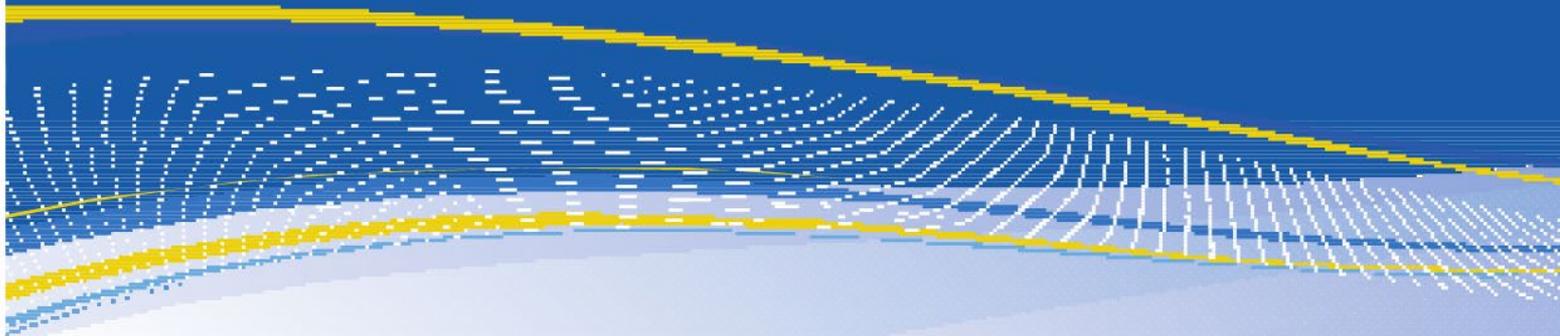




Provider-Owned or Controlled Settings, Encompassing Lease and Landlord/Tenant Relationships

**Division of Long-Term Services and Supports
Disabled and Elderly Health Programs Group
Center for Medicaid and CHIP Services**



Objectives for Today's Session

1. Define private homes and explore appropriate methods to monitor for ongoing compliance with the Home and Community-Based Services (HCBS) settings criteria.
2. Assist states to identify which settings should be considered provider-owned or controlled for the purpose of applying the additional requirements of the settings criteria.
3. Discuss the types of documentation that should be included in the person-centered service plan (PCP) when any modifications are made to the additional requirements for provider-owned or controlled settings, and strategies states are deploying to verify the appropriateness of modifications in PCPs.
4. Review landlord/tenant relationships and identify current state issues.

Definition of Private Homes

- Individual, privately-owned homes (privately-owned or rented homes and apartments in which the individual receiving Medicaid-funded home and community-based services lives independently or with family members, friends, or roommates) are presumed to be in compliance with the regulatory criteria of a home and community-based setting.
- Reference: SMD # 19-001, Frequently Asked Questions (FAQs): HCBS Settings Regulation Implementation, March 22, 2019: Question 12: What kind of compliance assessment with the HCBS settings criteria does CMS expect of states for private residences?
- Note: Settings where the beneficiary lives in a private residence owned by an unrelated caregiver (who is paid for providing HCBS to the individual) are considered provider-owned or controlled settings and should be evaluated as such.

CMS Guidance on Private Homes

- States are not responsible for confirming this presumption for purposes of ensuring compliance with the criteria regarding the qualities of a home and community-based setting.
- But states should include private residences as part of their overall quality assurance framework when implementing monitoring processes for ongoing compliance with the settings criteria, as well as any oversight provisions in their approved HCBS waivers or State Plan Amendments.

State Strategies for Ongoing Monitoring of Private Homes (1 of 5)

- Person-centered planning remains an important protection to assure that individuals have opportunities for full access to the greater community to the same degree as individuals not receiving Medicaid HCBS when they live in their own home or a friend or relative's private home.
- While the private home may afford a home-like setting, the PCP and provision of appropriate services that support access to the greater community are critical components to ensure community integration.

State Strategies for Ongoing Monitoring of Private Homes (2 of 5)

- Educate individuals and families on the basic tenets of the settings criteria and why it is important to embed the criteria into the private home setting. Examples might include:
 - Hosting webinars/virtual educational experiences;
 - Attending and presenting material on the topic at family, advocacy meetings of key organizations throughout the state;
 - Providing written communication/informational resources including key questions that individuals/families should consider about how to apply the criteria in a private home setting;
 - Explaining how the process of ongoing monitoring will occur.

