

HCBS Settings Rule

Workshop 2: Leases and Money

SC DEPARTMENT OF DISABILITIES AND SPECIAL NEEDS

MAY 9, 2018

Introduction

In 2014, the CMS issued the HCBS “Settings Rule”

- Code of Federal Regulations (including 42 C.F.R. § 441.301)

All States are required to fully comply by March 17, 2022.

- DHHS and DDSN have worked toward full compliance since 2014.

This presentation provides responses to issues raised by providers and other stakeholders in recent webinars/meetings.

17 Issues To Address Through Workshops

*bold denotes priority issues

- 1. Autonomy
- **2. Co-Location**
- 3. Day Services
- 4. DOL Posters
- **5. Food**
- 6. House Rules
- 7. Keys
- **8. Lease**
- 9. Money
- 10. Person-Centered Planning
- 11. Programmatic Mitigation
- 12. Service Plans
- 13. Setting Selection
- 14. Site-Specific Assessment
- 15. Staff Selection
- **16. Visitors**
- **17. Compliance Action Plan Completion**

Scheduled Workshops

- | | |
|--------------------------------|---|
| 1. May 7, 2018 10:00 AM | Food and Visitors |
| 2. May 9, 2018 10:00 AM | Leases and Money |
| 3. May 14, 10:00 | Keys DOL Posters Autonomy Person-Centered Planning |
| 4. May 16, 10:00 | Day Services Service Plans Setting Selection Staff Selection |
| 5. TBD 10:00 | Corrective Action Plan Completion |

Training Currently In Development

Human Rights Committee Training on HCBS Settings Rule

Training for Parents and Community – Partnering with Able SC and Family Connection

Individual Rights and Responsibilities Training

Board of Directors Training on HCBS Settings Rule

Philosophy

HCBS Settings Rule is built on a person-centered/community integration philosophy and aims to improve the life experiences of those receiving waiver services.

- **Person-centered philosophy** promotes the belief that people with disabilities are people first; they have the same rights as people without disabilities. As people, through listening and discovering, each person can help those around him/her learn how they want to live and what supports are needed to help them move toward a life they consider meaningful and productive.
- **Community integration philosophy** promotes the belief that every person deserves an opportunity to live, work and play in a community of his/her choice and in a way that reflects his/her own vision for life. People should be supported to optimize their personal, social, and vocational competency to live successfully in the community.

Health and Safety

The HCBS Settings Rule's general default is to maximize individuals' access to their own home and their community in ways that are meaningful to them.

The HCBS Settings Rule may create challenges for providers as they learn to manage what is important to the person, what is important for the person and the proper balance between the two.

Providers must be aware that HCBS Settings Rule compliance can be obtained without jeopardizing the health and safety (important for) of individuals. Some individuals may require restrictions due to the assessed impact of their disability on their everyday access.

Setting “Qualities”

The HCBS Settings Rule specifies that Home and Community-based Settings are required to have certain “qualities.” Examples of those “qualities” **include, but are not limited to:**

- “Facilitates individual choice regarding services and supports, and who provides them.”
- “Units have entrance doors lockable by the individual, with only appropriate staff having keys to doors.”
- “Individuals have the freedom and support to control their own schedules and activities, and have access to food at any time.”

The required “qualities” may only be modified on an individual basis when supported by a specific assessed need and justified in the person’s plan.

Modifications should be focused on the health and welfare of the person.

Modification of Required Quality

When a modification of a required “quality” is necessary, the following must be present:

- (1)** Identification a specific and individualized assessed need.
- (2)** Documentation of the positive interventions and supports used prior to any modifications to the person-centered service plan.
- (3)** Documentation of less intrusive methods of meeting the need that have been tried but did not work.
- (4)** Inclusion of a clear description of the condition that is directly proportionate to the specific assessed need (i.e., the modification is in line with the need).

Modification of Required Quality (Con't)

- (5) Inclusion of regular collection and review of data to measure the ongoing effectiveness of the modification.
- (6) Inclusion of established time limits for periodic reviews to determine if the modification is still necessary or can be terminated.
- (7) Inclusion of the informed consent of the individual.
- (8) Inclusion of an assurance that interventions and supports will cause no harm to the individual.

Additional requirements are noted in DDSN Directive 532-02-DD:
Human Rights Committee

1. Lease

HCBS Settings Rule

In a provider-owned or controlled residential setting:

“The unit or dwelling is a specific physical place that can be owned, rented, or occupied under a legally enforceable agreement by the individual receiving services, and the individual has, at a minimum, the same responsibilities and protections from eviction that tenants have under the landlord/tenant law of the State, county, city, or other designated entity.”

Department of Health and Human Services, CMS (2014)

Lease

HCBS Settings Rule, continued.

