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# New Medicaid Home and Community-Based Services Rules

*Understanding and Impacting  
Implementation*

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*The National Senior Citizens Law Center is a non-profit organization whose principal mission is to protect the rights of low-income older adults. Through advocacy, litigation, and the education and counseling of local advocates, we seek to ensure the health and economic security of those with limited income and resources, and access to the courts for all. For more information, visit our Web site at [www.NSCLC.org](http://www.NSCLC.org).*



- The Assisted Living Consumer Alliance (ALCA) is a national collaboration of groups and individuals working together to promote consumer safety, choice, and rights in assisted living.

# Webinar Logistics

- All attendees are on mute
  - For technical questions, use chat box
  - For substantive questions, use questions box
- E-mail [trainings@nsclc.org](mailto:trainings@nsclc.org) if unable to access webinar
- Slides and recording will be at nsclc.org

# Intro: Understand and Impact Implementation

CMS, *for the first time*, set standards to ensure Medicaid-funded HCBS are provided in settings non-institutional in nature.

This presentation and guide will provide participants with info to *understand* and *impact* transition and implementation.

# Today's Presentation:

## Understanding the Rule

- Service planning
- Standards for HCBS settings
- Qualifications for HCBS settings

## Impacting Implementation

- State transition process
- Stakeholder involvement
- Issues for advocacy

# BACKGROUND

# Rule's Intent: Ensure HCBS Provided in the Community

- Creates first-ever federal HCBS standards.
- Rule went into effect March 17, 2014.
- Applies to:

HCBS waivers

- Section 1915 (c) waivers

State-plan HCBS programs

- Section 1915 (i) programs

Community-First Choice Option

- Section 1915(k) programs

# SERVICE PLANNING



# What's in a Plan?

- Setting
- Goals and Strengths
- Services and Supports
- Risks
- Monitoring

# Can Consumers Control Who Does (and Does Not) Participate?

- Planning process includes persons chosen by the consumer.
- Consumers also choose who does not attend the planning meeting.

# Can an HCBS Service Provider Develop the Plan?

- Generally, NO.
- Exception only if provider is only entity in geographic area “willing and qualified.”
- Providers can be in attendance.
- Rules should not apply to provisional service plans.

# What Protections Ensure Plan Is “Person-Centered”?

- Understandable Style and Format
- Consent
- Appeal Rights (42 C.F.R. part 431 subpart E)

# STANDARDS FOR ALL HCBS SETTINGS

# Core Standards Apply to All Types of HCBS Settings

- **Integration with Community**
  - Setting must support full access by the consumer to the community.
- **Choice**
  - Choice among setting options.
- **Rights**
  - Rights to privacy, dignity, respect, and freedom from coercion and restraint.
- **Independence**
  - Setting must optimize ability to make life choices and must facilitate choice regarding services and supports.

# Exploratory Questions Help Guide Interpretation

- CMS: “Exploratory Questions to Assist States in Assessment of Residential Settings”
  - **Integration:** Do the individuals in the setting have access to public transportation?
  - **Choice:** Can the individual identify other providers who render services?
  - **Rights:** Are schedules of individuals for PT, OT, medications, diet, etc., posted in a public area for all to view?
  - **Dignity:** Does the staff talk to other staff about an individual as if the individual was not present or within earshot of other people in the setting?

# STANDARDS FOR RESIDENTIAL CARE FACILITIES

# Does the Rule Allow for Provider-Controlled Residential Settings?

- Additional standards must be met:
  - Protection from eviction
  - Privacy rights
  - Freedom of choice
  - Right to receive visitors
  - Physical accessibility

# What Eviction Protections Must Be Provided?

- Lease or other written agreement.
  - Every consumer
  - Specific living unit
- Protections against eviction at least as strong as state landlord-tenant law.

# What Privacy Rights Apply?

- Lockable entrance doors.
- Keys held by “appropriate staff.”
- Choice of roommates (where applicable).

