DDSN Executive Memo

To: **Executive Directors, DSN Boards**
CEOs, Contracted Service Providers
Directors of Day Programs
Directors of Residential Programs

From: **Associate State Director Susan Kreh Beck, Ed.S., LPES, NCSP**

Date: **June 20, 2019**

RE: **Update: CMS Home and Community-Based Settings Regulation Implementation and Provider Compliance Action Plans (CAPs)**

The purpose of this memo is to provide an update on the status of DDSN's actions to ensure statewide compliance with the Home and Community-Based Services (HCBS) Settings Regulation by March 2022. Details include: status of providers' Compliance Action Plan (CAP) reviews; DDSN Technical Assistance; final acceptance of CAPs; and meeting the milestones of the Statewide Transition Plan (STP). Additionally, this memo summarizes the Centers for Medicare and Medicaid Services (CMS) March 2019 guidance changes on HCBS Settings Regulation issues of defining "settings that have the effect of isolating" and heightened scrutiny requirements.

I. BACKGROUND

The HCBS Settings Regulation was issued by CMS in January 2014 and became effective March 2014. With the initial issuance of the Settings Regulation, states were expected to be fully compliant with the provisions therein by March 2019. Subsequently, CMS issued an extension of the date for full compliance to March 2022. Attachment A to this Memo summarizes the key provisions of the Settings Regulation.

In December 2016, SCDHHS engaged the Public Consulting Group, Inc. (PCG) to develop a review instrument to measure providers' compliance with the HCBS Settings Regulation and conduct on-site reviews of settings required to be compliant. The PCG reviews were completed between February and October of 2017.

In response to the PCG reviews, for any review question that, provider-wide, was scored 80% or lower, a CAP documenting the actions to be taken to achieve sustainable compliance was required. At the time of the review "co-location" was used to define settings which were presumed to have the qualities of an institution. Providers were asked to document how each of these "co-located" settings overcame the institutional presumption. CAPs were submitted to DDSN in October 2018.

II. ADJUSTMENT TO COMPLIANCE ACTION PLANS DUE TO MARCH 2019 CMS GUIDANCE

In late March 2019, CMS issued new guidance regarding settings presumed to have institutional qualities because these settings are presumed to have the effect of isolating. After careful consideration of the March 2019 guidance, the state's proposed definition of these settings has changed. The state's definition of settings presumed to have the effect of isolating now includes the following:

- A Community Residential Care Facility (CRCF) that was formerly an ICF/IID, and is physically located next to another CRCF that was also formerly an ICF/IID

- A HUD 811 apartment complex
- A setting with a ***locked*** fence around the property
- Three (3) or more HCBS (waiver) settings clustered together operated by the same provider

The state's definition is not intended to imply that these settings have the effect of isolating; rather, these settings are in a "higher risk category" which is created by the presumption that the setting has the effect of isolating. This higher risk category requires a higher level of review. The higher level review is to determine if the setting overcomes the presumption of isolation through evidence demonstrating waiver participants have full access to the community.

Statewide, of the 1321 DDSN-sponsored settings, 10 settings are those on the grounds of or adjacent to a public institution and, based on the new definition, 117 settings create the presumption of isolating. In total, there are 127 setting presumed to have the qualities of an institution, which is less than 10% of all DDSN-sponsored settings subject to HCBS Regulations (1321).

III. STATUS UPDATE ON REVIEW OF COMPLIANCE ACTION PLANS

All CAPs submitted by providers have been reviewed. Reviews were completed independently by two DDSN staff members then jointly discussed by the staff members for concurrence.

The CAPs submitted varied widely in content, completeness, and quality. In some instances, it was evident that providers were making strides to reach full compliance. The most effective plans incorporated continuous training and systems for monitoring the implementation of key processes necessary for compliance, as well as incorporated strategies to ascertain the participants' experiences as a measurement of compliance.

