



December 16, 2014

## **Preliminary Analysis of CMS Sub-Regulatory Guidance Regarding Non-Residential Home and Community-Based Services Settings**

On December 15, 2014, CMS issued the final document to complete the [HCBS Settings Toolkit](#). The final document includes:

- [HCBS Final Regulations 42 CFR Part 441: Questions and Answers Regarding Home and Community-Based Settings](#); and
- [Exploratory Questions to Assist States in Assessment of Non-Residential Home and Community-Based Services \(HCBS\) Settings](#).

Set about below is ACCSES' preliminary description and analysis of these two documents with a particular focus on guidance related to non-residential programs.

Our overall reaction is that the CMS guidance pertaining to non-residential programs provides states with reasonable flexibility to support the full array of HCB non-residential service options that address an individual's strengths, needs, abilities, and capabilities consistent with his or her person-centered plan. Of course that flexibility is subject to the quality standards set out in the definition of HCBS settings.

- The CMS guidance reaffirms that the definition of HCBS settings is based on "individual experience and outcomes, rather than one based on a setting's location, geography, or physical characteristics." For example, in response to the question "Do the regulations prohibit individuals from receiving pre-vocational services in a facility-based setting such as a sheltered workshop?" CMS response is "no" with a rationale (discussed below).
- CMS guidance reaffirms that states may adopt more stringent requirements for HCBS settings, as the federal regulations only establishes a floor.
- CMS guidance reaffirms that if a state determines that a current HCBS setting is not compliant with the new regulation, it does not have to stop providing services in that setting immediately i.e., the state has until March 2019 to bring its HCBS programs into compliance with the rule, consistent with its State Transition Plan.

## HCBS Final Regulations 42 CFR Part 441: Questions and Answers Regarding Home and Community-Based Settings

The Guidance addresses the following general topics:

- Public Notice and Comments;
- Home and Community-Based Settings—General (including enrollee’s private home or the relative’s home, number of residential settings that must be offered, representative payee’s, meaning of “non-disability specific settings,” private unit in a residential setting, staff entry into private room, definition of a “public institution,” and rural providers);
- HCB Settings Residential (including settings “on the ground of or adjacent to private institutions,” keys to bedrooms/living unit, choice of roommate, and number of individuals living in a residential center);
- HCB Settings Non-Residential; and
- HCB Settings—Restrictions.

This memo focuses on the guidance regarding non-residential HCBS settings. With respect to non-residential HCBS settings, the CMS guidance addresses three questions specifically applicable to facility-based programs (sheltered workshops).

**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>

**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>.

**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.

## **Exploratory Questions to Assist States in Assessment of Non-Residential Home and Community-Based Services (HCBS) Settings**

The purpose of this document is to offer considerations for states as they assess whether non-residential HCBS settings meet the Medicaid HCBS settings requirements. These questions serve as “suggestions” to assist states and stakeholders in understanding what indicators might reflect the presence or absence of each quality in a setting. The questions are offered as a tool and not a requirement to help illustrate the HCBS setting qualities for non-residential HCBS and to assist states in developing their transition plan for an existing waiver or state plan or for ensuring initial compliance with HCBS requirements. Finally, the CMS guidance does not constitute guidance on states’ obligations under the Americans with Disabilities Act, Section 504 of the Rehabilitation Act, and the Olmstead decision.

CMS Exploratory Questions related to quality standard #1 in the HCBS setting regulation are of particular relevance to ACCSES members. The Exploratory Questions may be construed to allow a state the flexibility to support a full array of service options that respond to the person’s desires as identified in his or her person-centered plan. The focus of many of these exploratory questions is whether the individual is provided “opportunities” consistent with his/her desires as identified in his/her person-centered plan. These questions reflect promising and emerging practices used by ACCSES members and other community rehabilitation programs.

*1. 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. 42 CFR 441.301(c)(4)(i)/441.710(a)(1)(i)/441.530(a)(1)(i)*

- Does the setting provide opportunities for regular meaningful non-work activities in integrated community settings for the period of time desired by the individual?
- Does the setting afford opportunities for individual schedules that focus on the needs and desires of an individual and an opportunity for individual growth?
- Does the setting afford opportunities for individuals to have knowledge of or access to information regarding age-appropriate activities including competitive work, shopping, attending religious services, medical appointments, dining out, etc. outside of the setting, and who in the setting will facilitate and support access to these activities?
- Does the setting allow individuals the freedom to move about inside and outside of the setting as opposed to one restricted room or area within the setting? For example, do individuals receive HCBS in an area of the setting that is fully integrated with individuals not receiving Medicaid HCBS?

- Is the setting in the community/building located among other residential buildings, private businesses, retail businesses, restaurants, doctor's offices, etc. that facilitates integration with the greater community?
- Does the setting encourage visitors or other people from the greater community (aside from paid staff) to be present, and is there evidence that visitors have been present at regular frequencies? For example, do visitors greet/acknowledge individuals receiving services with familiarity when they encounter them, are visiting hours unrestricted, or does the setting otherwise encourage interaction with the public (for example, as customers in a pre-vocational setting)?
- Do employment settings provide individuals with the opportunity to participate in negotiating his/her work schedule, break/lunch times and leave and medical benefits with his/her employer to the same extent as individuals not receiving Medicaid funded HCBS?
- In settings where money management is part of the service, does the setting facilitate the opportunity for individuals to have a checking or savings account or other means to have access to and control his/her funds. For example, is it clear that the individual is not required to sign over his/her paychecks to the provider?
- Does the setting provide individuals with contact information, access to and training on the use of public transportation, such as buses, taxis, etc., and are these public transportation schedules and telephone numbers available in a convenient location? Alternatively where public transportation is limited, does the setting provide information about resources for the individual to access the broader community, including accessible transportation for individuals who use wheelchairs?
- Does the setting assure that tasks and activities are comparable to tasks and activities for people of similar ages who do not receive HCB services?

## **Preliminary Conclusion**

Again, ACCSES' overall reaction is that the CMS guidance pertaining to non-residential programs provides states with reasonable flexibility to support the full array of HCB non-residential service options that address an individual's strengths, needs, abilities, and capabilities consistent with his or her person-centered plan. AThat flexibility is subject to the quality standards set out in the definition of HCBS settings.

ACCSES will continue to study the new guidance and advise the membership regarding our interpretations and suggestions for application, as well as additional advocacy recommendations.