# What Rights Are Included in Freedom of Choice?

- Furnish and decorate unit.
- Control schedule and activities.
- Access to food at any time.
  - 24 hours a day
  - More than just snacks

# What Are a Consumer's Rights to Accept Visitors?

- Any visitor the consumer chooses.
- Any time of day, including overnight.
  - Within limits of lease to avoid “visitor” who moves in.

# Can These Standards Be Modified?

- Must first attempt alternative strategies.
- Specific assessed need must be included in service plan.
- Informed consent of consumer.
- Periodic review to determine if modification still necessary.

# QUALIFICATION AS AN HCBS SETTING

# Disqualified for HCBS: Institutional Settings

## Disqualified: Institutional

- Institutional settings:
  - Nursing homes
  - Hospitals
  - Institutions for mental diseases
  - Intermediate care facility for persons with intellectual disabilities

## Disqualified: “Presumed” Institutional

- Location with “qualities of an institutional setting”:
  - Facility providing inpatient institutional
  - On the grounds of, or adjacent to a public institution

# More on Settings “Presumed” Institutional?

- Setting has the effect of isolating individuals receiving Medicaid HCBS from broader community.
- CMS will apply heightened scrutiny.
- CMS will look for “strong evidence” setting is home and community based.

# HCBS Payment Can Most Likely Be Made for CCRCs

- CCRC
  - Includes independent living units, assisted living and an nursing home.
- CMS: the isolation risk in CCRCs is limited “since CCRCs typically include residents who live independently in addition to those who receive HCBS.”

# Isolation from Community Is Key Factor in Disqualification

- Isolation is likely:
  - In a gated or secured “community”
  - Multiple settings located together and operated by the same provider

# Disqualification of Non-Residential Settings

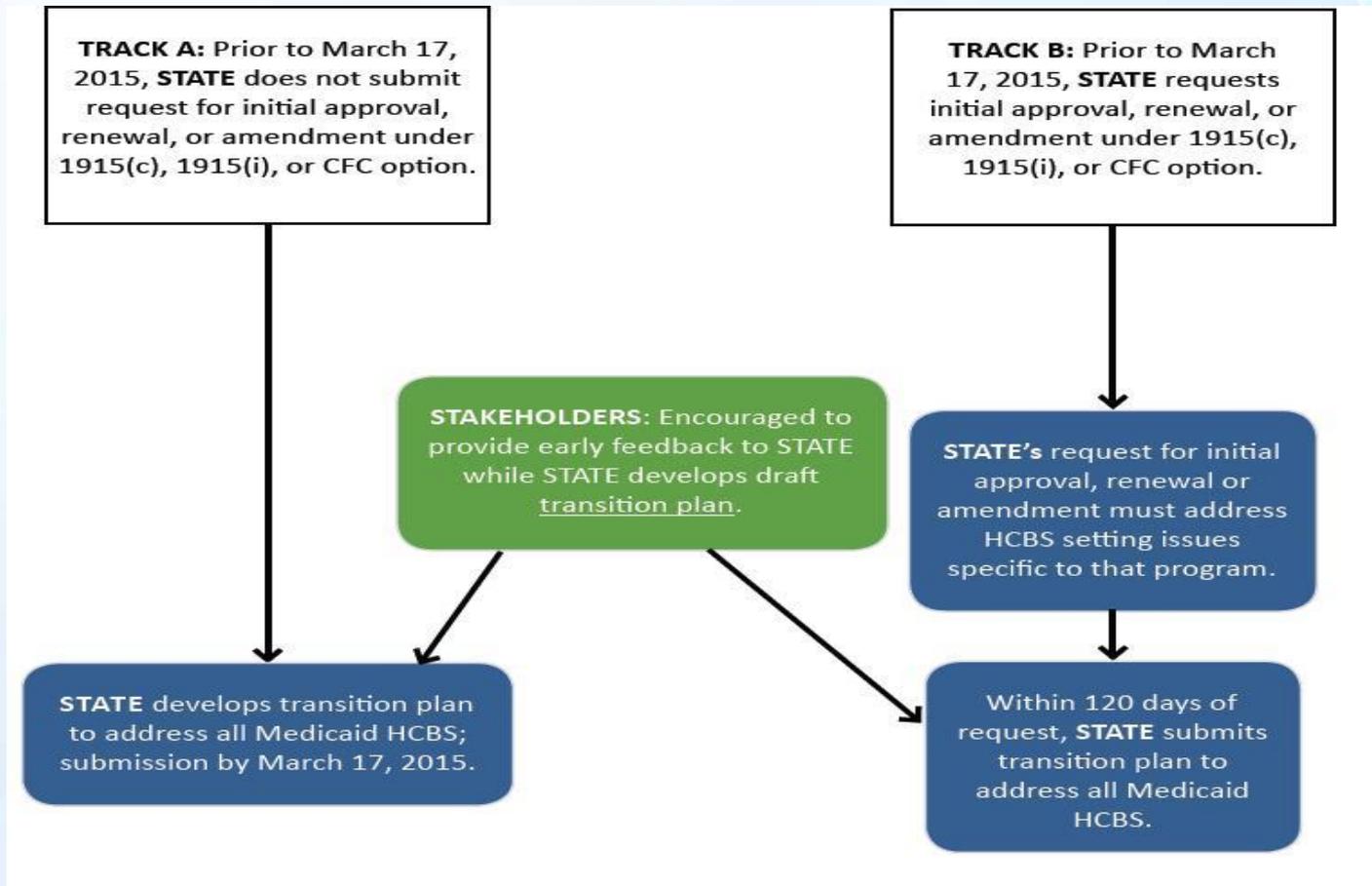
- CMS will issue further guidance.
- Non-residential HCBS provider may be disqualified:
  - if consumer's residence is out of compliance with the HCBS setting regulations, even if HCBS is not provided at the residence.

