Overview of Managing 1915(c) Waiver Capacity, Targeting, and Other Key Considerations for States

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CMS
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Presentation Objectives:

- Provide an overview of the following elements within a 1915(c) waiver:
  - Number of unduplicated participants (Factor C) served in the HCBS waiver and available strategies for management;
  - Target groups; and
  - Additional targeting criteria.
- Provide an overview of maintenance of effort requirements currently in effect.
- Identify common areas for technical assistance and considerations for states.

1915(c) Unduplicated Participants (Factor C)

1915(c) HCBS Waivers Unduplicated Participants (1 of 3)

Information regarding unduplicated participants in 1915(c) HCBS Waivers can be found in Section 1915(c) of the Social Security Act, implementing regulations at 42 CFR 441.303(f)(6), and in the HCBS Technical Guide (Appendix B-3).

“The State must indicate the number of unduplicated beneficiaries to which it intends to provide waiver services in each year of its program. This number will constitute a limit on the size of the waiver program unless the State requests and the Secretary approves a greater number of waiver participants in a waiver amendment.” (42 CFR 441.303(f)(6))

1915(c) HCBS Waivers Unduplicated Participants (2 of 3)

- In its application, a state must specify the maximum unduplicated number of participants the state intends to serve each year the waiver is in effect.
- The maximum number of unduplicated participants is known as Factor C.
- It is up to the state to determine this number, based on the resources available to underwrite the costs of waiver services.
- Until the maximum number of unduplicated participants in the approved waiver is reached, waiver entry may not be denied to otherwise eligible individuals unless the state chooses additional options (discussed later in this presentation).

Source: HCBS Technical Guide, Appendix B-3

1915(c) HCBS Waivers Unduplicated Participants (3 of 3)

- In calculating the Factor C, data from prior years related to the anticipated pace of turnover within the waiver, also known as *average length of stay,* should be used.
- Calculating the number of unduplicated participants within a single waiver year is an important element, as this figure sets forth the overall waiver capacity annually, including assumptions related to attrition and entrance during the waiver year.
- The unduplicated number is the number of **unique** individuals who are served within a single waiver year.
- Example:
  - The state's waiver year runs from July 1 to June 30.
  - Individual A is enrolled in the waiver from July 1 until September 15.
  - Individual A is one unduplicated number for the waiver year ending June 30.
  - Other individuals enrolled must be captured in new separate unduplicated number.

Increasing Number of Unduplicated Participants

- Increasing the unduplicated count can be a relatively simple amendment with swift CMS approval when it is the only change included in the amendment.
- States may submit an amendment at any time to increase the unduplicated participant count for a waiver year and that amendment may have an effective date that is retroactive back to the first day of the current waiver year in which the state submits the amendment (*CMS does not consider this a substantive amendment which would require a prospective effective date 42 CFR 441.304(d)).*
- When the state anticipates enrolling more individuals into the waiver than the Factor C (the maximum), the state may submit an amendment to align the waiver with the number of individuals that will be served.

Decreasing Number of Unduplicated Participants

- An amendment to reduce the maximum number of waiver participants below the number currently being served is considered a *substantive* change and may only have an effective date that is on or after the date that CMS approves the amendment.
- When a reduction is necessary, the state should submit an amendment as soon as the state identifies the need for a change to the participant limit.
  – This includes a freeze on enrollment or a moratorium on new entrants.
- Such an amendment must include information concerning the impact of the reduction on existing waiver participants.

Source: 42 CFR 441.304(d); HCBS Technical Guide p. 30 and p. 83

Note: A decrease in the number of unduplicated participants would likely constitute a Maintenance of Effort (MOE) issue during the FFCRA (as amended) effective period and the ARP spending period.

Managing Waiver Capacity Across Years

- States must indicate their waiver capacity management strategy for each year of the waiver.
- In Appendices B and J of the HCBS Waiver application, the state must indicate their Factor C (unduplicated participant maximum) for each independent waiver year.
- Each year is considered independently so the unduplicated number of participants must be considered on an annual basis (with actuals reported annually on the CMS 372 form).