State Strategies for Ongoing Monitoring of Private Homes (3 of 5)

- Regularly occurring, routine, personal visits with Case Managers or Licensing entities:
 - Provides the opportunity to gather information in a less intrusive, less bureaucratic, process in an individual's very personal space---their home.
 - Gives individuals the chance to share concerns, questions, issues in a private, more comfortable exchange and to know who to contact if there is a problem.

State Strategies for Ongoing Monitoring of Private Homes (4 of 5)

- Whether they're called experience or integration tools, setting surveys, assessments, customer satisfaction responses, quality assurance reviews, or standardized checklists, many states are developing these instruments/methodologies to gather information to ensure ongoing compliance with the settings criteria:
 - As an independent method of gathering data on current status;
 - As part of the annual person-centered planning process;
 - Or as a supplement to personal contact with Case Managers or other Licensing entities.

State Strategies for Ongoing Monitoring of Private Homes (5 of 5)

When issues arise in a person's home that are not consistent with the qualities of a Home and Community-Based setting:

- Provide targeted virtual or personal in-home training for individuals, parents, or other family members to better understand an individual's right to autonomy and independence.
- Offer opportunities for peer-to-peer training provided by individuals, parents, other family members, self-advocates or others with similar experiences who understand the intent of the criteria and can be extremely helpful in sharing that knowledge.

What Is a Provider-Owned or Controlled Setting? (1 of 5)

A setting is provider-owned or controlled when the setting in which the individual resides is a physical place that is owned, co-owned, and/or operated by a provider of home and community-based services.

Source: Home and Community-Based Settings Requirements: Systemic and Site-Specific Assessments and Remediation, CMS SOTA Presentation, December 9, 2015. See: <https://www.medicaid.gov/medicaid/hcbs/downloads/hcbs-systemic-and-site-specific.pdf>.

What Is a Provider-Owned or Controlled Setting? (2 of 5)

- If a provider is furnishing Home and Community-Based Services to all individuals in a setting in a property owned and leased by a third party, is this setting considered provider-owned and controlled?
 - If the individual leases directly from the third party that has no direct or indirect financial relationship with the provider, this would not be considered provider-owned or controlled.
 - If the HCBS provider leases from a third party or owns the property, this would be considered provider-owned or controlled.

What Is a Provider-Owned or Controlled Setting? (3 of 5)

- If the provider does not lease or own the property, but has a direct or indirect financial relationship with the property owner, we would presume that the setting was provider controlled unless the property owner or provider establishes that the nature of the relationship did not affect either the care provided or the financial conditions applicable to tenants.

Source: Home and Community-Based Requirements Q & A document published on June 26, 2015 at <https://www.medicaid.gov/medicaid/hcbs/downloads/home-and-community-based-setting-requirements.pdf>

What Is a Provider-Owned or Controlled Setting? (4 of 5)

- The other defining factor in categorizing whether a setting is provider-owned or controlled considers:
 - Whether the selection of a setting limits the participant to a specific HCBS provider of services.
 - This is most often found in assisted living, senior housing, supportive housing and group home living arrangements.

What Is a Provider-Owned or Controlled Setting? (5 of 5)

- It is also critical that a state is informed about the nature of the relationship between the participant and the person who owns the home in foster care or shared living settings.
- If the caregiver receives funding from an HCBS authority, and is not a family member of the HCBS participant, then the setting is provider-owned or controlled.

Sample Scenarios of Settings That Are/Not Provider-Owned and/or Controlled (1 of 3)

1. An adult foster home in which an unrelated caregiver owns and staffs the home: provider-owned and controlled.
2. Any setting in which, as a result of selection of the setting, the individual's selection of a provider is limited; any setting where the provider comes with the setting: provider controlled.
 - For example, a setting where the individual must have a specific provider in order to live in that setting is provider controlled.

Sample Scenarios of Settings That Are/Not Provider-Owned and/or Controlled (2 of 3)

3. A Medicaid recipient rents a setting, e.g., an apartment with roommates; however, a provider or state agency provides 24 hour supervision. The recipient holds the lease, but the provider/state provides the supervision, etc.: if the individual can change providers without breaking the lease, then the setting is not provider controlled.
4. A parent wills her home through her estate to her son, who now is in his own home, but requires 24 hour supervision/supports. The individual has chosen his own providers who will work with him: this setting is not provider controlled.

