FAQ – CMS Final Rule (CMS 2249-F/CMS2296-F) Impact on Residential and Non-Residential Services in West Virginia

ABOUT THE HCBS INTEGRATED SETTINGS FINAL RULE

1. What is the HCBS integrated settings rule?

In January 2014, the federal Centers for Medicare and Medicaid Services (CMS) issued a new federal rule (CMS-2249-F/CMS-2296-F) impacting sections of Medicaid law under which states may use federal funds to pay for home and community based services (HCBS). The rule supports enhanced quality in HCBS programs and adds protections for individuals receiving services. In addition, this rule reflects CMS' intent to ensure that ***individuals receiving services and supports through Medicaid's HCBS programs have full access to the benefits of community living and are able to receive services in the most integrated setting.***

Sometimes referred to as the HCBS integrated settings rule, the rule impacts all HCBS waiver programs administered by the WV Department of Health and Human Resources (WVDHHR). The context of this FAQ document addresses impact of the rule only on the WV Intellectual/Developmental Disability Waiver (IDDW).

Relevant to the IDDW, the rule defines and describes the requirements for home and community-based settings appropriate for the provision of services under our section 1915(c) HCBS waivers, and the person-centered planning requirements for section 1915(c) HCBS authority of the Social Security Act, or the Act.

The rule requires that all of the settings in which Medicaid-reimbursed HCBS are provided, including both ***residential and non-residential (day services), are integrated in and support full access to the greater community.*** *This includes opportunities for people receiving HCBS to seek employment, work in integrated settings, and earn a competitive wage. The rule also requires the inclusion of opportunities for people receiving HCBS to spend time with others who don't have disabilities and to use community services and participate in activities (like shopping, banking, dining, transportation, sports, fitness, recreation, and church) in their communities to the same degree of access, meaning in the same way, that people who don't have disabilities do. In other words, the opportunities and experiences offered to the waiver participant should be empowering, allowing their lives to look like ours in terms of independence, choice, and community integration.*

All states must comply with the new rule. While states will be given time to come into compliance, after a reasonable period, Medicaid funding can no longer be used to pay for HCBS delivered in settings that do not comply with the new rule. A "reasonable period" is the time needed to complete actions that are necessary to comply with the new rule. While CMS is giving states until March of 2019 to achieve full compliance, states are expected to bring settings into compliance as quickly as possible. States cannot simply continue to pay for services in noncompliant settings until the March 2019 deadline. If a setting is not expected to come into compliance, states are expected to begin helping individuals served in the setting transition as soon as possible to other services or settings that do meet the federal HCBS setting requirements.

*****For additional information, see*** 1915(i) State Plan HCBS, 5-Year Period for Waivers, Provider Payment Reassignment, Setting Requirements for Community First Choice, and 1915(c) HCBS Waivers - CMS-2249-F/CMS-2296-F

2. What is a setting?

As it relates to the new federal rule, a setting is any location where home and community-based services (HCBS) paid for by Medicaid are delivered. In other words, the setting is where a waiver participant receives the waiver-funded services that he or she selected with the agreement of the Inter-Disciplinary Team (IDT). Settings include any ***licensed*** *location where the waiver participant resides (residential setting). In addition, any* ***licensed*** *day setting, including facility-based day programs, pre-vocational sites, and/or sites where job development and supported employment are provided, are also required to comply with the rule. If a member receives services from one agency provider in a*

location owned or leased by another agency provider, this rule still applies. If a setting board of directors is made up primarily of employees of an IDDW waiver provider or the family member(s) of an IDDW agency provider, then this rule still applies.

To be compliant, HCBS settings must be integrated into the community—meaning that the individuals who receive services are able to spend time with other people who don't have disabilities and access community services the same way that people without disabilities do. The setting should not look or feel like an institution.

The home and community-based setting provisions in the final rules established a more outcome-oriented definition of home and community-based settings, rather than one based solely on a setting's location, geography, or physical characteristics. The purpose of the home and community-based settings requirements is to maximize the opportunities for participants in HCBS programs to have access to the benefits of community living and to receive services in the most integrated setting.

*While a setting and a service are not the same thing, each waiver-funded service that takes place in a **licensed** setting (a type of program or an environment) must meet the requirements of the HCBS final rule. The setting's physical location where the service is delivered is the site. For example, the setting might be an agency-operated day program, while the site might be the building at Good Day Facility at 123 East 4th Street.*

***For additional information, see §441.530 Home and Community-Based Setting at** http://www.ecfr.gov/cgi-bin/text-idx?SID=e9bc8bc6ca91c40d051a86914549fb27&mc=true&node=pt42.4.441&rgn=div5#se42.4.441_1530*

3. Are these changes that West Virginia is making or are these federal changes?

The HCBS settings rule is a federal rule. It was issued in January 2014 by the Centers for Medicare and Medicaid Services (CMS). CMS is the federal agency that must approve each of the Medicaid waiver programs that provide home and community based services (HCBS) to people with intellectual/developmental disabilities. CMS pays for 75% of the cost of HCBS provided in these waiver programs. To keep getting these federal funds, we have to follow their rules.

4. Is every state making the same changes to their HCBS waiver programs?

The new HCBS settings rule is a federal rule and every state that receives federal Medicaid funding to provide home and community based services (HCBS) must comply with this rule in order to keep getting federal Medicaid funds. However, every state has to decide how their state will assess and comply with the new rule.

In addition to the HCBS settings rule, states must comply with other federal laws that protect the rights of people with disabilities to be served in integrated community settings, including the Americans with Disabilities Act (ADA).