# STATE TRANSITION PROCESS AND STAKEHOLDER ENGAGEMENT

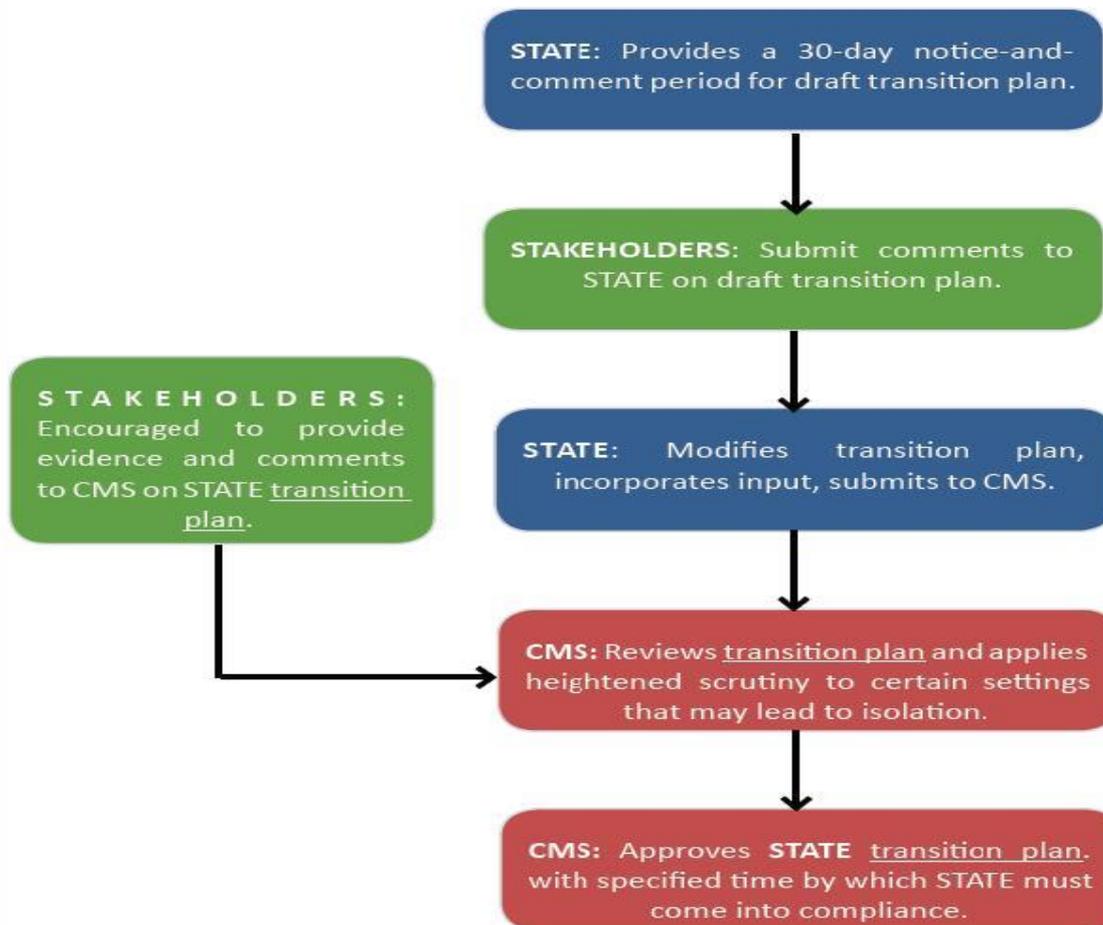
# Standards Will Be Phased In

- This is a big year!
- States will assess settings and draft a transition plan.
- Transition plan detail how the standards apply.
- Stakeholders *can* and *should* get involved in the assessment and transition plan process.

# Transition Process Differs Depending on State



# Stakeholders Encouraged to Be Involved Throughout Transition Development



# With One Year, Now Is Time for Stakeholder Engagement

- Key points where **STATE** should hear from **STAKEHOLDERS**:
  - **Assessment**: Feedback to state as it develops process to ensure compliance with HCB setting requirements.
  - **Transition Plan**: Commenting to state on draft plan detailing transition process.
  - **Heightened Scrutiny**: Providing evidence to CMS as the agency applies heightened scrutiny to settings.

# This Is an Important Year in Multi-Year Process

- CMS will approve transition plans of up to five years.
  - Length of transition period depends on different state circumstances.
- CMS expects states to transition to new settings requirements in as brief a period as possible.

# UNANSWERED QUESTIONS, AND ISSUES FOR ADVOCACY

# How Will Rules Apply to Non-Residential Settings?

- Non-residential provider may be disqualified due to consumer living in non-compliant setting, even though HCBS are not provided at residence.
  - 79 Fed. Reg. at 2,960.

# Guidance Forthcoming on Non-Residential Settings

- Is this good or bad news for adult day care providers?
- Attitudes of residential care facilities over the past few years may be illustrative.

# Possible Lessons from CMS's Optional Tool for Residential Settings?

- Setting in residential area, or commercial?