Sample Scenarios of Settings That Are/Not Provider-Owned and/or Controlled (3 of 3)

5. If that same individual's mother willed her home to a provider agency, which agreed to serve her adult child in the home, then the home would be provider-owned and controlled.
6. An Assisted Living or Senior Apartment building in which the senior rents the apartment, but when s/he decides to live there, there is only one choice of HCBS provider: this is a provider controlled setting.
7. The provider owns the residence in which the Medicaid recipient resides: this is a provider-owned setting.

Provider-Owned or Controlled Settings: Additional Requirements (1 of 2)

- In addition to the qualities of a home and community-based setting, provider-owned or controlled settings are subject to additional requirements:
 - The unit or dwelling is a specific place owned, rented, or occupied under a legally enforceable agreement.
 - Privacy is provided in the sleeping or living unit with entrance doors lockable by the individual; choice of roommates; freedom to furnish and decorate units within the lease agreement.

Provider-Owned or Controlled Settings: Additional Requirements (2 of 2)

- Freedom and support to control individual schedules and activities; access to food at any time.
- Individuals are able to have visitors of their choosing at any time.
- The setting is physically accessible to the individual.

Source: 42 CFR 441.301(c)(4)(vi)(A)-(E),
441.530(a)(1)(vi)(A)-(E), 441.710(a)(1)(vi)(A)-(E).

Modifications of the Conditions: Documented in the Person-Centered Service Plan (1 of 8)

- Any modification of the additional conditions for provider-owned or controlled settings must be supported by a specific assessed need and justified in the person-centered service plan.

Source: 42 CFR 441.301(c)(4)(vi)(F)(1)-(8), 441.530(a)(1)(vi)(F)(1)-(8), 441.710(a)(1)(vi)(F)(1)-(8).

Modifications of the Conditions: Documented in the Person-Centered Service Plan (2 of 8)

➤ Documentation includes:

(1) Identification of a specific assessed need;

Modifications of the Conditions: Documented in the Person-Centered Service Plan (3 of 8)

➤ Documentation includes:

(2) The positive interventions and supports used prior to any modifications of the person-centered service plan:

- What positive behavioral interventions have been tried to help reduce challenging behaviors and to help support and reinforce the learning of new, more appropriate behavioral skills?
- Has an analysis been completed to determine the cause of the behavior and why it is being exhibited? Have alternative positive measures, activities and or supports been introduced to teach more appropriate behaviors?

Modifications of the Conditions: Documented in the Person-Centered Service Plan (4 of 8)

➤ Documentation includes:

(3) The less intrusive methods of meeting the need that have been tried but did not work:

- More stringent modifications or interventions should only be implemented when less intrusive measures have not been successful in changing the behavior.

Modifications of the Conditions: Documented in the Person-Centered Service Plan (5 of 8)

➤ Documentation includes:

(4) A clear description of the condition that is directly proportionate to the specific assessed need;

Modifications of the Conditions: Documented in the Person-Centered Service Plan (6 of 8)

➤ Documentation includes:

(5) Regular collection and review of data to measure the ongoing effectiveness of the modification;

Modifications of the Conditions: Documented in the Person-Centered Service Plan (7 of 8)

➤ Documentation includes:

(6) Established time limits for periodic reviews to determine if the modification is still necessary or can be terminated;

Modifications of the Conditions: Documented in the Person-Centered Service Plan (8 of 8)

➤ Documentation includes:

(7) the informed consent of the individual to ensure s/he understands what they are agreeing to, including:

- Why the modification is being considered;
- A clear, specific description of the modification;
- Implications on the person's everyday life;
- When the modification will be reviewed;
- What the individual can do to change or terminate the modification.

(8) An assurance that interventions will cause no harm to the individual.

Lease/Tenant Relationships: Regulatory Language

- The state must ensure that a lease, residency agreement or other form of written agreement will be in place for each HCBS participant with the same responsibilities and protections from eviction that tenants have under the landlord/tenant law of the state, county, city or other entity.
- For settings where landlord tenant laws do not apply, the state must ensure that a lease, residency or other agreement provides protections that address eviction processes and appeals comparable to those provided under the jurisdiction's landlord tenant law.

See: 42 CFR 441.301(c)(4)(vi)(A), 441.530(a)(1)(vi)(A), 441.710(a)(1)(vi)(A).

