

# Home and Community-Based Services Settings Rule: Resolving Differences Between State Assisted Living Licensure Requirements and HCBS Settings Rule

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The federal Center for Medicaid and Medicare Services (CMS) promulgated regulations in 2014 which established standards for the settings in which Medicaid-reimbursed home and community-based services (HCBS) may be provided (42 C.F.R. § 441.301). These regulations also pertain to the settings in which individuals who receive HCBS may reside, even if the Medicaid HCBS are provided in a different setting. ***The federal regulations focus on community integration, individual choice and privacy, and other factors that relate to an individual's experience of the setting as being home-like and not institution-like.*** These regulations set a floor for Medicaid reimbursement, but states may elect to set more stringent requirements. States have been charged with developing a transition plan to ensure that state Medicaid programs come into compliance with the new HCBS expectations by March 2022. As of November 2017, seven states (Arkansas, Delaware, Kentucky, Oklahoma, Tennessee, Washington, and the District of Columbia) have received final CMS approval of their Transition Plans.

## **Many states have identified licensure and other regulations for assisted living (AL) communities that do not fully comport with the new federal regulations for Medicaid new federal regulations for Medicaid HCBS.**

In the Statewide Transition Plan Toolkit for Alignment with the HCBS Final Regulation's Setting Requirements released on September 5, 2014, CMS specifies that states should fully assess the extent to which the state's regulations, policies, and licensing requirements comport with the final rule in the Statewide Transition Plan (STP). Additionally, most of the CMS responses to submitted STPs have discussed the need for states to take a systemic approach to addressing compliance by assessing the regulatory and policy requirements, including licensure.

### **Common areas of discrepancy between state and federal regulations include:**

- **Staffing:** Some state regulations require or encourage co-located or adjacent AL communities and nursing facilities or hospitals to co-mingle staff, or assign staff from one setting to back up another. Often these practices involve licensed staff in shortage areas, such as nurses. CMS guidance on co-located settings discourages this practice of shared staff or administrative interdependencies.<sup>1</sup> These types of state regulations and practices may harm states' and AL communities' efforts to overcome the presumption that co-located or adjacent settings are institutional in nature. Should a state determine it is essential to maintain shared staff models in certain circumstances, AL communities should demonstrate this practice is used only as needed due to staffing shortages or other external factors, staff are cross-trained and meet all HCBS qualifications, and the sharing of staff does not negatively impact the experience of residents.

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<sup>1</sup> Guidance on Settings That Have the Effect of Isolating Individuals Receiving HCBS from the Broader Community, pg. 3 <https://www.medicare.gov/medicaid/hcbs/downloads/settings-that-isolate.pdf>, accessed 11/29/2017

- **Level of care and discharge:** Most state regulations place strict requirements on the level of support and care needs that may be provided by AL communities. State licensure requirements may require resident discharge if their support or care needs reach a specified level (for example, if a person requires additional medical tasks that must be performed by licensed personnel). Some Medicaid agencies have expressed concern that HCBS settings should not discharge residents based on service need – creating a risk either of AL communities violating their licensure or state nurse practice act requirements or of AL services no longer being available at all to Medicaid-covered residents. Absent state alignment of requirements, one option may be for the AL community to request that the HCBS care manager conduct a re-assessment of the individual’s needs and convene a person-centered planning team meeting to determine how best to meet the resident’s changing needs. The HCBS settings regulations do require individuals in provider-owned settings to have protections from discharge with at least the same level of eviction protection as local landlord-tenant law. Therefore, the AL community resident agreements should reflect this requirement, as well as the role of the person-centered planning process in determining an appropriate setting.
- **Special units:** Some state regulations require that memory care or dementia units follow specific protocols, including controlled egress and other restrictions on autonomy for all who live in the unit. CMS regulations require that these restrictions be implemented only in accordance with a specific assessed need on an individual basis, not be based on diagnosis alone, and must be reflected in the person-centered plan. Additionally, CMS requires that people living in the setting who do not have need for restrictions have their rights and autonomy protected, including the ability to avoid such restrictions. For example, in dementia care units with controlled egress, CMS suggests that people who do not experience wandering behaviors should have no restrictions on their movements. One option is that AL communities provide access to a key card or code to exit through a controlled door, while residents who have a health and safety need for the restriction would not be able to exit without support. AL communities should work with HCBS care managers to ensure that any restrictions implemented for a group of individuals (as required by the state) are appropriate to the people being served, reflected in each person’s plan of care specific to their assessed needs, documented on a periodic basis, and revisited regularly to determine if the restriction is still necessary for the individual resident.
- **Case management and person-centered planning procedures:** Many states require a separate service plan be developed by the AL community, but in some of these states, the AL community care plan is not informed by the person-centered planning process conducted by the HCBS care manager (e.g., some states may currently exclude the AL community provider from the person-centered planning process, not share the person-centered plan with the AL community, or largely defer person-centered planning to the AL community). In these situations, AL communities should: (1) seek clarity from states on their expectations for the AL community’s role in person-centered planning; and (2) ensure that providers understand and, where appropriate, are involved in the essential elements of compliance, including documentation and data collection. This is particularly important regarding any modifications to the additional requirements for provider-owned or -controlled residential settings that may be needed for individual residents.

## States have taken multiple approaches when faced with licensing requirements, statutes or regulations that contradict or are silent on the requirements in the HCBS Settings rule.

CMS has allowed states in some situations to avoid the need to immediately amend state regulations which do not fully comport with the new HCBS regulations by accepting instead state modifications to Medicaid-specific provider agreements, provider manuals or other provider guidance. This provides states with a more timely and less burdensome pathway to assuring compliance with federal regulations.

### The approaches approved by CMS include:

- Incorporation of federal requirements into state regulations, perhaps with modifications or additional detail. (Oklahoma)
- No change to silent or incongruous state regulations, with additional information provided through the state Medicaid assisted living provider manual and official provider communication. (Delaware, Arkansas)
- A promise in the transition plan to update state regulations in the future. (Tennessee, District of Columbia)

Arkansas found three instances where state regulations were out of compliance with the rule.

- State regulations require that keys, codes, and other opening devices be provided to all residents without a credible diagnosis of dementia.<sup>2</sup>
- State regulations allow limitations on visiting hours by the AL community<sup>3</sup>
- State regulations require three balanced meals with in between snacks.<sup>4</sup>

For each of these, the state will not change the regulatory language, but has included the language of the federal regulation in the Medicaid Assisted Living Provider Manual and will issue Medicaid Provider Informational Memos stating that facilities must come into compliance with the federal rule.

Oklahoma included a slightly modified version of the federal rule regarding lockable doors into state regulations by adding a requirement that each unit must have an attached, lockable compartment within each unit for valuables. The state also noted that overnight visitation is allowed as permissible by the Landlord/Tenant agreement.

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<sup>2</sup> Arkansas Department of Human Services, Home and Community-Based Services (HCBS) Statewide Settings Transition Plan, pg. 72, <https://www.medicaid.gov/medicaid/hcbs/downloads/ar/ar-approved-plan.pdf>, accessed 11/29/2017.

<sup>3</sup> Ibid., pg. 71.

<sup>4</sup> Ibid., pg. 70.