



The HCBS Settings Rule: Brief Analysis of New Heightened Scrutiny Guidance

Background

- The HCBS Settings Rule requires states to ensure that they are providing HCBS funding for community settings that adhere to the rule's goal of integration and not settings that are institutions, have the qualities of institutions or the effect of isolating individuals.
- The heightened scrutiny process of the HCBS Settings Rule allows states to submit a heightened scrutiny package to CMS requesting that the Secretary of the Department of Health and Human Services (HHS) perform a heightened scrutiny review of a setting or settings in the state that may be presumed to be institutional or isolating - but through review can overcome that presumption and show adherence to the requirements of the HCBS Settings Rule. Overcoming this presumption of being an institution or being isolating would then allow states to continue to fund the setting/s through their HCBS program/s.
- The initial guidance for the HCBS Settings Rule provided examples of settings that isolate to include settings like farmsteads, disability-specific communities, and gated communities also specific to people with disabilities.
- Several conversations occurred during the course of the Trump Administration and with CMS about whether the settings identified as isolating in the guidance felt that the result would have unintended consequences for the individuals served. Congressional letters were issued to CMS and stakeholder convenings as well. ANCOR was invited to participate in these meetings along with key disability advocacy groups which included Administrator Verma and the Director of Medicaid.

The Guidance

- The guidance that was just released does three key things: It readjusts the guidance originally provided for heightened scrutiny process, and it also provides answers to two separate issues: whether private individual homes needed to comply with the HCBS Settings rule (they do not) and whether people receiving HCBS services needed to live in HCBS Rule compliant settings if the residential side of their services is not funded by HCBS (only compliance in the setting funded by HCBS is expected).
- Key pieces of the heightened scrutiny guidance:
 - See Question 2 – This is the big one. The general description remains for what is isolating but examples of farmsteads, gated communities etc. no longer exist.
 - See Question 3 – Nothing new here. CMS repeated what they have always said in terms of rural settings – that states should compare the access that individuals living in the same geographical area (but who are not receiving Medicaid HCBS) have to engage in the community.
 - Note the response to Question 4 - It includes reference to full compliance with the rule by March 2022. ANCOR will be seeking additional guidance here as will several other stakeholders.
 - Note Footnote 4 – There is a reminder to states that complying with the HCBS Settings rule does not equate complying with requirements under the Americans with Disabilities Act and the subsequent *Olmstead* holding.
 - See Question 5 – CMS is working on promising practices with its sister agency, the Administration for Community Living (ACL). They share a few examples that may be helpful as providers prepare for transition.

- See Question 6 – HIPAA questions are raised as to how they limit public input on identified settings for the heightened scrutiny process. This is very interesting background, but the bottom line is there are some instances where states may not reveal much information about a setting undergoing heightened scrutiny based on HIPAA privacy obligations which could prevent the public from weighing in.
- See Question 9 – CMS strongly encourages states to submit their evidence of a setting that can overcome a heightened scrutiny review that is on the grounds or adjacent to a public or private institution by **March 2019** – and for all heightened scrutiny packages around presumed isolating settings to be submitted by **October 2020**.
- See Question 10 – In addition to guidance about what states should submit in their heightened scrutiny packages, CMS acknowledges the funding limitations that providers and states have to fund external recreational activities. While this does not change the implementation plans for 2022, this acknowledgement is important.

For More Information

There is a lot more to dissect here – be sure to register for our April 3 webinar doing a deep dive on the HCBS Settings Rule guidance and what comes next! Stay tuned for registration details. For more information please contact Esmé Grant Grewal, ANCOR Vice President of Government Relations, at egrewal@ancor.org.