



SMD # 20-0##
Re: Home and
Community-Based Settings
Regulation – Implementation
Timeline Extension and Revised
Frequently Asked Questions

July 14, 2020

Dear State Medicaid Director:

The Centers for Medicare & Medicaid Services (CMS) is issuing guidance pertaining to the home and community-based services (HCBS) Settings Rule, which became effective on March 17, 2014.¹ As states are responding to the Coronavirus Disease 2019 public health emergency (COVID-19 PHE), CMS recognizes that its impact has necessitated changes to states' ongoing efforts to comply with the HCBS settings criteria. States' stay-at-home and/or safer-at-home orders and the process of social distancing have made it difficult, if not impossible, for states to accurately evaluate how an individual is experiencing community integration in current HCBS settings. These necessary directives have seriously impacted not only the measurement of community integration for individuals, but the intent of the Settings Rule to ensure that individuals with disabilities and older adults have the opportunity to be active participants in their communities. Lastly, older adults and individuals with disabilities who receive Medicaid HCBS often have underlying conditions that increase risks to health and welfare associated with COVID-19 that can further delay a return to integrated activities as they existed prior to the global pandemic.

States have requested flexibility from CMS with respect to demonstrating compliance with the requirements of the HCBS Settings Rule under section 1135, Appendix K to section 1915(c) HCBS waivers, section 1115 demonstrations, and disaster relief State Plan Amendments (SPAs).² States have highlighted, in particular, delays in their ability to effectively assess settings and determine needed remediation to ensure compliance with the Settings Rule. Economic factors including state workforce furloughs and redirection or refocusing of limited existing state human and monetary resources due to the COVID-19 PHE have also impacted some of these activities. States have also requested that CMS consider extending the HCBS settings implementation deadline again in the course of ongoing training and technical assistance activities.

¹ See 79 Fed. Reg. 2948 (Jan. 16, 2014), available at <https://www.gpo.gov/fdsys/pkg/FR-2014-01-16/pdf/2014-00487.pdf>; see also 42 CFR Parts 430, 431, et. al.

² See <https://www.medicare.gov/resources-for-states/disaster-response-toolkit/coronavirus-disease-2019-covid-19/index.html>.

On May 9, 2017, in recognition of the reform efforts underway across the country, CMS issued guidance³ extending the timeframe for states to demonstrate compliance with the settings requirements to March 17, 2022. This extension permitted states and providers an additional three years to demonstrate true community integration of individuals receiving Medicaid HCBS. In light of impacts discussed above from COVID-19, and to ensure the continued delivery of quality Medicaid HCBS to beneficiaries, CMS will allow states an additional year, through March 17, 2023, to complete implementation of activities required to demonstrate compliance with the settings criteria.

CMS also issued a State Medicaid Director Letter on March 22, 2019 (SMD #19-001),⁴ that included Frequently Asked Questions (FAQ) to discuss settings identified by the regulation as being presumed to have the qualities of an institution that the state identifies for a heightened scrutiny review by CMS. States have been unable to complete settings assessments and implement remediation plans due to COVID-19 and have requested an extension to relevant deadlines to demonstrate compliance with these settings and/or submit heightened scrutiny evidence packages to CMS for review. Therefore, CMS is extending the timeframes identified in relevant FAQs an additional year through this letter. The revised FAQs are attached.

Under these revised FAQs, if a state determines that a setting that isolates individuals from the broader community has implemented remediation strategies that brought the setting into compliance with the settings criteria by July 1, 2021, then that setting will not need to be submitted to CMS for a heightened scrutiny review. Additionally, states may submit to CMS isolating settings that have not completed necessary remediation for a heightened scrutiny review no later than October 31, 2021, which is an additional year from the original timeline.

CMS requests that information on settings located in the same building as a public or private institution or on the grounds of or adjacent to a public institution be submitted for heightened scrutiny no later than March 31, 2021.

