

CMS QUESTIONS AND ANSWERS REGARDING HOME AND COMMUNITY-BASED SETTINGS*

HCBS Settings – Non-Residential

Please refer to “Exploratory Questions to Assist States in Assessment of Non-Residential Home and Community-Based Service (HCBS) Settings” found at: <http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Long-Term-Services-and-Supports/Home-and-Community-Based-Services/Home-and-Community-Based-Services.html>

1. Question: Are settings on the grounds of or adjacent to "private" institutions considered not to be home and community-based (HCBS)?

Answer: It depends. Settings that are on the grounds of or adjacent to a private institution are not automatically presumed to have the characteristics of an institution. However, if the setting isolates the individual from the broader community or otherwise has the characteristics of an institution or fails to meet the characteristics of a home and community-based setting, the setting would not be considered to be compliant with the regulation. States will need to assure that these settings fully comply with the requirements of 42 CFR section 441.301, 441.530 and 441.710 to qualify for Medicaid reimbursement under 1915(c), (i), or (k). A state’s assessment of settings that isolate should be informed by the public comments received prior to submission of the transition plan. Also, states may elect to adopt more stringent settings characteristics that would not allow a setting to be on the grounds of a private institution. For further information on this topic, please refer to <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>

2. Question: Could you direct me, please, to where I would look to find the necessary documentation requirements for providing staffing ratios for pre-vocational services in a sheltered workshop?

Answer: CMS does not determine staffing ratios for HCBS programs. States sometimes include these ratios in their license and/or regulation guidelines.

*Excerpts from CMS document “HCBS Final Regulations 42 CFR Part 441: Questions and Answers Regarding Home and Community-Based Settings”

<http://www.medicaid.gov/medicaid-chip-program-information/by-topics/long-term-services-and-supports/home-and-community-based-services/downloads/q-and-a-hcb-settings.pdf>

3. Question: Will CMS provide service-specific settings “definitions” to distinguish between settings that do and do not create barriers to the community?

Answer: CMS does not intend to issue service-specific guidance at this time; however, we will continue to respond to questions from stakeholders and offer technical assistance to states.

4. Question: Does the regulation prohibit facility-based or site-based settings?

Answer: No. The regulation requires that all settings, including facility- or site-based settings, must demonstrate the qualities of HCB settings, ensure the individual’s experience is HCB and not institutional in nature, and does not isolate the individual from the broader community. In particular, if the setting is designed specifically for people with disabilities, and/or individuals in the setting are primarily or exclusively people with disabilities and on-site staff provides many services to them, the setting may be isolating unless the setting facilitates people going out into the broader community. We note, however, that states have flexibility in determining whether or when to offer HCBS in facility-based or site-based settings, as the regulation only establishes a floor for federal participation. Please see guidance on settings that isolate at: <http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Long-Term-Services-and-Supports/Home-and-Community-Based-Services/Home-and-Community-Based-Services.html>

5. Question: Do the regulations prohibit individuals from receiving pre-vocational services in a facility-based setting such as a sheltered workshop?

Answer: No. The federal regulations require that all HCB settings must support full access of individuals receiving Medicaid HCBS to the greater community, including facilitating opportunities to seek employment in competitive 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. Therefore, a state could allow pre-vocational services delivered in facility-based settings that encourage interaction with the general public (for example, through interaction with customers in a retail setting). We note, however, that pre-vocational services may be furnished in a variety of locations in the community and are not limited to facility-based or site-based settings, and that states have flexibility in determining whether and when to use facility-based settings. All settings must have the characteristics of HCB settings, not be institutional in nature and not have the effect of isolating individuals from the broader community. Please see the CMS Informational Bulletin on Employment Services found at: <http://www.medicaid.gov/federal-policy-guidance/downloads/CIB-09-16-2011.pdf>.

6. Question: Will CMS allow dementia-specific adult day care centers?

Answer: The HCBS regulations do not prohibit disability-specific settings; as with all settings in which HCBS are provided or in which individuals receiving HCBS reside, the setting must meet the requirements of the regulation, such as ensuring the setting chosen by the individual is integrated in and supports full access of individuals receiving Medicaid HCBS to, the greater community, that individual's rights of privacy, dignity and respect and freedom from coercion and restraint are respected, etc. Please note that states may adopt more stringent requirements for HCB settings, as the federal regulations only establish a floor. For further information please refer to "Exploratory Questions to Assist States in Assessment of Non-Residential Home and Community-Based Service (HCBS) Settings. <http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Long-Term-Services-and-Supports/Home-and-Community-Based-Services/Home-and-Community-Based-Services.html>

7. Question: Can a day service that has both HCBS waiver participants and Intermediate Care Facility (ICF) residents provide Medicaid-covered HCBS in an Intermediate Care Facility for Individuals with Intellectual Disabilities (ICF/IID)?