“For settings in which 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, and that the document provides protections that address eviction processes and appeals comparable to those provided under the jurisdiction's landlord tenant law.”

Department of Health and Human Services, CMS (2014)

Lease

DDSN Standards

“A legally enforceable agreement (lease, residency agreement, or other form of written agreement) is in place for each person in the home setting within which he/she resides.”

“The agreement provides protections that address eviction process and appeals comparable to those provided under South Carolina’s Landlord Tenant Law. (S.C. Code Ann. § 27-40-10 et. seq.)”

5/4/18 HCBS Workgroup Question

Q: What could realistically be included in an “other form of written agreement?”

A: CMS has not provided guidance DDSN could locate on this form of documentation.

Similar to a lease or residency agreement, the requirements for HCBS Settings Rule compliance (eviction process and appeals) should be included.

Also see <http://www.scjustice.org/brochure/landlord-tenant-law-south-carolina/> and South Carolina’s Landlord Tenant Law S.C. Code Ann. § 27-40-10 et. seq.

Lease

Type & Terms

The type of each lease depends on who owns the residence. A sample lease agreement is available (see DDSN Directive 250-09-DD).

“Landlord tenant laws may allow landlords to set reasonable limits as long as the limits are not discriminatory or otherwise deny rights granted to tenants under the state law. In a provider-owned or controlled setting, the individual’s freedom to furnish and decorate sleeping or living units may contain limits within the scope of the lease or agreement.”

Department of Health and Human Services, CMS (2014)

5/4/18 HCBS Work Group Questions

Q: Could a provider “kick out” (actual words in the lease) a resident without some type of process involving SCDDSN, the person legally responsible for the resident and possibly others. The lease says the landlord can evict a resident with 30 days’ notice for any reason. So a provider could empty all their homes where people have signed a lease with a 30 day notice?

A: It would be unlikely and quite rare for a provider to shut down with only 30 days’ notice and evict all individuals. SCDDSN would of course become involved because alternate residential habilitation services would need to be arranged and funding considered.

5/7/18 Workshop Chat

Questions on Leases

Q: Does DDSN have any guidance related to leases in CTH Is? What are the legal implications of a lease for a caregiver? Are there any specific requirements for the lease per CMS?

A: CMS requires legally enforceable lease or residency agreement or other form of written agreement. A lease is not specifically required by CMS but may be a tool used to document the person's rights as a tenant. Caregiver implications would be the same as for any other property owner. CTH I caregivers should consult with their home owners' insurance company about implication of liability. CMS requires that the document provides protections that address eviction processes and appeals comparable to those provided under the jurisdiction's landlord tenant law.

Q: Do DSS foster homes have leases for foster children 18 years and older? (I know it is not an HCBS setting)

A: That is correct. These are not HCBS settings so the HCBS Settings Rules does not apply. Adults in DDSN care are not placed.

5/7/18 Workshop Chat

Questions on Leases

Q: I think DDSN should consider generating a sample lease.

A: See DDSN 250-09-DD published October 2017.

Q: (Topic was Lease). I don't have a problem with contacting my own attorney - but - there are a lot of providers - do you really think it's a good idea to potentially have everyone doing things or interpreting things differently?

A: A sample lease agreement was published in October 2017 in DDSN 250-09-DD.

Q: Does the lease need to be recorded/filed at the courthouse?

A: Leases are not filed at the courthouse.

5/4/18 HCBS Work Group Questions

Q: Residents in a QPL CTH II are *involuntarily placed* there by the state. The QPL contracts with the state for their care as a Qualified Provider. Why is the state not a part of this lease agreement?

A: To be clear, residents are not involuntarily placed in a group home by the state. Individuals have a choice in selecting residential providers. The QPL provider would have property ownership and therefore a direct relationship with the person for a lease or residency agreement.

Q: How can a person with an Intellectual Disability and adjudicated (incompetent to make certain decisions) not to be able to make decisions on their own (court appointed guardian or Power of Attorney granted to another) in a group home enter into a “legally enforceable contract”?

A: In line with HCBS Settings Rule requirements to involve the person in decisions involving them, it would be advisable to request of the guardian that they involve the person in the decision-making process. The scope of the guardian’s decisions would vary depending on the guardianship papers.

5/4/18 HCBS Work Group Questions

Q: Who would sign the lease? Resident, parent, other responsible family member, guardian? What if the guardian or other responsible individual will not sign the “lease” because they have concerns about the health and safety of their charge living in this open environment?

A: Court ordered guardianship defines the authority of a guardian. If an individual does not have a specific decision to be made by the legal guardian, the POA, or is not adjudicated, the person would retain their individual rights to sign the agreement. If restrictions to make independent decisions are in place, one of these parties would logically sign.

