

# Growth and Uncertainty in HCBS-Funded Assisted Living

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# Basics of HCBS Settings Rule

- ▶ Integration with the community.
- ▶ Dignity.
- ▶ Privacy.
- ▶ Autonomy; independence in making life choices.

# Additional Provisions for Provider-Owned or Controlled Residential Settings

- ▶ Protections against eviction.
- ▶ Privacy, including lockable doors.
- ▶ Freedom to furnish and decorate living units.
- ▶ Visitors at any time.
  
- ▶ Individualized modifications to these requirements allowed via person-centered service plan.

# Implementation of HCBS Settings Rule: Systemic Remediation

What approaches are states taking?

# Revising Waiver Regulations to Incorporate Federal Language

- ▶ Approach taken by many states
- ▶ Often “an overarching administrative rule”
  - ▶ Examples: MS, OH, OK, UT
- ▶ Benefit for consumers
  - ▶ Rules more lasting than changes to provider contracts, etc.
- ▶ Issues/Concerns
  - ▶ Federal language is very vague
  - ▶ Will the HCBS provisions apply to all residents in an assisted living facility or just residents receiving HCBS waiver services?

# Revising Licensing Regulations to Incorporate Federal Language

- ▶ A few states are using this approach
  - ▶ Examples: ND, OR
- ▶ Benefit for consumers
  - ▶ Individuals in all facilities benefit, not just HCBS recipients in facilities that receive Medicaid funding.
  - ▶ Revising regulations is more permanent
  - ▶ Because licensing rules are tied to some kind of system of inspection, enforcement, and complaint investigation, there is generally:
    - ▶ More oversight and monitoring
    - ▶ Some recourse for consumers who have concerns about care and/or services
    - ▶ More public information available
- ▶ Issues/Concerns
  - ▶ Federal language is very vague

# Adopting Tiered Standards

- ▶ Very few states are using this approach
  - ▶ Examples: MN, IN
- ▶ Benefit for consumers
  - ▶ Should result in new settings with higher standards; more fully address intent of HCBS rule
- ▶ Issues/Concerns
  - ▶ Still being developed - unsure what final standards will look like

# Revising Provider Contracts, Manuals, Policies & Procedures

- ▶ At least one state is coming into compliance using this approach
  - ▶ AR
- ▶ Many states are doing this in addition to other approaches

# Consumer Perspective

- ▶ Of approaches states are taking:
  - ▶ Revising state licensing regulations is the gold standard



- ▶ Even better: strengthening state licensing regulations!

# Heightened Scrutiny

Any setting that is located in a building that is also

- ▶ a publicly or privately operated facility that provides inpatient institutional treatment, or
- ▶ in a building on the grounds of, or immediately adjacent to, a public institution, or
- ▶ any other setting that has the effect of isolating individuals receiving Medicaid HCBS from the broader community of individuals not receiving Medicaid HCBS

will be presumed to be a setting that has the qualities of an institution unless the Secretary determines through heightened scrutiny, based on information presented by the State or other parties, that the setting does not have the qualities of an institution and that the setting does have the qualities of home and community-based settings

# Heightened Scrutiny

## Settings being submitted

- ▶ Co-located with nursing home
- ▶ Proximity to a nursing home
- ▶ Isolating
  - ▶ Memory Care units

# Heightened Scrutiny

## Forms Used/Evidentiary Packages

- ▶ Some states have developed their own tools for collecting and evaluating the evidence
  - ▶ OR: Created onsite review template; provider worksheet
  - ▶ NV: developed a heightened scrutiny questionnaire
  - ▶ IL: Preliminary Heightened Scrutiny Review, includes document checklist

# Heightened Scrutiny

## Forms Used/Evidentiary Packages

- ▶ Evidentiary packages vary enormously from state to state
- ▶ Some:
  - ▶ Don't identify why setting is being submitted for HS
  - ▶ Are short with no supporting documentation
  - ▶ Are lengthy and detailed
    - ▶ IL: onsite assessment residential and non-residential HCBS settings validation checklist, activities schedules, list of transportation options, photos, license, staff qualifications
    - ▶ KY: detailed general summary, settings compliance with key areas, participant interviews, staff interviews, photos of rooms, summary of public comments