- Access to broader community.
  - Access to information about activities outside setting?
  - Access to public transportation?
  - Wi-Fi available?

# More Possible Lessons

- Dignity
  - Residents called by name, or as “hon” or “sweetie”?
  - Meals
    - Disposable plates and silverware?
    - Assigned seats at meals?

# Residential Standards Applying to Residents Regardless of Payment Source

- Regulations generally referring to “individual” or “individuals.”
- Provision pertaining to written lease-type agreements applies specifically to “each HCBS participant.”

# Why Facility-Wide Application of Standards Makes Sense

- Would a non-institutional setting discriminate by payment source?
  - e.g., Access to food at any time.
  - Right to receive visitors.
  - Lockable doors.

# How Will Rules Be Enforced?

- To great extent, no existing mechanism.
  - State makes assurances to CMS regarding beneficiaries' health and welfare.
    - For residential care facilities, state often references existing state licensure standards.

# Quality Improvement

- State commits to quality improvement based on collected data.
- Data is:
  - Aggregate.
  - Not easily accessible to public.

# Compare to Federal Nursing Facility Standards

- Formal certification of facilities, or “distinct parts” of facilities.
  - Standards applying to all residents within certified facility.
- Annual inspections.
- Remedies based on scope and severity of violations.

# Many Questions to Be Answered

## Re: Enforcement

- Consumers will need some enforcement mechanism to make these standards a reality.
- Thoughtful, persistent advocacy will be required.

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