Given the impact of the COVID-19 PHE, states are strongly encouraged to use this extra year to evaluate how the provision of Medicaid-funded HCBS fulfills larger public health priorities and advances the tenets of beneficiary autonomy and community integration. HCBS are a key feature of state efforts to offer a meaningful choice to beneficiaries on where to live and how to receive services, and in state compliance with the Americans with Disabilities Act and the *Olmstead v. L.C.*⁵ Supreme Court decision. As states continue to examine their array of HCBS as part of strategies to recover from the COVID-19 PHE, the availability of person-centered, individualized supports will take on even greater importance. States are encouraged to use this additional year to develop short and long-term strategies for increasing the capacity of these supports. In light of the risks associated with congregate settings and COVID-19, states may wish to give particular priority to those provisions of the rule regarding making available non-disability specific settings among the range of options available to individuals with disabilities, including to individuals currently residing in disability-specific congregate settings (for whom transition supports may be necessary to make the option available).

³ Available at <https://www.medicaid.gov/sites/default/files/federal-policy-guidance/downloads/cib050917.pdf>.

⁴ Available at <https://www.medicaid.gov/sites/default/files/Federal-Policy-Guidance/Downloads/smd19001.pdf>.

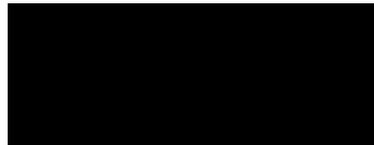
⁵ 527 U.S. 581 (1999).

Several states have also expressed a desire to engage with CMS to further enhance rebalancing efforts, lessening reliance on institutional settings in the provision of long-term care, due to the disproportionate impact of COVID-19 in nursing facilities and other institutions. The additional year will also free-up state resources that may be used in furtherance of these pursuits.

Lastly, acknowledging that states are and will continue to be faced with a backlog of actions as a result of COVID-19, states are encouraged to work consistently on their HCBS settings compliance activities between now and March 17, 2023. CMS continues to expect that states will demonstrate progress toward compliance throughout the transition period. This will avoid a last-minute build-up of actions and decisions, and ensure adequate engagement of stakeholders throughout the transition period as states finalize and implement their vision for HCBS provision.

CMS remains steadfast in its commitment to continue to provide technical assistance to states and other stakeholders to identify implementation approaches that ensure provision of Medicaid services in a manner consistent with program requirements. If you have any questions regarding the information in this letter, please contact Michele Mackenzie, Technical Director, in the Disabled and Elderly Health Programs Group, by email at Michele.MacKenzie@cms.hhs.gov.

Sincerely,



Calder A. Lynch
Deputy Administrator and Director

Frequently Asked Questions: HCBS Settings Regulation Implementation and Heightened Scrutiny Reviews of Presumptively Institutional Settings: July 2020 Update

1. **Question:** What is the new deadline for states to assure that all settings are in compliance with the home and community-based services (HCBS) settings criteria?

Answer: States have been granted an additional year to demonstrate compliance and should ensure all settings are in full compliance with the HCBS settings criteria by March 17, 2023. This date to demonstrate compliance replaces the March 17, 2022 timeline included in CMS guidance issued May 9, 2017.¹ Several states have requested an extension to demonstrate compliance with the HCBS settings criteria due to an inability to complete site-specific assessment and remediation activities due to the COVID-19 public health emergency (PHE). Social-distancing requirements in response to the PHE are resulting in the inability to complete activities outlined in approved statewide transition plans and/or activities required to obtain final approval of those plans.

During this extension, CMS urges states to continue to identify settings in need of remediation and work on the development, approval and implementation of their Statewide Transition Plans, including close consultation with relevant stakeholders. In light of the risks associated with congregate settings during the COVID-19 PHE, states may wish to give particular priority to those provisions of the rule regarding making available non-disability specific settings among the range of options available to individuals with disabilities, including to individuals currently residing in disability-specific congregate settings (for whom transition supports may be necessary to make the option available).

In addition, CMS reminds states that they continue to have independent obligations to comply with the Americans with Disabilities Act, Section 1557 of the Affordable Care Act, and Section 504 of the Rehabilitation Act, including their requirements under *Olmstead v. L.C.*², which remain in effect during this public health emergency. Technical assistance is available from the HHS Office for Civil Rights and the Department of Justice Civil Rights Division.