Options for Managing Waiver Capacity: Point in Time Limitation

- In addition to specifying the maximum number of unduplicated participants, a state has the option to specify the maximum number of participants who are served at any point in time during the waiver year.
- Many states find this useful to manage waiver expenditures as they consider the turnover expected throughout the waiver year.
- This option should be designed in alignment with the state's expected average length of stay for the waiver year.

Source: HCBS Technical Guide: p. 83

Note: Instituting a new point in time limitation or decreasing an existing point in time limit would likely constitute a MOE issue during the ARP spending period.

Options for Managing Waiver Capacity: A Point in Time Limitation Example

- A state anticipates that it will serve 1000 unduplicated participants over the course of a single waiver year.
- The state only has sufficient resources to serve 950 individuals at one time, so establishes a point in time limitation.
- The limit that is established will be lower than Factor C (the maximum unduplicated waiver participant limit) and should be reasonably related to the expected rate of turnover of waiver participants.
- The use of the point in time limitation will help the state manage expenditures and overall capacity without requiring an adjustment to Factor C.

Options for Managing Waiver Capacity: Reserved Capacity (1 of 3)

- Reserving waiver capacity means that some waiver openings (slots) are set aside for persons who will be admitted to the waiver on a priority basis for the purpose(s) identified by the state.
- Reserved capacity must be, in total, lower than Factor C and must be considered carefully in conjunction with point in time limitations.
- If capacity is not reserved, then all waiver openings are available to all target group members in accordance with the state's approved approach for selection of entrants into the waiver as detailed in Appendix B-3-f of the waiver application.

Source: HCBS Technical Guide: p. 84

Note: Adding reserved capacity without a commensurate increase in the overall Factor C may constitute an MOE violation.

Options for Managing Waiver Capacity: Reserved Capacity (2 of 3)

Examples of “Reserved Capacity” categories include:

- Institutional transitions including for individuals participating in a Money Follows the Person (MFP) initiative;
- Emergency situations;
- Individuals transitioning from another waiver (for example, an individual that aged out of a waiver for children); and
- Transitioning youth aging out of EPSDT benefits.

Source: HCBS Technical Guide: p. 84

Options for Managing Waiver Capacity: Reserved Capacity (3 of 3)

Important considerations for the use of Reserved Capacity **cannot be used to**:

- Limit access to services within the waiver;
- Curtail access to the waiver for individuals in specific Medicaid eligibility groups;
- Limit the number of individuals who are directing their own services; and
- Limit waiver access when the upper amount of the reserved capacity group has been reached but there is still overall waiver capacity.

Source: HCBS Technical Guide: p. 84

Options for Managing Waiver Capacity: Scheduled Phase-In/Phase Out

- A state may phase-in or phase-out a waiver over the course of a waiver year or multiple waiver years. *For example, a state may provide for the entrance of 100 persons per month to the waiver during the first year of a waiver's operation.*
- Alternatively, a state may decide to phase out a waiver by transitioning individuals to another waiver or service arrangement over an extended period of time.

Source: HCBS Technical Guide: p. 85

Options for Managing Waiver Capacity: Scheduled Phase-In/Phase Out (Continued)

- A state may limit waiver capacity month-by-month during a waiver year by tying the maximum number of waiver participants who may be served each month to a phase-in or a phase-out schedule.
- If the state does not utilize a phase-in/phase-out schedule, the state is obligated to allow individuals to enter the waiver up to the participant limit for the waiver year.
- States opting to use a phase-in/phase-out schedule must provide information on the schedule within the application and make any corresponding adjustments to average length of stay.
- States using a Phase-In/Phase-Out schedule will want to coordinate their approach carefully with the other capacity management tools described in their waiver to ensure alignment.

