

To: Specified Day and Residential Home and Community Based Services Providers
From: Michelle Morse Jernigan, Deputy of LTSS Quality & Administration
Date: November 16, 2015
Subject: State Heightened Scrutiny Review Related to the Federal Home and Community-Based Services Settings Rule

This memorandum provides information regarding next steps to assess and ensure State compliance with the Centers for Medicare and Medicaid Services (CMS) Home and Community-Based Services (HCBS) Settings Rule, which was effective March 17, 2014. HCBS setting requirements are located at 42 C.F.R. § 441.301(c)(4)-(6), available at <https://www.federalregister.gov/articles/2014/01/16/2014-00487/medicaid-program-state-plan-home-and-community-based-services-5-year-period-for-waivers-provider>.

As you are aware, the HCBS Settings Rule sets standards that all HCBS settings must meet in order to receive Medicaid reimbursement. As an HCBS provider in CHOICES and/or a Section 1915(c) waiver for individuals with intellectual disabilities, you have already participated in a self-assessment process to help evaluate whether the settings in which you provide services comport with the new federal rule. If applicable, you have also developed a transition plan to identify the actions you will take to achieve compliance with the new rule. That plan has been reviewed by the Department of Intellectual and Developmental Disabilities (DIDD) or by a Managed Care Organization (MCO) as applicable, and submitted to TennCare.

In reviewing the self-assessments and transition plans and in reviewing guidance issued by CMS regarding the implementation of the new Rule, TennCare has determined that additional actions are needed with respect to assessing compliance of certain HCBS services and settings, specifically:

- Adult Day Care (CHOICES)
- Assisted Care Living Facilities (CHOICES)
- Facility Based Day (ID Waiver)
- Residential Habilitation settings with more than 4 persons (ID Waiver)
- Intensive Behavioral Residential Services (ID Waiver)

Intensive Behavioral Residential Services were not included in the initial self-assessment process (because all settings were established after the rule became effective), but will be assessed as part of the state's heightened scrutiny review to ensure compliance with the CMS HCBS Settings Rule.

TennCare will work directly with providers and contracted partners to further assess each specified setting for compliance with the HCBS Settings Rule using guidance provided by CMS.

As previously explained, the federal HCBS Settings Rule identifies settings that are *presumed* to have institutional qualities and do not meet the rule's requirements for home and community-based settings. These settings include those in a publicly or privately-owned facility that provide inpatient treatment; on the grounds of, or immediately adjacent to, a public institution; or that have the effect of isolating individuals receiving Medicaid-funded HCBS from the broader community of individuals not receiving Medicaid-funded HCBS. A state may *only* include such a setting in its Medicaid HCBS programs if CMS determines through a heightened scrutiny process, based on information presented by the state and input from the public that the state has demonstrated that the setting meets the qualities for being home and community-based and does not have the qualities of an institution. (For more information about the heightened scrutiny process, see Section 441.301(c)(5)(v) Home and Community-Based Setting.)

CMS guidance on the heightened scrutiny process identifies settings that have the following two characteristics as *potentially* having the effect of isolating individuals:

- *The setting is designed specifically for people with disabilities, and often even for people with a certain type of disability.*
- *The individuals in the setting are primarily or exclusively people with disabilities and on-site staff provides many services to them.*

The guidance also identifies the following characteristics of settings that isolate:

- *The setting is designed to provide people with disabilities multiple types of services and activities on-site, including housing, day services, medical, behavioral and therapeutic services, and/or social and recreational activities.*
- *People in the setting have limited, if any, interaction with the broader community.*
- *Settings that use/authorize interventions/restrictions that are used in institutional settings or are deemed unacceptable in Medicaid institutional settings (e.g. seclusion).*

CMS guidance on settings that isolate is available at <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>.

A setting that has these characteristics does not necessarily fail to meet HCBS Settings requirements. However, CMS will apply a higher level of scrutiny to such settings and requires information from the state to overcome that presumption and describe how the HCBS settings requirements are met. Tennessee does not intend to submit services/settings to CMS for application of the heightened scrutiny process unless the State believes that the setting in fact has the qualities of a home and community based setting, which may include steps that will be taken by the provider as part of an approved transition plan which the State believes are expected to achieve compliance.

In order for services/settings that would otherwise be presumed to be institutional to be considered HCBS in nature, they must not isolate or segregate people with disabilities from their broader community. CMS guidance states:

“Importantly, any setting regardless of location that has the effect of isolating individuals receiving Medicaid home and community-based services (HCBS) from the broader community of individuals not receiving HCBS is also presumed to be institutional, and therefore requires information from the state to overcome that presumption and describe how the HCBS settings requirements are met.”

TennCare will partner with DIDD and its contracted MCOs to conduct the heightened scrutiny reviews. These reviews will consist of a more in depth assessment of individual service settings, with particular focus on the experiences of persons served in those settings. Per CMS, evidence of how a setting overcomes its presumed institutional qualities should focus on the qualities of the setting and how it is integrated in and supports full access of individuals receiving HCBS into the greater community, **not** on the aspects and/or severity of the disabilities of the individuals served in the setting.

The heightened scrutiny review will consist of a review of data pertaining to services utilized by all persons receiving services in the specified setting; an on-site visit and assessment of physical location and practices; review of person-centered plans and individual experience assessments for individuals receiving services in the setting; interviews with service recipients; a secondary review of policies and other applicable service related documents; and additional focused review of the agency's proposed transition plan, including how each of the above is expected to be impacted as the plan is implemented. An assessment tool specific to each service/setting that will be utilized by the State will be provided to applicable providers prior to the State's on-site visit. The CMS heightened scrutiny process requires public input and as such will be incorporated into the State's assessment process. TennCare will also engage advocacy organizations in the review of evidence gathered through the process.

The Tennessee Statewide Transition Plan has been amended to reflect this process and reposted for the 30 day public comment period. The heightened scrutiny review process will begin April 01, 2016 and conclude by December 31, 2016. Additional details regarding the process will be provided to the specified provider types prior to that time.

Should you have any questions, please contact Daphne Rosalis at Daphne.Rosalis@tn.gov.