# Heightened Scrutiny

## Public Input

- ▶ Easiest to access when included in evidence for specific site
  - ▶ KY
- ▶ Don't always include supporting documentation
- ▶ Almost no public comment pertaining to individual settings

# A Few Questions

- ▶ Is CMS going to verify that states have made changes to their regulations, policies, etc?
- ▶ How is CMS going to validate states' evidence for HS?
  - ▶ “When a state reviewer indicates that “a setting uses delayed egress devices or has secured perimeters only in accordance with individually approved plans of care,” how will CMS have confidence that the service plans are really individualized and not one size fits all?
  - ▶ When a state summary of a settings says “recipients can participate in community activities of their choice and utilize the community for medical care, entertainment, religious activities, beautician services, shopping, and other services to the extent desired,” how do we know that is a meaningful statement? Does that mean there is readily available transportation? Does it mean individuals will be provided the supervision and support they need?
- ▶ What will CMS consider to be enough evidence for HS?

# A Few Questions

- ▶ What are the criteria for when a memory care facility or facility with a memory care unit should be submitted for HS?
- ▶ How is CMS going to evaluate community integration for memory care units/facilities?
  - ▶ Is it acceptable if:
    - ▶ A “majority of recipients do not regularly engage in the community, not because they are prevented from doing so, but because of their need for protective oversight?”
    - ▶ “There is very little community integration or activity among this group to prevent a breakdown of harmony within the community?”
    - ▶ The only community integration is if family members take a resident out?

# A Few Preliminary Recommendations

## CMS

- ▶ Provide more clarity on previous points
- ▶ Develop a suggested evidentiary package (based on HS criteria CMS has already identified) and encourage its use by states
- ▶ Share a strong state evidentiary package as a model/best practice

## States

- ▶ Make it easier for the public to comment
  - ▶ State could create a form people could use or questions to consider
- ▶ Make it easier for the public to identify settings they believe should be submitted for HS, but are not
  - ▶ OR

# Protections Against Eviction

- ▶ Resident must have at least “the same responsibilities and protections from eviction that tenants have under the landlord/tenant law of the State, county, city, or other designated entity.”
- ▶ If landlord/tenant laws do not apply:
  - ▶ “the State must ensure that a lease, residency agreement or other form of written agreement will be in place for each HCBS participant,”
  - ▶ “the document provides protections that address eviction processes and appeals comparable to those provided under the jurisdiction's landlord tenant law.”

# What Protections Have Been Included in Approved Final Transition Plans?

- ▶ **Arkansas** incorporates existing assisted living regulations into Medicaid provider manual
  - ▶ But regulations allow without-cause evictions with 30-day notice.
- ▶ **Tennessee** requires lease agreements
  - ▶ But also references 30-day notices without mentioning criteria or appeal rights.
- ▶ **Kentucky** will incorporate federal regulatory language.
  - ▶ But it will be left to providers to “[r]esearch state laws for leases to understand how to comply” and “[d]raft lease or legally enforceable document that provides participants the same responsibilities and protections from eviction that tenants have under Ky law.”

# Many States Propose Incorporation of Federal Language

- ▶ Two problems with this method:
  - ▶ Not enough detail, e.g., what would be the terms of the residency agreement?
  - ▶ Landlord/tenant law may be a bad fit for residential facilities.
    - ▶ May authorize eviction without cause, or will list inappropriate causes.
      - ▶ E.g. TN landlord/tenant law allows termination of tenancy for failure to adequately maintain rental property.

# Some States Have Developed Model Agreements

- ▶ But these agreements may not give much guidance or support to residents.
  - ▶ Idaho: Allows for without-cause termination as long as 30-day notice is provided.
  - ▶ North Dakota: “If Tenant violates a material term of this Agreement ... , Landlord may terminate this Agreement after \_\_\_ days’ written notice. Any eviction action by Landlord shall comply with [the North Dakota landlord-tenant eviction laws].”

# Greater Protections through Administrative Hearings

- ▶ Oregon:
  - ▶ Assisted living regulations allow for eviction only under seven specific conditions.
  - ▶ Eviction can be challenged through administrative hearing.
  - ▶ Resident protections must be addressed in residency agreement.
- ▶ Montana:
  - ▶ Transition plan points to existing state regulations.
  - ▶ Only five justifications for eviction.
  - ▶ Right to administrative hearing.