Source: HCBS Technical Guide: p. 85

Options for Managing Waiver Capacity: Scheduled Phase-In/Phase Out Example

Example: Phase-In or Phase-Out Schedule			
	Waiver Year:	One	
Month	Base Number of Participants	Change in Number of Participants	Participant Limit
October	3,500	0	3,500
November	3,500	0	3,500
December	3,500	0	3,500
January	3,500	150	3,650
February	3,650	150	3,800
March	3,800	150	3,950
April	3,950	150	4,100
May	4,100	150	4,250
June	4,250	150	4,400
July	4.400	0	4,400

Excerpt: HCBS Technical Guide p.86; https://wms-mmdl.cms.gov/WMS/help/35/Instructions_TechnicalGuide_V3.6.pdf

Options for Managing Waiver Capacity: Allocation of Waiver Capacity (1 of 3)

- Allocation of waiver capacity refers to the practice in some states (especially states where waivers are operated through local/regional non-state entities) of allocating waiver openings (a.k.a., “slots”) by geographic area.
- Certain states may choose to allocate waiver capacity for a variety of reasons by geographic area. Such reasons may include:
  - Population of each area;
  - Other demographic factors;
  - Assessed need for waiver services by area; or
  - A combination of such factors.

Source: HCBS Technical Guide: p. 87

Options for Managing Waiver Capacity: Allocation of Waiver Capacity (2 of 3)

- Allocating waiver capacity based on local/regional geographic area is permissible so long as the methods to allocate waiver capacity result in similar access to the waiver among the geographic areas where the waiver operates.
- States utilizing such strategies must include in the waiver application:
  - The methodology that the state will employ to allocate capacity and assure that it is based on objective factors/criteria and will result in similar access to the waiver among the geographic areas where the waiver operates.
  - The entities or areas upon which the state is allocating capacity.

Source: HCBS Technical Guide: p. 87

Options for Managing Waiver Capacity: Allocation of Waiver Capacity (3 of 3)

- States utilizing such strategies must include in the waiver application (cont'd.):
  - The policies and active management strategies to reallocate unused capacity among local/regional non-state entities or geographic areas and to ensure that no one is denied entry to the waiver because their area has reached its allocation while unused slots are available in other geographic areas.
  - The strategies used to ensure that individuals have comparable access to waiver services across the geographic areas served by the waiver and to assure that the practices do not impede the movement of participants across geographic areas.

Source: HCBS Technical Guide: p. 87-88

1915(c) Target Groups and Additional Targeting Criteria

Target Groups in 1915(c) Waivers: Statutory Basis

- Section 1915(c) of the Social Security Act permits waivers of three provisions of the Act so that a state may operate a HCBS waiver. Waiving "comparability" requirements at 1902(a)(10)(B) allows states to target the benefit to specific populations.
- Language from regulations and the HCBS Technical Guide (p.74):

  1902(a)(10)(B) (Comparability). *A waiver of this provision of the Act permits a state to limit HCBS waiver services to Medicaid beneficiaries who require the level of care in an institutional setting and are in the target group(s) specified in the waiver*, as well as offer services to waiver participants that are not provided to other Medicaid beneficiaries.

Source: 42 CFR 441.301(b)(6) and HCBS Technical Guide: p. 74

Target Groups in 1915(c) Waivers: Applicable Regulations and Level of Care Alignment

- 42 CFR Section 441.301(b)(6) requires that a waiver be limited to one or more of the following target groups or any subgroup thereof:
  - Aged or disabled, or both;
  - Individuals with Intellectual Disabilities or a developmental disability, or both;
  - Persons with mental illnesses.
- Because individuals must also meet an institutional level of care, the target group must align with the comparative level of care. For example, waivers serving individuals who are aging are most frequently tied to nursing facility level of care.

Additional Targeting Criteria: 1915(c) HCBS Waivers (1 of 3)

- States may also choose to include criteria over and above the target group/subgroup and age-ranges selected defining the target groups. States must clearly define the terms that are used to specify membership in the target group(s).
- Additional criteria may be specified in terms of reasonable and definable characteristics that distinguish the target group from other persons who may need the level(s) of care specified for the waiver.
- Such additional targeting criteria may include:
  - Nature or type of disability;
  - Specific diseases or conditions;
  - Functional limitations (e.g., extent of assistance required in activities of daily living (ADLs) and/or instrumental activities of daily living (IADLs); and,
  - Additional criteria also may be specified in order to align the waiver to service population eligibility criteria that are specified in state law.

