

Themes Identified During CMS' Heightened Scrutiny Site Visits

November 16, 2022

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Objectives for Today's Session

- Provide an overview of CMS' heightened scrutiny site visit process.
- Share overarching themes identified during CMS' heightened scrutiny site visits.
- Considerations for states moving forward.

An Overview of CMS Heightened Scrutiny Site Visits

Site Visit Background (1 of 3)

- In calendar years 2022-2023, approximately 15 states have received, or will receive, a site visit from CMS.
 - As of October 31, 2022, CMS has completed seven site visits.
- CMS selected states based on presumptively institutional settings that they have submitted or settings in the state that were identified by federal partners or stakeholders.
- In other words, the settings that CMS selected for visits are those settings states submitted to CMS for heightened scrutiny, and/or settings that stakeholders identified as meeting the requirements for heightened scrutiny.

Site Visit Background (2 of 3)

- The site visit team has visited settings including assisted living facilities (including memory care units), adult day care centers, group homes, settings providing day services, sheltered workshops, intentional community/campus settings, and farmsteads.
- The site visit teams have visited all three categories of presumptively institutional settings:
 - Settings in the same building as a public or private institution;
 - Settings on the grounds of or adjacent to a public institution; and
 - Settings that have qualities that isolate Medicaid beneficiaries.

Site Visit Background (3 of 3)

- The site visit team is composed of CMS, ACL, and New Editions staff. Up to two state Medicaid staff and/or state waiver operating agency staff per setting have participated in the site visits to date as observers.
- The team typically receives a tour of the setting, reviews person-centered services plans (PCSPs) and other documents on site, and speaks with HCBS beneficiaries and direct support professionals (DSPs).

Themes Identified During CMS Heightened Scrutiny Site Visits

Positive Observations

- States that have implemented statewide training programs for providers on the HCBS Rule.
- States that have adopted and trained case managers in person-centered planning and implementation.
- Providers, despite the workforce shortages, finding ways to implement the rule providing people with more opportunities for choice and community engagement.
- In many settings, meals, including alternative options, and snacks were readily available and convenient to individuals.
- Settings where people were clearly free to have visitors at any time and were aware of this right. This was sometimes seen in policy or lease agreements, but most often reported by the staff and verified by the participant.
- Many direct support staff who were caring, committed individuals who understood the purpose of the HCBS settings rule and were making a positive difference in peoples lives.
- More recently established settings adhered more closely to the settings requirements.

1. PCSP: Regulatory Requirements

42 CFR 441.301(c)(2) Person-Centered Service Plans must:

- Reflect services/supports that are important for the individual to meet the needs identified through the functional needs assessment;
- Reflect services/supports that are important to the individual; and
- Reflect that the setting has been chosen by the individual.
- Be finalized and agreed to, with the informed consent of the individual in writing, and signed by all individuals and providers responsible for its implementation.
- Be distributed to the individual and other people involved in the plan.

Themes Identified: PCSPs

CMS reviewed PCSPs in advance, as well as on-site. In several states CMS found:

- Settings do not typically have the current PCSP for all Medicaid HCBS beneficiaries who are served at the setting;
- Individuals do not appear to have participated in the plan development and/or have not signed the plan; and
- Individuals are functioning under provider-specific plans of care; in some cases there are plans only known to the case manager and the individual.
- Plans often did not record what was important to people, their preferences or their goals.
- There was often no indication in the plans that choice had been offered whether it was living location, employment or community engagement or how the person managed their personal resources.

PCSP and the Role of the State and Case Managers

CMS reminds states that case management (possibly called service coordination, care planning, etc.) is not the responsibility of HCBS service providers, but it must be developed by someone independent of service provision. The Case Manager:

- Works with the participant to determine who should be involved, convenes the team and (to the extent the participant wishes) assists the participant in leading the team.
- Offers choices in services and supports based on each person's PCSP, including choices about what is important to the person with regard to services and supports.
- Provides alternatives to facilitate each person's access to services or activities in the community as desired, including access to transportation and flexible schedules.
- Is attuned to each participant's desire for new services or settings and arranges for the services to take place.
- Monitors the service plan to ensure services are provided and adjusts accordingly.