# Modifications and Service Plans

- ▶ Modifications must be
  - ▶ Supported by assessed need and
  - ▶ Justified in person-centered service plan.
- ▶ Resident must consent to modification.

# Modification Must Be Supported with Significant Detail

- ▶ Identify need.
- ▶ Document previous interventions, both successful and unsuccessful.
- ▶ Include data review to assess effectiveness of modification.
- ▶ Set time limits for periodic review.

# Service Provider Cannot Develop Service Plan

- ▶ “Providers of HCBS for the individual, or those who have an interest in or are employed by a provider of HCBS for the individual **must not provide case management or develop the person-centered service plan**, except when the State demonstrates that the only willing and qualified entity to provide case management and/or develop person-centered service plans in a geographic area also provides HCBS.”

# Guidance Distinguishes Between Developing Plan, and Participating

- ▶ Beneficiary must **choose** to include provider.
- ▶ An “independent agent” must have final responsibility for “service plan functions.”
- ▶ CMS’s guidance on residents who tend to wander seems to treat service planning as a provider function.

# Is Medicaid Service Plan Realistically Able to Address Modifications?

- ▶ Medicaid service plan often is a service authorization document with no ability to consider day-to-day details of resident's life.

# What Is Relationship to Facility Service Plan?

- ▶ Most states' assisted living rules require a service plan developed with the facility's active participation.
- ▶ Ideally, these service plans are developed by the resident with assistance from the facility and others.
  - ▶ Details will vary from state to state.

# Next Steps

- ▶ CMS and states must consider service planning details.
  - ▶ Compliance with service planning regulations has not been included in transition plans, since service planning rules are not subject to transition period, but ignoring service planning is counterproductive.
  - ▶ CMS should be clear about how provider participation is allowed.
  - ▶ States and CMS should think more clearly about service planning processes, and how service planning fits in with Medicaid service plans that currently are little more than payment authorization documents.

# Opportunities for HCBS Rule

- ▶ Providers, advocates, state and federal regulatory agencies had the opportunity to work together on the development of this rule.
- ▶ Years of revisions led to a rule that was supported by AL.
- ▶ Early rollout of implementation was supported by CMS with additional guidance clarifying parts of the rule.
- ▶ On-going dialogue among stakeholders to serve best interests of MA residents of all ages.

# Heart of the HCBS “SETTINGS” Rule

- ▶ Ensure Medicaid recipients have the opportunity to live in the least restrictive setting of their choice.
- ▶ Define Home and Community-Based Setting so that nationwide same definition/standards will apply.
- ▶ Emphasizes:
  - ▶ Privacy/Dignity / Respect - locks on doors.
  - ▶ Choice - visitors any time, access to food, choice in roommate.
  - ▶ Integration into the community - free to come and go.
  - ▶ Person-Centered Care- care plans designed to meet each individual’s needs and wishes.

# Heart of Assisted Living

- ▶ Home and community-based alternative to nursing homes.
- ▶ Residents age with freedom of choice, independence, dignity, respect, privacy.
- ▶ Quality of Life as important as Quality of Care.
- ▶ Embrace Person-Centered Care.
- ▶ Right to make own decisions even if “ bad decision.”
- ▶ Balance safety and risk with freedom of choice.

# Success Stories

- ▶ Many success stories where the rule is being implemented as planned.
- ▶ Everyone trying to do the best they can.
- ▶ Some states have dedicated additional staff.
- ▶ CMS extension for meeting requirements of rule appreciated.

# Challenges

- ▶ Multiple approaches on how to comply in different states.
- ▶ Multi-state providers with same operating model in different states are being told different things.
- ▶ Paper compliance exercise and forms for remediation plans, documentation, assessments are not consistent.
- ▶ Providers hiring attorneys to handle complex/time consuming documentation requirements.
- ▶ Creating a bureaucracy that was not the intent of the rule.

# Recognition that one size does not fit all

## Customer

- ▶ Not all Medicaid recipients are the same.
- ▶ Age/Cognition/Chronic Conditions/Physical limitations/Outlook.