Concerns about health and safety regarding the perceived “open” environment should be addressed through communication, training on dignity of risk, review of House Rules, and review of HRC documentation when a health or welfare issue causes a need for modification of HCBS quality requirements.

Q: What is the legal recourse of a resident or the provider if either party objects to a decision to evict or leave?

A: This would be handled as it would be in the community right now through legal enforcement.

2. Money

HCBS Settings Rule

“The setting is integrated in and supports full access of individuals receiving Medicaid HCBS to the greater community, including opportunities to seek employment and work in competitive integrated settings, engage in community life, control personal resources, and receive services in the community, to the same degree of access as individuals not receiving Medicaid HCBS.”

Department of Health and Human Services, CMS (2014)

Money

Degree of Control

Waiver participants' degree of control over personal resources must match that of the degree of control of individuals not receiving waiver services. In other words, waiver participants have the right to choose what to do with their own money just like everyone else.

Participants can choose to spend, save, keep, give away, invest, or otherwise direct their money. The free exercise of this right cannot be restricted. However, it may be modified through properly made modifications to the individual's person-centered ISP.

See 42 CFR § 441.530(c)(4)(vi)(F)

Money

Representative Payees

The “control personal resources” requirement “does not restrict the opportunity of individuals with representative payees to choose to participate in Home and Community-Based Services (HCBS) waivers.”

“Additionally, individuals with other types of fiduciaries, such as conservators, guardians, trustees, etc. are not precluded from participation in HCBS waivers.”

Department of Health and Human Services, CMS (Dec. 2014))

What are the duties of the representative payee?

A payee acts for the beneficiary. A payee is responsible for everything related to benefits that a capable beneficiary would do for himself or herself. We encourage payees to go beyond just managing finances and be actively involved in the beneficiary's life. The following lists the required duties of a payee.

<https://www.ssa.gov/payee/faqrep.htm>

Required Duties of the Rep. Payee:

- Determine the beneficiary's needs and use his or her payments to meet those needs;
- Save any money left after meeting the beneficiary's current needs in an interest bearing account or savings bonds for the beneficiary's future needs;
- Report any changes or events which could affect the beneficiary's eligibility for benefits or payment;
- Keep records of all payments received and how you spent and saved them;
- Provide benefit information to social service agencies or medical facilities that serve the beneficiary;
- Help the beneficiary get medical treatment when needed;
- Report to us any changes that would affect your performance or your continuing as payee;
- Complete written reports accounting for your use of funds; and
- Return to us any payments to which the beneficiary is not entitled.

<https://www.ssa.gov/payee/faqrep.htm>

The Beneficiary wants to spend money on things that do not meet my approval. What is my responsibility?

“Your main duty is to make sure the current needs of the beneficiary are met. Once you have met these needs, he or she has a right to some discretionary spending money, even if you do not approve of all of his or her choices...”

<https://www.ssa.gov/payee/faqrep.htm>

CMS Suggests Three Questions:

Does the individual have a checking or savings account or other means to control his/her funds?

Does the individual have access to his/her funds?

How is it made clear that the individual is not required to sign over his/her paychecks to the provider?

<https://www.medicaid.gov/medicaid/hcbs/downloads/exploratory-questions-re-settings-characteristics.pdf>

Suggested Considerations

How long does it take for someone to get their money in order to make a desired purchase?

- Example, consider the time from the decision to buy a new pair of shoes to the point they have the money to shop.

Does anyone else, other than the person, have to “approve” of how the person’s money will be used; can a desired purchase/action be prohibited by anyone other than the person?

- Example, individual wants a \$200 TV, bills are already paid and there is \$800 available.

Next HCBS Workshop

May 14, 10:00

Keys
DOL Posters
Autonomy
Person-Centered Planning

May 16, 10:00

Day Services
Service Plans
Setting Selection
Staff Selection

TBD 10:00

Corrective Action Plan Completion

Workshop Slides and Q and A Response Postings

<http://www.ddsn.sc.gov/QualityManagement/Pages/HomeandCommunityBasedServicesSettingsRule.aspx>

[Relocation Stress Syndrome](#)

[South Carolina HCBS Summary of Findings](#)

AUTONOMY, EMPOWERMENT & SUPPORTED DECISION-MAKING

[FAIR TREATMENT: HOW CAN WE SUPPORT THIS OUTCOME?](#)



HCBS IMPLEMENTATION RESOURCES:

- [HCBS ANSWERS TO PROVIDER QUESTIONS](#)
- [HCBS ANSWERS TO PROVIDER QUESTIONS HR Food Visitors](#)

THE END

Questions? Comments? Concerns?

Please contact:

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