PCSP and the Role of Providers

CMS reminds states that HCBS providers are a key partner in the PCSP process due to their role in delivering services as outlined in the PCSP. The provider is responsible to:

- Ensure that the PCSP is implemented or reflected in how each person is served in that setting.
- Offer services and supports based on each person's PCSP, including choices about what is important to the person with regard to services and supports.
- Provide alternatives or work to facilitate each person's access to services or activities in the community as desired, including access to transportation and flexible schedules.
- Be attuned to each person's desire for new services or settings and refer them to their case manager/support coordinator for assistance in updating their plans.

PCSP and Elements of Informed Choice

CMS also reminds states that informed choice is a critical component of the person-centered planning process:

- 42 CFR 441.301(c)(1)(7) and 42 CFR 441.725(a)(6)(8) define requirements for informed choice as part of the person-centered planning process. To meet those requirements a state system may include the following elements:
 - Use appropriate modes of communication to give people information they need to exercise informed choice and assist them in doing so;
 - Provide or assist people in acquiring information that enables them to exercise informed choice in the development of their person-centered service plans; and
 - Develop and implement flexible policies that allow people the opportunity to make meaningful choices.

A person-centered approach to informed choice is to always presume competence.

2. Staff Training on HCBS: Sub-Regulatory Guidance

- States should submit the following information to CMS for a heightened scrutiny review:
 - Description of how staff are trained and monitored on their understanding of the settings criteria and the role of person-centered planning, consistent with state standards as described in the waiver or state plan amendment or in community training policies and procedures established by the state.

<https://www.medicaid.gov/federal-policy-guidance/downloads/smd19001.pdf>

Themes Identified: Provider Staff Training on HCBS

Part of the CMS site visit process is to speak with administrators and direct support staff. Frequently CMS has found that:

- Staff and administration were not aware of the HCBS settings requirements; and
- When asked to describe the difference between institutional settings, such as a nursing facility, and HCBS settings, such as an assisted living, and whether there was specific training for HCBS, staff frequently provided responses about the level of support that people need rather than responses related to community integration.

3. Community Integration: Regulatory Requirements

42 CFR 441.301(c)(4)(i): The setting is integrated in and supports full access of individuals receiving Medicaid HCBS to the greater community, including opportunities to seek employment and work in competitive integrated 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.

Themes Identified: Community Integration: Limited Access to Settings

CMS has visited some HCBS settings that are located in a building that is also a publicly or privately operated facility that provides inpatient institutional treatment (category I) that have restricted access to the building due to PHE protocols so that all visitors enter through a single entrance and can be screened prior to entry.

- These single points of entry/exit for HCBS settings that are connected to institutional settings are typically located at the entrance to the institutional setting.
- Settings should have a plan to reopen the separate entrances once the PHE protocols are lifted and states should have a plan to verify that this is done.

Themes Identified: Community Integration: Employment and Activities

CMS has found that providers will reference group activities that take place off-site as “community” activities even when individuals are not integrated with the broader community.

- Employment:

- Some settings staff or individuals have described being “on the job” or “at work” when they are actually referring to attendance at agency-funded day programs or sheltered workshops.
- Some participants expressed the desire to work, but there was nothing related to employment services in their PCSP.

- Community Activities:

- Some settings defined full community integration as activities that occur on the provider’s campus, and visits to other HCBS group homes on campus, such as attendance at a campus/provider function (dance, party, holiday event, etc.) that is only for individuals with disabilities who reside on the campus or attend the provider agency’s programs.
- Community engagement was often described as group trips and activities rather than individual opportunities for meaningful engagement in community life.

