

NASDDDS

National Association of State Directors of Developmental Disabilities Services
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Dear Ralph,

I am writing to you at the request of several state agencies regarding the CMS guidance on the HCBS settings rule.

In the document transmitting the Qs and As, CMS states that “..... CMS does not intend to issue service-specific guidance at this time; however, we will continue to respond to questions from stakeholders and offer technical assistance to states.” This letter is to communicate two questions generated by a number of states with a request for a written definitive response.

The first issue is regarding question 7 of the recently released Qs and As.:

Question: *Can a day service that has both HCBS waiver participants and Intermediate Care Facility (ICF) residents provide Medicaid-covered HCBS in an Intermediate Care Facility for Individuals with Intellectual Disabilities (ICF/IID)?*

Answer: *If the service is rendered by the ICF/IID, it is institutional and cannot be covered by HCBS. If, however, the service is provided by a licensed day service operated separately from the ICF/IID but in the same building, it will be presumed to have institutional characteristics. If the state believes that the setting meets the HCB settings requirements and does not have the characteristics of an institution, the state can follow the process to provide evidence and demonstrate that the setting can or will comply with the HCB setting requirements of the regulations. Other parties can submit information to CMS regarding whether the setting has the qualities of HCB settings or of an institution. If the Secretary, through this heightened scrutiny, determines that the setting does comply with the HCB settings requirements and does not have the qualities of an institution, the service can be covered under the HCBS waiver. If the state does not submit evidence or a transition plan to bring the setting into compliance, the presumption stands and the state can claim for federal matching funds for services in those settings presumed not to be HCBS only for the period contained in the approved transition plan.*

The statement in the response that “*Other parties can submit information to CMS regarding whether the setting has the qualities of HCB settings or of an institution,*” while intended to allow stakeholders to challenge a state’s request for heightened scrutiny, is being interpreted by provider agencies as a means of appeal to CMS to request heightened scrutiny for facilities that the state has determined do not meet the rule. During our monthly call, Barb Edwards made clear that this is not the intent of the response but agreed that the written answer leaves open the possibility of this interpretation.

We are therefore requesting written clarification that when a state determines that a program or facility does not meet the rule, that the decision rests with the state and that only when a state is

requesting heightened scrutiny to include a facility in the waiver as meeting the rule, is CMS accepting information from “other parties.”

The second issue is about putting limits on the size, location and characteristics of facilities. States have also asked us to assist them on this issue which is coming up in their transition planning sessions.

A quote from one provider testimony represents the challenge states are facing:

*Based on this and other statements by CMS, ADDP believes it is the intent of CMS to promote and enable states to utilize **an outcome based definition of home and community based settings**, as opposed to the DDS draft Transition Plan which we believe has the potential to focus disproportionately on location, geography, physical characteristics and size.*

We believe that CMS has not communicated that there should be any restriction on the type of standards states employ to define home and community based settings but neither has there been any guidance that would acknowledge the value of objective criteria when developing standards. As you know, the developmental disability program has a long history of using size (e.g. no more than 4), geography (e.g. prohibiting isolation), and physical characteristics (e.g. standard residential characteristics) and location (e.g. not juxtaposed to other facilities, industry, or institutions). The use of objective criteria to determine whether a setting is home and community based is the only feasible approach when states are funding thousands of settings. Outcome based criteria would have to be measured on an ongoing basis for each person to determine ongoing participation in the program – an approach that is inefficient and unsustainable over time. Outcome based criteria alone, without the concomitant structural/size requirement is inefficient and unsustainable.

We are therefore requesting written clarification that not only acknowledges that states have the responsibility to establish standards for HCBS services but also endorses the use of objective criteria as part of the standards for participation.

Our members are coming to meet with you and other leaders on Feb. 4th - in two weeks. The second of these issues is included on the agenda.

This letter is a formal request for a written response to these two issues. We would understand if you would prefer to hold your response until after that meeting.

We are all looking forward to our meeting in February.

Sincerely,

Nancy Thaler



Executive Director