



CONFLICT FREE

Home and Community Based Services

Aquila Jordan, J.D./MPA

Director, HCBS Programs

April 14, 2015

Introduction

- HCBS Final Rule – 42 CFR 441.301
 - Person-Centered Planning
 - Conflict Free HCBS System
 - HCB Settings Final Rule
- Conflict Free System
- Mitigating Conflicts of Interest
 - Guardianship
 - Targeted Case Management
 - Independent Assessment
- Best Practices



Summary of the CMS Final Rule

- Citation: 42 CFR 441.301 (Contents of HCBS Waiver)
- Issued: January 2014
- Effective: March 17, 2014
 - Exception: within 5 years for the Settings Transition Plan
 - States have until March 17, 2015, to complete a comprehensive transition plan to come into compliance with the final rule for settings
- Basic Changes:
 - Person-Centered Support Planning
 - Conflict Free System in HCBS Programs
 - HCBS Settings Transition Plan
 - Combine HCBS programs, age groups, and disabilities
- Application:
 - Applies to 1915(c), 1915(i), 1915(k) (in regulation)
 - Applies to 1115 Demonstration (at HHS Secretary's discretion)



AD ASTRA

Why the change?

To ensure individuals receiving long-term services and supports through HCBS have full access to the benefits of community living and the opportunity to receive services in the most integrated setting appropriate

To enhance the quality of HCBS and provide protections to participants

To establish an outcome-oriented definition that focuses on the nature and quality of individuals' experiences



What does the New Rule say?

In General, the new rule includes 5 standards that all home and community-based services need to meet.

1. Integrated Setting Supports Access to Community (“to the same degree” as other people)
2. Individual Choice of Settings
3. Individual Rights (privacy, dignity and respect, and freedom from coercion and restraint)
4. Autonomy (optimizes but does not regiment individual initiative, autonomy and independence)
5. Choice Regarding Services and Providers

- 42 CFR 441.301(c)(4)(i)-(v)

Highlights of the Final Rule

1. Defines, describes, and aligns home and community-based setting requirements across three Medicaid authorities
2. Defines person-centered planning requirements for persons in HCBS settings under 1915(c) HCBS waivers
- 3. Establishes Independent Assessment and Provider Qualifications to Mitigate Conflicts of Interest**
4. Allows states to combine target populations across age, disability, and conditions

- 42 CFR 441.301

April 22, 2015



1 Rule. 3 Issues

Person-Centered Planning

Supporting People

- Integrated Service Planning
- Person-Centered Support Plans
- Limiting Restraints, Restrictions, Seclusion

Conflict Free System

Mitigating Conflicts

- Targeted Case Management
- Guardianship & DPOA/MDPOA
- Separation of Services and Assessment
- System Improvements

HCB Settings Transition Plan

Assessing Settings

- Non-residential Settings (Day/Work)
- Residential Settings
- Provider Assessment
- Quality of Life
- Person's Rights and Freedoms

HCBS Conflict Free Design Elements

- **Separation of Duties.** Eligibility is separated from direct service provision
- **Clear Role Definitions.** CM cannot make financial or health-related decisions on consumer's behalf. Guardian/DPOA paid to provide services cannot develop the integrated service plan and direct the consumer's care
- **Robust Monitoring/Oversight.** Monitor eligibility and service provision practices to ensure consumer choice and control are not compromised
- **Consumer Complaint System.** way to submit grievances and/or appeals and the State ensure they are adequately tracked and monitored
- **Administrative Firewalls.** *In limited circumstances when one entity is the only willing and able provider for providing case management and service delivery in a rural area, states must have appropriate safeguards and firewalls exist to mitigate risk of potential and the consumer must have the ability to appeal the State's determination of only one provider*



Person-Centered Plans, **CONFLICT OF INTEREST**, HCB Settings

HCBS FINAL RULE – OVERVIEW

Cathy has a killer freestyle, is a jazz
connoisseur, and just moved to
Vermont from California

General Rule

Providers of HCBS for the individual, or those who have an interest in **or are employed** by a provider of HCBS for the individual,

- must not provide Case Management or
- develop the person-centered service plan,