4. Provider-Owned or Controlled Residential Settings – Regulatory Requirements

42 CFR 441.301(c)(vi) In a provider-owned or controlled residential setting, in addition to the qualities at 42 CFR 441.301(c)(4)(i) through (v), the following additional conditions must be met:

(A) The unit or dwelling is a specific physical place that can be owned, rented, or occupied under a legally enforceable agreement by the individual receiving services, and **the individual has, at a minimum, the same responsibilities and protections from eviction that tenants have under the landlord/tenant law of the State, county, city, or other designated entity.** For settings in which landlord tenant laws do not apply, the State must ensure that a lease, residency agreement or other form of written agreement will be in place for each HCBS participant, **and that the document provides protections that address eviction processes and appeals comparable to those provided under the jurisdiction's landlord tenant law.**

Provider-Owned or Controlled Residential Settings – Regulatory Requirements (cont'd)

- (B) Each individual has privacy in their sleeping or living unit:
 - (1) Units have entrance doors lockable by the individual, with only appropriate staff having keys to doors.
 - (2) Individuals sharing units have a choice of roommates in that setting.
 - (3) Individuals have the freedom to furnish and decorate their sleeping or living units within the lease or other agreement.
- (C) Individuals have the freedom and support to control their own schedules and activities, and have access to food at any time.
- (D) Individuals are able to have visitors of their choosing at any time.
- (E) The setting is physically accessible to the individual.

Themes Identified: Provider-Owned or Controlled Settings: Access to Visitors

In numerous settings the site visit teams found restrictions on visiting hours posted on site, included in lease language and/or documented elsewhere in the program. Some examples include:

- Residential settings that prohibit overnight guests.
- Residential settings that set a limit on number of visits an individual can receive.
- Residential staff who indicate there is no written agency policy, but staff may prevent a person from having visitors or restrict the time of day the person can have visitors.
- Participants in a smaller subset of settings reported the need to get approval to have guests and that having guests was an infrequent experience if they had guests at all.

Themes Identified: Provider-Owned or Controlled Settings: Restrictive Language in Lease, Residency Agreement, or Other Form of Written Agreement

CMS has found restrictive language in lease or residency agreements that is inconsistent with typical lease agreements.

- Examples of restrictive language in lease or residency agreements that the site visit team has seen during visits include requirements for the individual to:
 - Work on the provider’s worksite;
 - Pay the provider for lack of attendance at the worksite;
 - Move out during specified periods of time; and/or
 - Be evicted if the individual’s needs increase even if resources were available to provide additional support.

Themes Identified: Provider-Owned or Controlled Settings: Identification

- CMS has found examples of states not identifying provider-owned or controlled settings as such if the setting is not formally owned by a provider of HCBS.
- CMS reminds states and stakeholders that the additional regulatory criteria found at 441.301(c)(vi) also applies to settings controlled by a service provider.
 - This includes scenarios in which a provider has influence over whether an individual is accepted for residency.
 - This includes scenarios in which the landlord has influence over which service providers the individual in the setting uses.

5. Modifications of the Additional Conditions: Regulatory Requirements

42 CFR 441.301(c)(4)(vi)(F): Any modification of the additional conditions, under 42 CFR 441.301(c)(4)(vi)(A) through (D), must be supported by a specific assessed need and justified in the person-centered service plan. The following requirements must be documented in the person-centered service plan:

- (1) Identify a specific and individualized assessed need.
- (2) Document the positive interventions and supports used prior to any modifications to the person-centered service plan.
- (3) Document less intrusive methods of meeting the need that have been tried but did not work.

Modifications of the Additional Conditions: Regulatory Requirements (cont'd)

- (4) Include a clear description of the condition that is directly proportionate to the specific assessed need.
- (5) Include regular collection and review of data to measure the ongoing effectiveness of the modification.
- (6) Include established time limits for periodic reviews to determine if the modification is still necessary or can be terminated.
- (7) Include the informed consent of the individual.
- (8) Include an assurance that interventions and supports will cause no harm to the individual.

Themes Identified: Modifications of the Additional Conditions/Rights Restrictions

- In reviewing PCSPs and talking to individuals, site visit team members found restrictions in practice that did not adhere to the regulatory requirements.
- The restrictions were not supported by a specific assessed need for the individual or justified in the individual's person-centered plan and, therefore, are not permissible under the regulations as an individual modification to the regulatory criteria.
- Restrictions included not having locks on bedroom or bathroom doors, restricted access to the community (e.g., locked building entrance doors with no keys or other accommodations afforded to the individual), behavior plans requiring individuals to earn activities that are their right or using the loss of activities and rights as a negative consequence, and restrictions on visitors, smoking, and access to food.