Source: HCBS Technical Guide: p. 76

Additional Targeting Criteria: 1915(c) HCBS Waivers (2 of 3)

Example of Additional Targeting Criteria:

- Acquired Brain Injury Waiver:
  - *ABI waiver applicants must have sustained a brain injury and complete the eligibility assessment process prior to age 65. Participants who turn age 65 would be offered a choice to remain on the ABI Waiver…or transition to the Home and Community Based Services Elder Waiver, which serves clients age 65 and over.*

Additional Targeting Criteria: 1915(c) HCBS Waivers (3 of 3)

- Adult Autism Waiver Additional Criteria:
  - *Have a diagnosis of Autism Spectrum Disorder (ASD) manifested before the age of 22 as determined by a licensed psychologist, certified school psychologist, psychiatrist, developmental pediatrician, licensed physician, licensed physician assistant, or certified registered nurse practitioner using the most recent version of the Diagnostic and Statistical Manual of Mental Disorders (DSM) applicable at the time of the diagnosis; and*
  - *Have substantial functional limitations in three or more major life activities as a result of ASDs and/or other developmental disabilities that are likely to continue indefinitely: self-care, receptive and expressive language, learning, mobility, self-direction and/or capacity for independent living.*

Maintenance of Effort (MOE) Considerations

MOE

- As of January 2023, there are two major statutory provisions that impose maintenance of effort requirements on State Medicaid programs.
  - Families First Coronavirus Relief Act (FFCRA), as amended by the Consolidated Appropriations Act, 2023, and
  - American Rescue Plan Act of 2021 (ARP).
- These two statutes have different requirements and states should be aware of both sets of expectations as adjustments are considered to 1915(c) HCBS waivers.

MOE Section 9817 of the American Rescue Plan Act of 2021 (ARP)

- Section 9817 of the ARP provided states with a temporary 10 percentage point increase to FMAP for certain Medicaid HCBS from April 1, 2021 through March 31, 2022 to improve HCBS under the Medicaid program.
- States must comply with specific program requirements to receive the increased FMAP for HCBS expenditures.

MOE Section 9817 of ARP (Cont.)

- On May 13, 2021, CMS issued a State Medicaid Director Letter that outlines state requirements to meet the statutory obligation to supplement, not supplant resources for HCBS. States must:
  - Not impose stricter eligibility standards, methodologies, or procedures for HCBS programs and services than were in place on April 1, 2021;
  - Preserve covered HCBS, including the services themselves and the amount, duration, and scope of those services, in effect as of April 1, 2021; and
  - Maintain HCBS provider payments at a rate no less than those in place as of April 1, 2021.
- For ARP, these provisions are in effect until the state has fully expended the state funds equivalent to the amount of federal funds attributable to the increased FMAP.

https://www.medicaid.gov/federal-policy-guidance/downloads/smd21003.pdf

Waiver Capacity and Targeting Strategies and MOE

- These provisions are important to keep in mind as states contemplate any adjustments to HCBS programs.

- There are several things that might constitute MOE violations. These may include:
  - Adjustments to the strategies related to waiver capacity, and any adjustments to the target groups served.
  - The inclusion of additional targeting criteria contained within a waiver.
  - Adding a reserved capacity category without a commensurate increase in Factor C.
  - Instituting a phase-in/phase out schedule or point-in-time limitation when such tools were not previously in place (and which are not accompanied with a commensurate increase in Factor C).

Common Areas for Technical Assistance and Considerations for States

Common Areas for Technical Assistance

- The strategies for capacity management within 1915(c) HCBS waivers are very technical in nature and many states have questions regarding the best path forward.
- There are opportunities to use the tools described in this webinar independently or in combination with one another to achieve specific state priorities and to reflect state resources.
- CMS recognizes that many states seek to understand the permissible ways to utilize these strategies and CMS is available to provide ongoing technical assistance on these elements.