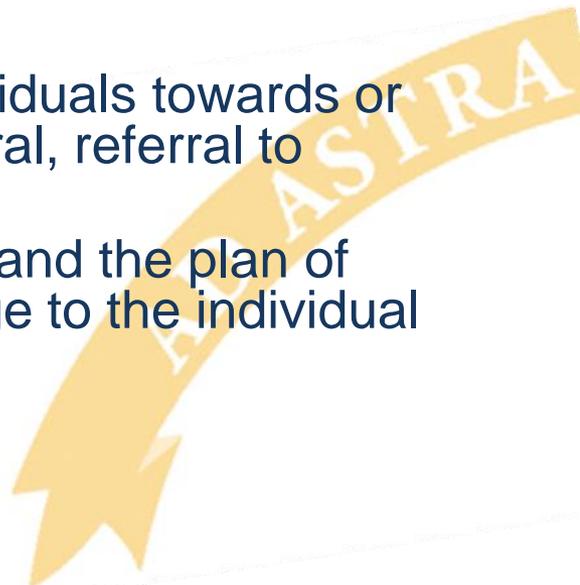
Exception: when the State demonstrates (to CMS) that the only willing and qualified entity to provide case management and/or develop person-centered service plans in a geographic area also provides HCBS.

- **42 CFR §441.301(1) (vi)**

DEFINITION

According to the Centers for Medicare and Medicaid Services (CMS), home and community-based services must be “conflict free”, which has the following characteristics:

- Separation of duties – freedom from coercion
 - Separation of case management from direct services provision
 - Separation of eligibility determination from direct service provision
- Independent – Free from potential conflicts
 - No method to coerce, incentive, or steer individuals towards or away from certain choices (such as self-referral, referral to parent/sister company for services, etc.)
 - Anyone conducting evaluations, assessment and the plan of care cannot be related by blood or by marriage to the individual or any paid caregiver.



Components of Conflict Free HCBS System

CMS has created common expectations for HCBS

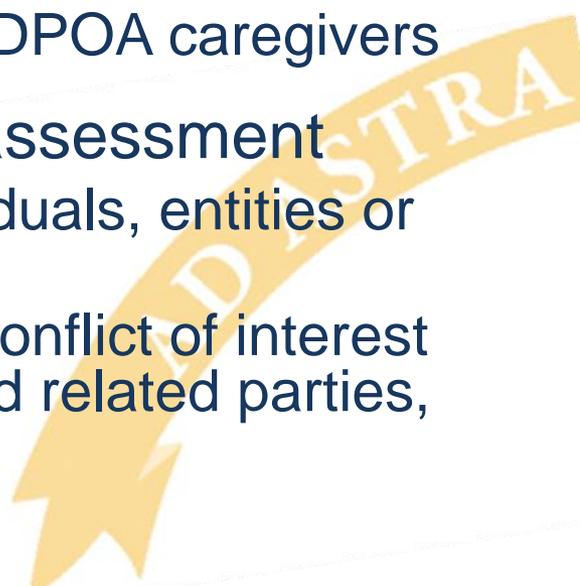
- Eligibility decisions are separate from service provision.
- No relation by blood or marriage.
- Robust oversight and monitoring.
- Clear path for tracking grievances and appeals.
 - Established for consumers to submit grievances and/or appeals to the managed care organization and State for assistance regarding concerns about choice, quality, eligibility determination, service provision and outcomes.
- Track and document consumer experience.



Conflict of Interest Standards

The Rule:

1. Prohibits providers of HCBS and those with an interest in or employed by a provider of HCBS from developing person-centered plans or integrated service plans
 - Individuals or entities responsible for person-centered plan development must be independent of the HCBS provider
 - This also applies to paid family/guardian/DPOA caregivers
2. Requires independent evaluation and assessment
 - Assessment must be performed by individuals, entities or agents that is independent
 - Independent generally means free from conflict of interest with providers of HCBS, the individual and related parties, and budgetary concerns



The Problem

Conflicts can arise from incentives for:

- either over- or under-utilization of services;
- subtle problems such as **interest in retaining the individual as a client rather than promoting independence;**
- or issues that **focus on the convenience of the agent or service provider rather than being person-centered.**

Many of these conflicts of interest may not be conscious decisions on the part of individuals or entities responsible for the provisions of service.



