CMS Conflict of Interest and Medicaid HCBS Case Management

WV I/DD Waiver QIA Council

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--Excerpts from CMS Conflict of Interest Part II and Medicaid HCBS Case Management

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., Thomas West, St. Paul, MN (2004)

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Why COI Matters….

- 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/

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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 outcomes
  - The "fiduciary" (financial) relationship

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COI and Potential Effects on 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

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COI and Potential Effects on 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.

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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 getting 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

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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.***

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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 *my 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 the person-centered service plan"

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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.

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

- 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 the 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.

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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 statuses, standards, and guidance (manuals) comport with the Federal requirements to prevent against and mitigate potential conflict of interest? What changes are needed?

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Mapping the Services System

- Mapping can give a picture of COI across the system by identifying the impacts of 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 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?
- Handouts 1-3

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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 activities (counties, community boards, area 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?
- Handout 4

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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" options?

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

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

- 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

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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

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Federal requirements to prevent and mitigate potential COI:

- Under the HCBS authorities, if there is no 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(c) HCBS Waiver: 42 CFR 441.301(c)(1)(vi)

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Federal requirements to prevent and mitigate potential COI:

- 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.
- The conflict of interest protections devised by the state must be approved by CMS.

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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

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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

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Safeguards

- 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.

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Engaging Stakeholders

- 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 other surveys
  - Surveys stakeholders about the current experiences and future concerns to better understand the impacts of the COI regulations

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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 in come 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

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Communication/Stakeholder Engagement

Ohio	South Dakota
• Webinar on new rules early on • FAQs • Featured articles in weekly Pipeline publication with distribution to 17,418 people • Quarterly scorecards on how COI remediation progressing *http://dodd.ohio.gov/PipelineWeekly/SiteAssets/default/Scorecard%20Q1-15%20Final.pdf#search=DODD%20scorecards*	• "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*

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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.

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What is a Corrective Action Plan (CAP)?

- 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
- Handout 5

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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

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Developing a CAP

- 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
- Handout 6

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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

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- CMS Website:

https://www.medicaid.gov/medicaid/hcbs/guidance/index.html

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Contact

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