Lease/Tenant Relationships (1 of 2)

- Can a residential agreement between the individual and the entity that owns or controls the property have the same protections as a lease?
- Yes. However, the state must ensure that a lease, residency agreement or other form of written agreement will be in place for each HCBS participant, and the document provides enforceable protections that address eviction processes and appeals comparable to those provided under the jurisdiction's landlord tenant law.

Lease/Tenant Relationships (2 of 2)

- So what will suffice?
 - If a state already has provisions in their contracts, standards or other agreements that provide the required protections for individuals, will that suffice to meet the regulations?
 - Whatever is legally enforceable and in place for each individual will suffice.
 - So protections can be found in various documents (including but not limited to the person-centered service plan), so long as it is legally enforceable.

What Must Be Included in a Residency Agreement?

- The residency agreement must include at a minimum the same level of protections found in the jurisdiction's landlord tenant laws which may include:
 - Length of the agreement;
 - The amount of and when payment is due;
 - Use and return of security deposits;
 - Expectations for maintenance;
 - Notice before entry into a unit;
 - Conditions that could initiate an eviction and the process to terminate an agreement, evict a tenant/resident and the process to appeal an eviction.

States' Concerns Regarding Lease/Tenant Relationships (1 of 5)

- Concerns raised by states regarding Lease/Tenant Relationships:
 - Subleases: Landlords don't want providers to have a sublease arrangement and/or the providers don't want individuals to have contact with the landlords.

States' Concerns Regarding Lease/Tenant Relationships (2 of 5)

- Concerns raised by states regarding Lease/Tenant Relationships:
 - Shared living settings that require a lease - especially the right to not vacate/challenge eviction - seems counter to the family-home nature of the setting.

States' Concerns Regarding Lease/Tenant Relationships (3 of 5)

- Concerns raised by states regarding Lease/Tenant Relationships:
 - What protections are in place to prevent individuals from being “discharged” when an individual’s needs or circumstances change?
 - What strategic plan should the state have in place when the provider can no longer meet the needs of the participant?

States' Concerns Regarding Lease/Tenant Relationships (4 of 5)

- Concerns raised by states regarding Lease/Tenant Relationships
 - Implementing a lease/residency agreement in their shared living/adult foster home settings could jeopardize the tax free status of payments to the foster family.
 - CMS does not believe that the Settings Rule conflicts with Section 131 of the IRS Code, and refers states to IRS Rulings, such as Internal Revenue Service Department of the Treasury, Washington, DC 20224 Number: 201624012 Release Date: 6/10/2016 Index Numbers: 131.02-00, 6041.08-00, 6041A.04-00, 6051.00-00, for further information regarding the intersect between this IRS Code and the Medicaid program.

States' Concerns Regarding Lease/Tenant Relationships (5 of 5)

- Concerns raised by providers about early termination of a lease
 - Does a provider have the ability to collect rent from a Medicaid beneficiary who breaks his/her lease and moves out prior to the lease end date?

Additional Resources for States (1 of 3)

- Helpful information can also be found at a state's:
 - Consumer Affairs or Protection Division or Agency
 - Attorney General Office
 - State or local Housing Authorities
- National Resources:
 - The American Apartment Owners Association: <https://wp-dev.american-apartment-owners-association.org/landlord-tenant-laws/>
 - U.S. Department of Housing at <https://www.hud.gov>
 - FindLaw at <https://realestate.findlaw.com/landlord-tenant-law/state-resources.html>.

Additional Resources: Monitoring of Private Homes (2 of 3)

Idaho: Ongoing monitoring will be conducted in a variety of ways: leveraging partners in licensing and certification; updated review materials to include HCBS criteria; using QA staff who review Medicaid and HCBS rules; using a variety of satisfaction/beneficiary engagement surveys that include HCBS requirements.

Oklahoma: The Case Management Worksheet is a review tool that is used to assess 100% of individuals served. The tool was designed to assist case management in effectively evaluating the settings and completing the tool correctly. Quality Assurance staff conduct actual on-site surveys to assess all applicable criteria.

Additional Resources: Monitoring of Private Homes (3 of 3)

Tennessee: Each individual's Individual Support Coordinator, case manager or care coordinator will assist the individual and his or her family member/representative in completing an initial Individual Experience Assessment. These are conducted during the annual PCP review or sooner if an amendment or plan review is conducted prior to the annual review. This is incorporated into all initial and annual person-centered plan reviews to assure ongoing compliance.