The Problem (cont.)

- an increased possibility for conflict of interest exists when
 - the assessor is also the provider because s/he may be more likely to recommend treatments and care options that are more expensive, whether or not they are necessary.
 - Even when the case management and provider (i.e. homemaker services or group home) units are separate but contained in the same organization, the risk is high
 - Over time, as reimbursement models changed, providers had incentive to get individuals to choose more complex, expensive services



Guardianship/DPOA, Targeted Case Management,
Independent Assessment

MITIGATING CONFLICTS OF INTEREST

April 22, 2015

A yellow ribbon graphic with the text "AD ASTRA" written in white, curving upwards from the bottom right towards the center of the slide.

AD ASTRA

Areas of Potential Conflict

- The person responsible for the individual's healthcare and financial decisions also
 - Directs the Person-Centered Planning Process
 - Signs the Integrated Service Plan of Care, which determines the types of services and number of hours a person receives
 - Hires, Fires, Manages, Trains and Monitors Direct Service Workers
 - Chooses him or herself as the Direct Service Worker
- This conflict affects
 - Guardians who self-direct care and are paid or want to be paid to provide supports
 - Durable Power of Attorneys who self-direct care and are paid or want to be paid to provide supports
 - Provider responsible for staff and agency-directed supports that also is paid to provide the supports
 - Targeted Case Managers who are providing direct supports

Provider Qualifications

In general, an HCBS provider, its employees and related entities, cannot provide service planning or case management for a consumer. HCBS requires conflict of interest standards.

At a minimum, an assessor, case manager, and agent determining eligibility cannot be:

1. related by blood or marriage to the consumer;
2. related to any paid service provider for the consumer;
3. financially responsible for the consumer;
4. empowered to make the consumer's financial or health related decisions; or
5. hold a financial interest in any entity paid to provide "care" for the consumer.

Designated Representative

For individuals who do not have legally appointed guardians, an individual may authorize a **designated representative** to represent the individual for the purpose of making personal or health care decisions:

- ❑ The state must put safeguards in place to ensure that the representative uses substituted judgment on behalf of the individual.
- ❑ The state must have policies in place that address exceptions to using substituted judgment when the individual's wishes cannot be ascertained or when the individual's wishes would result in substantial harm to the individual.
- ❑ The state must allow someone freely chosen by the individual to act as that individual's representative unless the state can document evidence justifying rejection of the chosen representative due to inability or not acting in accordance with the state's policies.

Definition

A Designated Representative is defined as:

- 1) a parent, family member, guardian, advocate, or other person
- 2) who is authorized in writing by the consumer or legal guardian to
- 3) make determinations for HCBS on
 - the consumer's assessed care needs,
 - where he or she prefers to live and
 - which home and community based services will be delivered and
 - by whom the services will be delivered.

Note: Individuals who chose to participant-direction are presumed to have the ability to direct their own care.

Requirements

A designated representative is required for individuals who:

- Self-direct services;
- Have a court-appointed guardian or activated durable power of attorney; and
- Guardian/DPOA is the paid direct service worker

At no other time will an individual be required to appoint a **designated representative.**

Not all individuals receiving home and community based services require a designated representative.

Guardians (KSA 59-3068)

When a court appointed guardian proposes to or does provide services to the participant, the following actions must be documented in writing and maintained in the individual's person-centered plan and file:

- Submit an Annual or Special Report to the court stating the potential conflict of interest
- Provide a copy of the file-stamped report and order stating conflict of interest has been mitigated

Note: it is the guardian's responsibility to report a potential conflict of interest. If the guardian is a paid provider for the ward, the guardian is required to report.



Guardians (KSA 59-3068, cont.)