Answer: If the service is rendered by the ICF/IID, it is institutional and cannot be covered by HCBS. If, however, the service is provided by a licensed day service operated separately from the ICF/IID but in the same building, it will be presumed to have institutional characteristics. If the state believes that the setting meets the HCB settings requirements and does not have the characteristics of an institution, the state can follow the process to provide evidence and demonstrate that the setting can or will comply with the HCB setting requirements of the regulations. Other parties can submit information to CMS regarding whether the setting has the qualities of HCB settings or of an institution. If the Secretary, through this heightened scrutiny, determines that the setting does comply with the HCB settings requirements and does not have the qualities of an institution, the service can be covered under the HCBS waiver. If the state does not submit evidence or a transition plan to bring the setting into compliance, the presumption stands and the state can claim for federal matching funds for services in those settings presumed not to be HCBS only for the period contained in the approved transition plan.

8. Question: Does the HCBS rule prohibit adult day care and day treatment services in a facility that is in a hospital or a nursing home?

Answer: Yes, unless the evidence submitted by the state demonstrates that the setting does have the qualities of a HCB setting and does not have the qualities of an institutional setting. Any HCB setting (residential or non-residential) located in the building of any public or private institution, or on the grounds of a public institution, is presumed to have the characteristics of an institution and therefore does not qualify as a home or community based setting. Note that if the setting is presumed to not be home and community-based under the standards established in the regulation, but the state believes it has the qualities of home and community-based settings and not the qualities

of an institution, the state can submit evidence of such, and CMS may determine that the setting is home and community based. If the state instead submits a transition plan to either bring such settings into compliance or transfer people to a setting that meets HCB settings requirements, the state may claim for federal matching funds during the approved transition period while implementing the plan. For further information on settings that isolate, please refer to

<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>.

9. Question: If a state determines that a current HCB setting is not compliant with the new regulation, does it have to stop providing services in that setting immediately?

Answer: No. If a state determines that HCBS are currently being provided in settings that do not provide opportunities for participants to seek employment and work in competitive settings, engage in community life, control personal resources, and access the community to the same degree of access as individuals not receiving Medicaid HCBS, or if individuals receiving HCBS are not residing in settings that meet the HCB settings requirements, the state has until March 2019 to bring its HCBS programs into compliance with the rule, consistent with its State Transition Plan. States can claim for federal matching funds for these services during the transition period.

Person-Centered Planning

1. Question: During the person-centered process, what is the measure of whether a past intervention or method has or has not worked to meet an individual's assessed needs? Must strategies have been tried over a certain period of time? Must there be a certain number of incidents to demonstrate that the intervention or method did not meet the individual's assessed need?

Answer: CMS has not established a uniform federal standard for measuring the effectiveness of past interventions. Each individual is unique, so considerations for each individual's person-centered plan will be different, including the appropriate use of interventions. The person-centered planning team must consider what is a reasonable amount of time (e.g., week, month) to evaluate the effectiveness of an intervention, based on the individual circumstances, as well as weigh the risk, success and amount of time given for a response. Data related to the utilization of positive interventions and supports, as well as less intrusive methods of addressing the need, must be collected and documented prior to making or amending any modification. The person-centered planning team may need assistance from specific experts, such as a behaviorist or behavior specialist, to aid in the person-centered planning process (e.g., behavior analysis, crisis intervention plan). These considerations should be documented in the person-centered plan to support the determination of an intervention's effectiveness. A modification must be reviewed on a regular basis and should never become a "standing order" without time limitations. In addition, the person-centered plan must be finalized

and agreed to in writing, based on the informed consent of the individual. It is therefore vital to include the individual in this process, solicit the individual's view of the benefits or success of an intervention and consider together an appropriate course of action.

2. Question: During the person-centered planning process, may the effectiveness of prior positive interventions and less intrusive methods for meeting assessed needs be considered from previous settings in order to develop the individual's service plan, or must the methods have been tried and have failed in the current setting?

Answer: Clear documentation of past interventions and positive reinforcement may be used initially at the time of an individual's transition from one setting to another. The new setting itself might make a significant difference as to whether restriction that might have been in place in a prior setting are necessary. If a person moves between settings (e.g., from a large residential setting into a small apartment or group home), the individual's response to the modification currently being used or even the new setting without the modification may or may not be comparable. The person-centered planning team must convene to amend the individual's plan, considering the context of the new setting, and not assume that modifications made in a prior setting necessarily apply but rather evaluate to see if they do. These types of considerations facilitate discussion on what is reasonable for an individual and must be reflected and agreed to in writing by the individual, in the person-centered plan.