2. **Question:** What assistance is available to states to address the impact of the COVID-19 PHE on statewide transition plan activities?

¹ <https://www.medicaid.gov/sites/default/files/federal-policy-guidance/downloads/cib050917.pdf>

² Under title II of the ADA and *Olmstead v. L.C.*, the unjustified isolation of individuals with disabilities constitutes unlawful discrimination. States are required to provide community-based treatment where such treatment would be appropriate, the affected person does not oppose such treatment, and the treatment can be reasonably accommodated. Further information on state obligations under *Olmstead* can be found at https://www.ada.gov/olmstead/q&a_olmstead.htm.

Answer: States can review up-to-date guidance on flexibilities available for the delivery of HCBS on the CMS website.³ States can also avail themselves of individual and small group technical assistance from CMS, including alternative ways to gather site-specific assessment data and conduct validation activities. CMS also is available to offer assistance with approaches to gather information from beneficiaries and other stakeholders when face-to-face contact is impacted by state or local restrictions due to the COVID-19 PHE.

3. **Question:** Given the extension of the deadline to assure full implementation of the settings criteria to March 17, 2023, when will states be required to submit heightened scrutiny packages for settings that have the effect of isolating Medicaid HCBS beneficiaries from the broader community?

Answer: If the state determines, through their assessment and validation activities, that a setting that isolates individuals from the broader community has implemented remediation strategies to bring the setting into compliance with the settings criteria by the new timeline of July 1, 2021, the setting will not need to be submitted to CMS for heightened scrutiny review. This replaces the original date published in the March 2019 FAQs.⁴ However, states should continue to provide information to the public about how those settings have overcome the presumption and comply with the settings criteria, in accordance with the parameters of questions 4 and 7 of the March 2019 FAQs.

Any settings that meet the criteria in question 2 of the March 2019 FAQs of having the effect of isolating Medicaid beneficiaries from the broader community, and have not come into compliance with the regulatory criteria by July 1, 2021, should be posted for public comment with the remediation plan to comply with the settings criteria by March 17, 2023 in accordance with question 8 of the March 2019 FAQs. For these settings, CMS requests that states submit information for a heightened scrutiny review no later than October 31, 2021, which also represents an additional year beyond the original timeline.

The above dates replace prior guidance given in FAQ 4 of the March 2019 FAQs (SMD #19-001) issued on this subject. The deadlines by which states can work with settings that isolate Medicaid beneficiaries from the broader community to implement remediation and demonstrate compliance have been revised.

4. **Question:** What is the timeline to submit all other settings that are presumed to be institutional according to the HCBS settings rule⁵ (i.e., settings that are located in the

³ Available at <https://www.medicaid.gov/resources-for-states/disaster-response-toolkit/coronavirus-disease-2019-covid-19/index.html>.

⁴ Available at <https://www.medicaid.gov/sites/default/files/Federal-Policy-Guidance/Downloads/smd19001.pdf>.

⁵ See 42 CFR 441.301(c)(4), .530(a)(1), .710(a)(1).

same building as a public or private institution, or are on the grounds of or adjacent to a public institution providing inpatient treatment) to CMS for heightened scrutiny review?

Answer: In accordance with the parameters described in FAQ 8 of the March 2019 FAQs, the state should submit a numbered list of settings that the state has determined to be located in the same building as a public or private institution or on the grounds of or adjacent to a public institution that comply, or will comply, with the settings criteria by the end of the transition period to CMS for heightened scrutiny review. This information should be submitted to CMS by March 31, 2021. Public comments should be solicited upon completion of the assessment and validation activities outlined above.

The above dates replace prior guidance given in FAQ 9 in the March 2019 FAQs (SMD #19-001) issued on this subject. The deadline for states to submit evidence packages for settings that fall under the institutional presumption is revised.

5. **Question:** If settings have made significant and long-term changes to the services provided or the location in which services will be provided in response to the COVID-19 PHE, will states be required to reassess those settings?

Answer: If a setting has made significant and permanent changes to the services provided or the location in which those services are provided, the state may be required to reassess the setting, after the PHE, for compliance with the Settings Rule requirements.