Moving Forward: Key Considerations for States

Key Considerations

- As states are evaluating settings, the totality of the settings criteria must be met.
- The findings from the site visits suggest there are concerns with overall assessments for compliance with the settings criteria, not limited to assessments of presumptively institutional settings.
- In some states, the entities responsible for the assessment and ongoing monitoring of settings, such as licensing and case management entities, are more familiar with settings' day-to-day processes; whereas the entities conducting heightened scrutiny reviews may not have that same experience or familiarity, leading to flawed findings.

Reminders of Key Dates

- **December 1, 2022:** States that plan to request a corrective action plan (CAP) should submit the required information to CMS.
- **January 1, 2023:** All states should submit to CMS the description of how the state's oversight systems have been modified to embed the regulatory criteria into ongoing operations; how the state assesses providers for initial compliance and conducts ongoing monitoring for continued compliance; and a beneficiary's recourse to notify the state of setting non-compliance and how the state will address beneficiary feedback.
- **March 17, 2023:** End of the transition period. All settings must be in compliance with the HCBS settings regulatory criteria not articulated in a CMS-approved CAP.

Reminders of Key Dates, cont'd (2)

- States requesting a CAP to continue implementation of certain regulatory criteria beyond the end of the transition period should submit the following information to CMS by **December 1, 2022**:
 - Information on which criteria the state will need extra time to ensure full provider compliance;
 - The state's efforts to bring providers into compliance with those criteria, and the PHE-related impacts that created barriers to compliance; and
 - The state's plan to overcome encountered barriers, and the time needed to do so.
- *All states are eligible to request a CAP, including those states that have received final approval of their Statewide Transition Plans. CMS encourages states to consult with their provider communities in evaluating whether a CAP is needed.*

Reminders of Key Dates, cont'd (3)

- All states should ensure the following information is submitted to CMS no later than **January 1, 2023** to document state and provider compliance with the regulatory criteria that must be met by the end of the transition period.
 - Description of how the state's oversight systems (licensure and certification standards, provider manuals, person-centered plan monitoring by case managers, etc.) have been modified to embed the regulatory criteria into ongoing operations;
 - Description of how the state assesses providers for initial compliance and conducts ongoing monitoring for continued compliance; and
 - Description of a beneficiary's recourse to notify the state of setting non-compliance (grievance process, notification of case manager, etc.) and how the state will address beneficiary feedback.

Resources (1 of 3)

- CMS Baltimore Office Contact—Division of Long-Term Services and Supports:
 - HCBS@cms.hhs.gov
- To request Technical Assistance:
 - HCBSsettingsTA@neweditions.net
- CMS/ACL Strategy for the Implementation of the HCBS Settings regulation:
 - <https://www.medicare.gov/medicaid/home-community-based-services/downloads/hcbs-settings-rule-imp.pdf>

Resources (2 of 3)

- Frequently Asked Questions (FAQs): Home and Community-Based Settings Regulation Implementation, Heightened Scrutiny Reviews of Presumptively Institutional Settings: SMD # 19-001, March 22, 2019:
<https://www.medicaid.gov/federal-policy-guidance/downloads/smd19001.pdf>
- The Home and Community-Based Services Training Series has trainings focused on various aspects of STP Implementation:
<https://www.medicaid.gov/medicaid/home-community-based-services/home-community-based-services-training-series/index.html#hcb>

Resources (3 of 3)

- Home and Community-Based Settings Regulation—Implementation Timeline Extension and Revised Frequently Asked Questions State Medicaid Director Letter, SMD # 20-003, issued by CMS on July 14, 2020: <https://www.medicaid.gov/Federal-Policy-Guidance/Downloads/smd20003.pdf>
- State final determination letters and Summary of Findings for heightened scrutiny at: <https://www.medicaid.gov/medicaid/home-community-based-services/statewide-transition-plans/index.html>

Questions?



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