions or notifications CM has done

Issue: Case Management Services – Conflict of Interest The State is currently in violation of federal conflict of interest (COI) rules, which require the State to separate service plan development/case management providers from direct service providers. The State's service delivery structure appears to provide case management services and direct services through the same set of limited providers which is not in compliance with conflict of interest rules.
Question: How does the State intend to come into compliance with the requirement to provide conflict-free case management to its waiver participants?

2 Section Two – Completed by CMS
State Action Requested by CMS: Submit a draft corrective action plan (CAP) to CMS by____-. This CAP should include a chart with the timeframe, status and action steps needed to correct the violations of the HCBS regulations noted above. The State should also include monthly updates to CMS through this CAP.CMS will hold regularly scheduled monitoring calls and will review progress reports, to determine the State's compliance with the approved CAP.

3. Section Three - Completed by the State
The State is submitting the attached CAP to develop a timeline and implementation plan to provide services that comply with Conflict of Interest (COI) Regulations for those receiving Waiver Services.. The State intends to be in full compliance with COI by [date negotiated with CMS}.State explanation of process to come into compliance, including situational factors stakeholder engagement, data supporting specific aspects of the CAP,

4. Section Four – State Signatures

5. Section Five – CMS Review: This section is used by CMS to document actions to be taken to review and approve the CAP.

Key Dates for CAP Implementation:

Monitoring Calls: CMS will schedule monthly or bi-monthly monitoring calls to determine the State's compliance with the approved CAP until the corrective action plan is fully implemented.

Progress Reports: The State will submit quarterly written progress reports to the CMS CAP Team for review and comment. The first report will be due by [date] and will be submitted quarterly until the corrective action has been finalized.

Developing a CAP

- Use system assessment data to inform your narrative plan
  - Use data to show where changes are necessary or where they are not
  - System mapping should inform any plan for “only willing and qualified" entity option

- Establish a realistic CAP compliance date taking into account:
  - Legislative actions-budget and regulations
  - Scope of the system change, numbers of individuals and agencies affected
  - Steps necessary to ensure system stability during period of corrective action

Developing a CAP, cont.

- The CAP, using the information from stakeholder input, data gathering and mapping, lays out the:
  - Action items
  - Timelines: start date, target completion date, actual completion date
  - Responsible parties
  - Desired outcome for each action item
  - Milestones
    - Status of specific efforts
    - Challenges to meeting milestones

To develop a Case Management system for the State of New Hampshire that is conflict free. Target date for full compliance: August 31, 2021
N.B. this sample shows only the categories, not most activities. The actual plan is far more detailed and can be found at:
https://www.dhhs.nh.gov/dcbcs/bds/documents/nhcaptimeline.pdf

Action Items	Start Date	Completion Target Date	Responsible Office	Milestone	Desired Outcome	Status	Date	Completion Date
Sharing and Stakeholder Engagement								
Stakeholder Workgroup developed								
Assessment of current case management system functioning Develop Report								
Development of Implementation Plan								
Assessment of current case management system functioning Develop Report (continued)								
Cost Allocation Plan								
Law and Rule Review and Revision								
Rate Modeling								
Gap Plan								
Determine funding needed for implementation								
Development of Implementation Plan								
Case Management System								
Quality Improvement								
Contract Development								
Case Management Transition								

And advice from those who have gone before…

- Formally engage stakeholders early and continuously (and include a state legislator!)
- Continuous engagement with CMS
- Transparency is essential to building support
- Negotiate a realistic timeline for compliance
- Be ready to revise as you go-there may be unforeseen issues
- Data, data, data including stakeholder survey/input before, during and after CAP implementation

Where to Find Help

- CMS Website:
https://www.medicaid.gov/medicaid/hcbs/guidance/index.html

- Engage with the Regional and Central Office staff

- Request TA:
http://www.hcbs-ta.org/form/request-technical-assistance

- For additional information:
http://www.hcbs-ta.org

Wrap up and Questions/Answer Period

Please complete a brief (7 question) survey to help CMS monitor the quality and effectiveness of our presentations.

Please use the survey link to access the survey:

https://www.surveymonkey.com/r/6VMW6MN

(The survey link CAN'T be opened within the webinar platform)

WE WELCOME YOUR FEEDBACK!