Virginia: The state is providing support to build provider capacity for transportation to access the community; created a community guide service that includes a housing guide and helps identify services and options.

Additional Resources (1 of 7)

CMS Central Office Contact—Division of Long-Term Services and Supports:

❖ HCBS@cms.hhs.gov

To request Technical Assistance:

❖ HCBSsettingsTA@neweditions.net

Additional Resources (2 of 7)

- ❖ Reference Slide 3: See: SMD # 19-001, Frequently Asked Questions (FAQs): HCBS Settings Regulation Implementation, March 22, 2019: Question 12: What kind of compliance assessment with the HCBS settings criteria does CMS expect of states for private residences?
- ❖ Reference: Slide 4: See: HCBS Final Regulations 42 CFR Part 441: Questions and Answers Regarding Home and Community-Based Settings, Home and Community-Based (HCB) Settings-General.

Additional Resources (3 of 7)

- ❖ Reference: Slide 4, 5: See: SMD # 19-001, FAQs: HCBS Settings Regulation Implementation, March 22, 2019. This response supplements prior guidance on this topic found at Question 3, page 4 at <https://www.medicaid.gov/medicaid/hcbs/downloads/q-and-a-hcb-settings.pdf> This guidance has been supplemented by SMD #19-001, March 22, 2019, Question 12.
- ❖ Reference, Slide 10: Source: CMS SOTA Presentation entitled: Home and Community-Based Settings Requirements: Systemic and Specific Assessments and Remediation, December 9, 2015. See: <https://www.medicaid.gov/medicaid/hcbs/downloads/hcbs-systemic-and-site-specific.pdf>.

Additional Resources (4 of 7)

- ❖ Reference: Slide 12: Source: Home and Community-Based Requirements Q & A document published on June 26, 2015 at <https://www.medicaid.gov/medicaid/hcbs/downloads/home-and-community-based-setting-requirements.pdf>
- ❖ Reference: Slide 15: See: Page 2958, CMS' response to comments noted on pages 2957 and 2958 in the Preamble to the HCBS settings criteria: Source: Federal Register, Vol. 79, No. 11, Thursday, January 16, 2014, Part II Department of Health and Human Services, Centers for Medicare and Medicaid Services, 42 CFR Part 430, 431, et al.

Additional Resources (5 of 7)

- ❖ Reference: Slide 19: See: Provider-Owned or Controlled Settings: Additional Requirements at 42 CFR 441.301(c)(4)(vi)(A)-(E), 441.530(a)(1)(vi)(A)-(E). and 441.710(a)(1)(vi)(A)-(E).
- ❖ Reference: Slide 20: See: Modifications of the Additional Conditions in Provider-Owned or Controlled Settings at 42 CFR 441.301(c)(4)(vi)(F)(1)-(8), 441.530(a)(1)(vi)(F)(1)-(8). 441.710(a)(1)(vi)(F)(1)-(8).
- ❖ Reference: Slide 21: Source: CMS FAQs concerning Medicaid Beneficiaries in Home and Community-Based Settings Who Exhibit Unsafe Wandering or Exit-Seeking Behavior, December 15, 2016.

Additional Resources (6 of 7)

- ❖ Reference: Slide 29: Source: CMS: Home and Community-Based Setting Requirements, Tenancy, Question and Answer #13, June 26, 2015 at <https://www.medicaid.gov/medicaid/hcbs/downloads/home-and-community-based-setting-requirements.pdf>.
- ❖ Reference: Slide 35: Source: Internal Revenue Service Department of the Treasury, Washington, DC 20224 Number: 201624012 Release Date: 6/10/2016 Index Numbers: 131.02-00, 6041.08-00, 6041A.04-00, 6051.00-00

Additional Resources (7 of 7)

❖ Reference: Slide 37: See:

- The American Apartment Owners Association: <https://wp-dev.american-apartment-owners-association.org/landlord-tenant-laws/>
- U.S. Department of Housing at <https://www.hud.gov>
- FindLaw at <https://realestate.findlaw.com/landlord-tenant-law/state-resources.html>.

Questions and Answers

Feedback

Please complete a brief survey to help CMS monitor the quality and effectiveness of our presentations.

Please use the survey link:

<https://www.research.net/r/providerowned>

WE WELCOME YOUR FEEDBACK!