Some CAPs were noted to be missing needed templates or supporting information. The least effective plans utilized a "once and done" approach to training and monitoring of key processes necessary for compliance and/or relied heavily on checklists, handbooks, calendars, documentation and other management tools as the sole source of "proof" of compliance.

As a result of the change in the state's definition of setting that have the effect of isolating, some CAPs will need adjustments to add/subtract templates for settings that are presumed to have institutional qualities. Providers operating settings that are presumed to have institutional qualities will be notified of their specific settings within the next few weeks.

IV. COMPLIANCE ACTION PLAN ACCEPTANCE

Over the next few months, DDSN will be developing a Technical Assistance (TA) plan for each provider based on their CAP. These plans will be shared by phone, Skype or in-person. DDSN staff will be available to assist providers to update or improve their CAPs, update internal policies or procedures as a basis for compliance, and/or structure ongoing internal mentoring and monitoring systems for compliance. Any assistance provided will focus on the sustainability of the compliance actions to ensure that the requirements become a natural, ingrained part of service delivery. Each provider's CAP must thoroughly document the actions to be taken in all settings to achieve sustainable compliance.

Of the 64 DDSN providers, 39 (61%) did not have any settings with presumed institutional qualities (on/adjacent public institution & effect of isolating). When these providers' CAPs thoroughly reflect the necessary remediation actions to achieve sustainable compliance with the Regulation across all of their settings, the CAP will be "accepted" by DDSN. While compliance actions have likely already begun, once a CAP is "accepted," providers must complete the actions outlined in the CAP to achieve compliance with HCBS settings requirements. Subsequently, all of the

providers' settings will be subject to monitoring to ensure the implementation of the CAP through the results of Licensing Reviews, Contract Compliance Reviews, and day and residential observations.

V. OVERCOMING PRESUMPTION OF INSTITUTIONAL QUALITIES AND HEIGHTENED SCRUTINY PROCESS

The Settings Regulation, as released in January 2014, notes that if states seek to include settings that are presumed to have institutional qualities (on/adjacent to public institution & effect of isolating) in Medicaid HCBS programs, a determination must be made by CMS that the setting is home and community-based and does not have the qualities of an institution. This determination by CMS is called a "heightened scrutiny review."

For settings that are presumed to have institutional qualities because the setting has the effect of isolating, the March 2019 guidance issued by CMS now allows states to **avoid** having a determination made by CMS when the state determines that the setting can fully implement all of its HCBS remediation steps to comply with HCBS regulatory criteria by **July 1, 2020**. **DDSN is focused on supporting providers to achieve settings compliance by July 1, 2020.**

The decision that a setting can fully implement all remediation steps to comply by July 1, 2020 will be initially determined by DDSN based on the robustness of the CAP and other available data. These decisions must be made no later than March 1, 2020. SCDHHS will confirm DDSN's assertion. Once confirmed by SCDHHS, a list of these settings will be presented for public notice and comment, then submitted to CMS. These settings will **avoid any further review**.

All settings on/adjacent to a public institution (10) **and** settings that have the effect of isolating that **will not** achieve compliance by July 1, 2020 will be subjected to heightened scrutiny review. The heightened scrutiny review process, while subject to change, will begin with the preparation of an evidence package for each setting. DDSN will work with each provider to prepare the evidence packages. The contents of the evidence package is subject to change but may include:

- PCG Assessment
- Thorough and robust CAP
- Photographs
- Current residential/day observation
- Recent (defined as FY 2019) or upcoming (defined as no later than FY 2020) Contract Compliance and Licensing reviews
- Results of participant interviews (to be conducted by trained interviewers

Collected evidence rebutting the presumption of a settings institutional qualities will be presented for state level review. Evidence packages will be reviewed by a state level review team comprised of SCDHHS and DDSN staff members. The state level review will not necessarily, but may, entail traveling to the setting for on-site review or observation. A rubric will be utilized to determine if the setting overcomes the presumed institutional qualities and currently is, or can be, compliant with the Regulation. Should the state level review team agree that the evidence does not rebut the presumption of the settings institutional qualities, the additional evidence can be submitted for an additional review. Should the state review team be unable to reach agreement, a trained panel comprised of representatives from various stakeholder groups will be consulted.