If the court determines that all potential conflict of interest concerns have not been mitigated, the legal guardian can:

- Relinquish guardianship to continuing being paid as a provider for the ward
- Select another family member or friend or hire a direct service worker
- Select a **Designated Representative**



Designated Representative Duties

WILL:

- Approve participant-directed services provided to the person
- Hire, fire, manage, train, and monitor direct service workers, including the paid court-appointed guardian and other direct service workers.
- Represent the individual receiving services to choose service options and identify qualified providers
- Participate in the person-centered planning process and make appropriate decisions regarding participant-direction.

WILL NOT:

- Serve in any other capacity as designated representative for the court appointed guardian.
- Displace the guardian in legal and appropriate activities of a court appointed guardian including the appointment of a designated representative.
- Select services from which they financially benefit
- Be a paid care provider for the individual
- Be an employee of a service provider or a targeted case manager

Guardian/Activated DPOA . . .

Paid to provide services to the individual

MAY:

- Contribute information for the functional needs assessment.
- Contribute information for the development of the integrated service plan of care and the person-centered support plan.
- Participate fully in the ISP team as a team member.

MAY NOT:

- Override team decisions, or contributions of the designated representative.
- Determine the hours of service for which he/she will be paid
- Determine his/her rate of pay
- Sign the integrated service plan of care to authorize services
- Serve as the employer of record and hire, fire, direct or manage the other direct service workers.

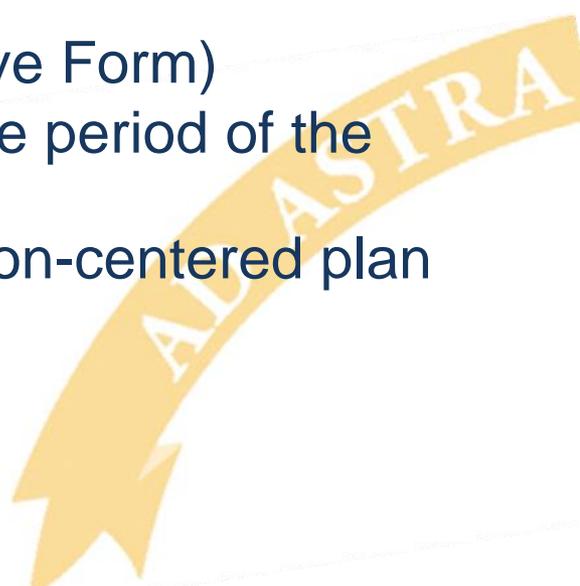
The Proposed Process

A designated representative must be appointed by

- participant who is directing his or her care or
- the court-appointed guardian or activated durable power of attorney, if he or she is also a paid care provider.

Appointment

- Must be in writing (Designated Representative Form)
- Is only effective for a year, and at least for the period of the integrated service plan of care
- Must be documented on the ISP and in person-centered plan
 - A copy must be in the person's file
- Must be appointed annually
- Must be revoked in writing

A yellow ribbon graphic with the word "ALASTRA" written in white capital letters, curving across the bottom right of the slide.

The Proposed Process (cont.)

Two Step Process

- Guardian submits Special/Annual Report
- Guardian/DPOA can complete a Designated Representative Form
 - Appoint a Designated Representative

Policy will be posted online and emailed to the HCBS listserv



Potential Conflicts

- **Assessment**

- there may be an incentive during the assessment to assess for more or less services than the consumer needs.
- The HCBS provider, its employees and related entities, cannot provide service planning or case management for the beneficiary.

- **Financial interest**

- May be more interested in a care plan that retains the consumer as a client than rather than independence.
- May not suggest outside providers for concern of lost revenue.
- May not support independence or decreased services for concern of lost income

- **Convenience**

- Provider may develop the POC that is more convenient for the provider than a plan that is person-centered.

- Adapted from Balancing Incentive Program Manual, available at: www.balancingincentiveprogram.org/resources/example-conflict-free-case-management-policies



Case Management

- **Definitions:**
 - **Case management consists of services** which help beneficiaries gain access to needed medical, social, educational, and other services.
 - **“Targeted” case management services** are those aimed specifically at special groups of enrollees such as those with **Intellectual/ developmental disabilities** or chronic mental illness.
- Case management services are comprehensive must include all of the following (42 CFR 440.169(d)):
 - (1) assessment of an eligible individual;
 - (2) development of a specific care plan;
 - (3) referral to services; and
 - (4) evaluation and monitoring activities

A yellow ribbon graphic with the Latin phrase "AD ASTRA" written in white, serif, uppercase letters. The ribbon is curved and has a decorative tail at the bottom left.