## National Data on Assisted Living Residents:

83% need assistance with medications

62% need assistance with bathing

46% diagnosed with cardiovascular disease

23% with depression

40% Alzheimer's or related dementia

# Not all Providers are the Same

- ▶ Offer different services: IL, AI, MC, hospice, rehab.
- ▶ Different degrees of MA participation.
- ▶ Licensed by state and have regulatory requirements to provide for safety of residents; regs may differ by levels of care, size of community.

Everyone caring for frailer residents where balancing safety and independence a challenge:

- ▶ Realities of civil lawsuits.
- ▶ New cases of criminal lawsuits.

# Broadening interpretation/applying settings rule to Non-MA residents

- ▶ Concern by providers that states are redefining the rule, and interpreting rule beyond what was intended.
- ▶ Applying settings rule to Non-MA providers.
- ▶ What will the penalty be or ability to challenge if meeting current state laws/regs?
- ▶ Some states trying to change state laws to mirror setting rule and holding providers accountable before law/regs changed.

# Integration into the community

- ▶ Providers contend:
  - ▶ Older people can be fearful about leaving the AL community:
    - ▶ 21% have had falls within 90-day time period.
  - ▶ Don't want to be seen in wheelchair, worried burden to the group.
  - ▶ AL “community” is their community - has what they need/want.
  - ▶ Whatever reason- Choice means choice NOT to go outside.
  - ▶ There will never be 100% community integration.
    - ▶ Because of people's choice.
    - ▶ Because of resident limitations.
    - ▶ Safety issues that must be balanced.

# Interpretations that conflict with intent of Rule

- ▶ Wordsmithing “access to food at all times”:
  - Means dining room needs to be open certain length of time.
  - Requiring kitchenettes, places for residents to reheat food.
- ▶ Claiming shared bathrooms violate choice of roommate.
- ▶ No visitors observed at breakfast; therefore, “visitors anytime” rule violated.
- ▶ Sr. Community for nuns who go to mass on campus cited because not integrated into the community.

# Balancing Safety with Risk

- ▶ Choose who to eat with- including eating in own room- can be choking hazard.
- ▶ Site free from gates, locked doors or other barriers. Secured outdoor space for MC, gate off a pond, safety of employees at night.
- ▶ Can't require people to sign in / out when leave community - many states require and necessary for emergency situations.

# Memory Care/ High Acuity Challenges

- ▶ Private lockable mailbox for memory-impaired residents.
- ▶ Keys to rooms for memory-impaired residents.
- ▶ Medication carts are institutional.
- ▶ Can't assess someone for self-administration of medications.
- ▶ Residents don't have to move out even if exceed care needs that can be provided under state license.
- ▶ Person-centered care plans should be the answer but requiring case manager sign-off can be a challenge.

# Unintended consequences

- ▶ Many providers want to participate in MA to help long-time residents who spend down.
  - ▶ Others have a higher % mixed populations but not the entire community.
  - ▶ Are these providers going to install mailboxes because they have 3- 5 MA residents?
- ▶ AL is consumer driven -- if residents ( or their families) feel they want/need other services or amenities, they let providers know.
- ▶ Don't think the intent of the rule was to put locks on doors or install kitchenettes that will never be used.
- ▶ Don't think intent was to force nuns to go to mass outside of their campus.
- ▶ These interpretations will reduce home and community based setting options for MA residents who will be forced to go to SNFs.

# Adding to the Implementation Challenges

- ▶ The rule was promulgated under a prior administration.
  - ▶ What does this administration think of the rule?
- ▶ Public focus of current CMS is on reducing regulations - will this have an impact?
- ▶ Future of Medicaid?
- ▶ Funding levels/ Block Grants?

# Closing Note: We are on the same page!

- ▶ As an industry we support state regulations that allow residents the opportunity to age with freedom of choice, dignity, privacy and respect.
- ▶ Assisted living care is based on individualized resident-centered care plans
- ▶ Assisted living philosophy is aligned with the heart of the settings rule.
- ▶ Balancing safety and freedom of choice for a frail senior population is always going to be a challenge.
- ▶ Continuing the dialogue will lead to a thoughtful implementation of the rule that reflects the intent we all agree upon.

# Questions / Discussion

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