For settings on/adjacent to a public institution (10), once the state level review team determines that the setting has overcome the institutional presumption, information about the setting will be presented for public notice and comment. Any comments received about the setting and the evidence package will be submitted to CMS. **DDSN**

will begin working with providers to prepare evidence packages for these settings in July/August 2019.

For settings that have the effect of isolating that **will not** achieve compliance by July 1, 2020, once the state level review team determines that the setting has overcome the institutional presumption, information about the setting will be presented for public notice and comment. Information about the setting and any comments received from the public about the setting will be submitted to CMS by **October 31, 2020**. For these settings, using the information and comments submitted, CMS will select a sample of the settings to be reviewed. Upon notification by CMS that a setting has been selected for review, evidences packages will be submitted.

VI. CLOSING

DDSN is committed to maintaining a collaborative, supportive partnership throughout the implementation of the HCBS Settings Regulation. As such, over the next few weeks and months, DDSN will:

- Notify providers' who are operating settings which, based on the definition, are presumed to have institutional qualities; and
- Contact all providers to discuss their CAP and any technical assistance that may be recommended.

It is recommended that over the next weeks and months, you, as a provider:

- Review available Settings Regulation resources available at:

  https://www.ddsn.sc.gov/about-us/divisions/quality-management/home-and-community-based-waiver-settings-rule

  https://msp.scdhhs.gov/hcbs/

- Incorporate information HCBS Settings Regulation requirements into staff trainings so that staff become familiar with the general concepts.

- Continue implementation of your CAP.

Should you have questions or concerns, please contact Janet Priest at 803-898-9620 or jpriest@ddsn.sc.gov.

Attachment

Attachment A

Background Information on the HCBS Settings Regulation

The Home and Community-Based Services (HCBS) Settings Rule was issued by the Centers for Medicare and Medicaid Services (CMS) in January 2014 and was effective March 2014. With the initial issuance of the Settings Rule, states were expected to be fully compliant with the provisions therein by March 2019. Subsequently, CMS issued an extension of the date for full compliance to March 2022.

Key Provisions

The Rule requires that all home and community-based settings meet the following criteria:

- The setting is integrated in and supports full access of individuals to the greater community;
- Is selected by the individual from among setting options;
- Ensures individual rights of privacy, dignity and respect, and freedom from coercion and restraint;
- Optimizes autonomy and independence in making life choices; and
- Facilitates choice regarding services and supports and who provides them.

The Rule includes additional requirements for provider-owned or controlled home and community-based residential settings which are:

- The individual has a lease or other legally enforceable agreement providing similar protections;
- The individual has privacy in their unit including lockable doors, choice of roommates and freedom to furnish or decorate the unit;
- The individual controls his/her own schedule including access to food at any time;
- The individual can have visitors at any time; and
- The setting is physically accessible.

The Rule notes that any modification to the additional requirements for provider-owned or controlled home and community-based residential settings must be supported by a specific assessed need and justified in the person-centered service plan.

The Rule excludes certain settings as permissible for the provision of Medicaid HCBS (e.g., Nursing Facilities, ICFs/IID). Additionally, it identifies other settings that are presumed to have institutional qualities, and do not meet the threshold for Medicaid HCBS. These settings include:

- Settings in a public or privately-owned facility that provides inpatient treatment;
- Settings on the grounds of , or immediately adjacent to a public institution; or
- Settings that have the effect of isolating individuals receiving Medicaid HCBS from the broader community of individuals not receiving Medicaid HCBS.

The Rule notes that if states seek to include settings that are presumed to have institutional qualities in Medicaid HCBS programs, a determination must be made by CMS, based on information submitted by the state, that the setting is home and community-based and does not have the qualities of an institution.

The Rule includes a transition process for states to ensure that the Rule requirements are met; each state must submit its plan for transitioning to full compliance to CMS.