5. How will the HCBS settings rule affect the sheltered workshop or facility I attend?

Sheltered workshops and facility-based day programs are designed specifically for people with disabilities and in many cases; don't appear to comply with the new federal HCBS settings rule. Except for paid staff, people receiving services in these settings usually have limited, if any, interaction with people who do not have disabilities or with the greater community during the hours this service is provided. Change may be required for facility-based programs and sheltered workshops in order to continue to receive Medicaid funding.

6. Does this mean that the sheltered workshop I attend will have to close?

The new rule does not mandate sheltered workshops close. However, it does require workshops meet a specific set of standards and dictate where services reimbursed by Medicaid can be provided.

Medicaid funds cannot be used to pay for employment (or vocational) services in a sheltered workshop. Medicaid funding can be used to pay for pre-vocational services in a sheltered workshop, but only if the services are time-limited, and intended to help prepare the person to work in an integrated setting.

It's important to note that even in those situations; there is an expectation that people are engaged in the greater community rather than being isolated in a sheltered workshop.

It's also important to understand that the impact of the HCBS settings rule on Medicaid reimbursement of services in a sheltered employment setting is not new. In 2011, CMS issued guidance to states which made clear that Medicaid waiver funding could not be used to pay for vocational services (i.e., employment services) in a sheltered employment setting. The 2011 guidance also said Medicaid payment for pre-vocational services in a sheltered setting must be time-limited, and only to prepare a person to transition into employment in integrated settings.

*****For additional information**, see the now archived version of the September 16, 2011 CMCS Informational Bulletin on* **Updates to the §1915 (c) Waiver Instructions and Technical Guide regarding employment and employment related services (archived at https://downloads.cms.gov/cmsgov/archived-downloads/CMCSBulletins/downloads/CIB-9-16-11.pdf),** *now incorporated into the January 2015* ***Version 3.5 Instructions, Technical Guide and Review Criteria*** *published by CMS to instruct states on preparing waiver applications for review and approval by CMS.*

7. Does this mean that the facility-based day program I attend will have to close?

No, the new rule does not say that facility-based day programs must close. It does, however, dictate where services that are reimbursed by Medicaid can be provided. Medicaid funds can only be used to pay for services that comply with the new HCBS settings rule and include opportunities to spend time with people in the community who don't have disabilities and aren't paid staff.

8. What changes will have to be made in order for the facility to stay open?

Each provider has the opportunity to decide how best to transition their programs into compliance with the new federal rule. Providers may engage the people they support, local advocacy groups, and families in developing a transition plan. Employment providers may step up their efforts to help people that have been employed in sheltered settings find jobs and transition to integrated employment, earning a competitive wage. Providers may find ways to ensure that people participating in facility-based day programs for some portion of their day or week also have opportunities to engage in work or non-work activities in integrated community settings.

The WV Department of Health and Human Resources (WVDHHR) is committed to helping providers with these transitions and will assist providers in their efforts to come into compliance.

9. What are some ways that Facility-Based Day Programs, Sheltered Workshops, and Licensed Residential Sites will be able to become compliant with this rule?

Providers are asked to look at the following documents for guidance on compliance:

- *HCBS settings final rule (1915(i) State Plan HCBS, 5-Year Period for Waivers, Provider Payment Reassignment, Setting Requirements for Community First Choice, and 1915(c) HCBS Waivers - CMS-2249-F/CMS-2296-F), at: https://www.federalregister.gov/documents/2014/01/16/2014-00487/medicaid-program-state-plan-home-and-community-based-services-5-year-period-for-waivers-provider;*
- *Home and Community-Based Settings, Excluded Settings, and the Heightened Scrutiny Process, November 4, 2015, at: https://www.medicaid.gov/medicaid/hcbs/downloads/hcb-excluded-settings-and-heightened-scrutiny.pdf; and*
- *The Statewide Transition Plan for compliance, at: http://www.dhhr.wv.gov/bms/Programs/Documents/IDD%20Waiver/Waiver%20and%20reports/WV%20Waiver%20State-wide%20and%20Individual%20Transition%20Plans%20%20Second%20Iteration%2010.25.16.pdf*

As each provider agency is unique, the state will conduct on-site assessments with every licensed setting to determine compliance. Any setting found to not be compliant with requirements must develop and implement a Plan of Compliance as instructed based on the on-site assessment.

10. What if I don't want to work or I'm not able to work?

The federal HCBS settings rule doesn't require that every person work. It does require, however, that everyone has the opportunity and the supports needed to work in an integrated setting and to participate fully in their communities. It's important that each person receiving HCBS understand that they can work and have the supports they need to work,

no matter how significant their disabilities. It's also important that providers help people explore jobs that would match interests and abilities with opportunities to be productive and earn a competitive wage or develop customized employment opportunities.

If a person is no longer working age or doesn't want to work, the other services the person receives must comply with the new HCBS settings rule and include opportunities to spend time with people in the community who don't have disabilities and participate in community services and activities. This includes both residential and day services options.

11. Does this mean that the licensed residential site that I currently live in will have to close and I will need to move into a different home?

No, the new rule does not say that licensed residential sites must close or that a person must move into a different home. It does, however, dictate where services that are reimbursed by Medicaid can be provided and Medicaid funds can only be used to pay for services that comply with the new HCBS settings rule. The rule also requires the inclusion of opportunities for people receiving HCBS to use community services and participate in activities (such as shopping, banking, dining, transportation, sports, fitness, recreation, and church) in their communities in the same manner that people who don't have disabilities do. The setting should not look or feel like an institution and there is an expectation that people are engaged in the greater community rather than being limited to being around only those with disabilities and paid staff. In other words, the opportunities and experiences offered to the waiver participant should be empowering, allowing their lives to look like ours in terms of independence, choice, and community integration.

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