The following slides contain several examples of areas where states have requested technical assistance.

Common Areas for Technical Assistance, Examples (1 of 3)

- Phase-In Schedule
  - A state is launching a new 1915(c) waiver and seeks to use a gradual enrollment approach to ensure all provider capacity development, oversight and management practices are performing as intended. The state has an overall Factor C of 200.
    - The state opted to utilize a phase-in schedule for the first year, gradually increasing enrollment according to an established monthly schedule at 20 individuals each month for the first 10 months of the waiver year.

Common Areas for Technical Assistance Examples (2 of 3)

- Effective Use of Additional Targeting Criteria
  - A state seeks to develop a waiver for individuals with developmental disabilities but seeks to align the waiver with the state's unique definitional requirement for developmental disability that includes provisions related to ADLs and IADLs.
    - The state selected Intellectual and Developmental Target group and included additional targeting criteria that includes specific functional requirements which included assistance with 3 or more ADLs and/or IADLs.
- Forecasting necessary waiver capacity in a manner consistent with prior year CMS 372 reports.
  - States should leverage their available data from the actual enrollment counts from their CMS 372 to calibrate the waiver's Factor C. Some states do not take this available data source into account when developing strategies for future year enrollment projections.

Common Areas for Technical Assistance Examples (3 of 3)

- States' utilization of point-in-time limitation sometimes does not align with the approved waiver:
  - Certain states have approved point-in-time limitations but, through state practice, are imposing more stringent limitations than those approved in the waiver. States must undertake efforts to ensure practice in state waiver operation aligns with the approved waiver.

Common Areas for Technical Assistance - CMS Engagement

- States contemplating adjustments to waiver capacity and/or target groups or criteria are advised to consult with CMS early in the process to ensure understanding and adherence to all applicable requirements.
- CMS is available for advice and technical assistance and stands ready to assist the state make improvements to HCBS programs (and help states avoid undertaking efforts that may constitute MOE violations during the applicable periods).

Public Input Requirements

- CMS requires states to obtain public input during the development of a waiver (or a waiver renewal or a waiver amendment with substantive changes) in accordance with 42 CFR 441.304(f).
- The state's public input process must have included at least two (2) statements of public notice and public input procedures, with at least one being web-based AND at least one being non-electronic to ensure that individuals without computer access have the opportunity to provide input. This state must provide at least a 30-day public notice and comment period and be completed prior to submission of the proposed change to CMS.
- Per 1902(a)(73), states must also follow state tribal consultation processes prior to submission.

Source: HCBS Technical Guide, p. 54-55.

Summary

- Strategies for managing waiver capacity are important to a state's overall waiver management plan.
- Options for managing waiver capacity impact access to critical HCBS and states must ensure that the methods to manage waiver capacity result in equitable outcomes across the state.
- As states contemplate utilizing these options, they must be cognizant of applicable MOE requirements for FFCRA (as amended) and ARP.
- As always, it is most effective to consult with CMS early in the development phase to ensure full understanding of all requirements and implications.
- Most of the strategies discussed in this webinar would constitute substantive changes/additions to the state's waiver program, and public input requirements apply.
- CMS stands ready to assist with technical assistance and, where possible, will strive to help states make changes quickly.

Resources

- CMS Baltimore Office Contact—Division of Long-Term Services and Supports:
  HCBS@cms.hhs.gov

- To request Technical Assistance:
  http://hcbs-ta.org

- 1915(c) Instructions, Technical Guide and Review Criteria
  https://wms-mmdl.cms.gov/WMS/help/35/Instructions_TechnicalGuide_V3.6.pdf

- Informational Bulletin related to the Families First Coronavirus Response Act as amended by the Consolidated Appropriations Act, 2023
  https://www.medicaid.gov/federal-policy-guidance/downloads/cib010523.pdf

- American Rescue Plan Act of 2021 State Medicaid Director Letter
  https://www.medicaid.gov/federal-policy-guidance/downloads/smd21003.pdf

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