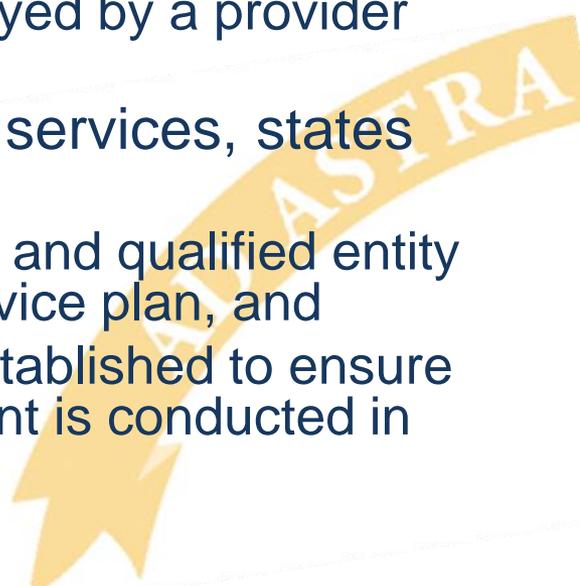
AD ASTRA

Independent Assessment & Separation of Duties

CMS Technical Guidance for 1915(c) Waivers

States must:

- Indicate whether the entities and/or individuals responsible for the development of the person-centered service plan are
 - permitted to provide other direct (non-case management) services to the waiver participant, or
 - whether they have an interest in or are employed by a provider of HCBS.
- If such entities are permitted to furnish other services, states must:
 - Explain how and why they are the only willing and qualified entity to be responsible for the person-centered service plan, and
 - Describe the safeguards that the state has established to ensure that person-centered service plan development is conducted in the best interests of the waiver participant.



CMS Technical Guidance

If States allow a service provider to develop the person-centered plan, CMS reviews the waiver to ensure the state has met the requirements and:

Described the safeguards that mitigates/address potential problems with the service providers' influence on the person-centered planning process (such as controlling choice or providers, plan's content, assessment of risk, and informing consumer of their rights) including:

- ❑ Full Disclosure, Support and Information of all Services and Providers
- ❑ Consumer's Opportunity to dispute the State's determination that there is no other entity available (willing and able)
- ❑ Direct oversight over the process or periodic evaluation by state agency
- ❑ Restricting the entity that develops the person-centered service plan from providing services without the direct approval of the state; and
- ❑ Requiring the agency that develops the person-centered service plan to administratively separate the plan development function from the direct service provider functions.

States Developing Conflict Free HCBS Systems

No clear conflict-free
template for
managed care.

Note: A Managed Care system does not violate the principle of the conflict free mandates because CMS puts in additional safeguards, reviews and expectations of states under Managed Care.

Efforts to Improve HCBS Design & Services



- **Quality Assurance**

- Other states have taken efforts to improve case management by addressing the design and effectiveness of a state's quality assurance system,
- standardizing performance measures across funding streams and disability groups,
- standardizing caseload size, and
- coordinating efforts across all disability groups.

Efforts to Improve HCBS Design & Services (cont.)

- **Funding:**

- Some states are also addressing their funding of case management by reevaluating their balances between administrative claiming, service claiming, and use of the targeted case-management funding stream.

- **Access/Availability:**

- Finally, reform efforts should be balanced against the basic principles of improving access and service availability while assuring basic safeguards, improving accountability and performance, honoring individualization, and promoting consumer choice and self-determination

What Other States are Doing...

LOUISIANA

- State makes eligibility decisions; MCO does needs assessment
- Assessors are not providers on the plan and assessment units are administratively separate from utilization review units and functions
- MCO established consumer council to monitor issues of choice.
- State oversees MCO to assure consumer choice and control are not compromised and documents consumer experiences

TEXAS

- Entities that conduct eligibility determinations and provide case management are wholly independent of the entities that provide direct services.
- State monitors providers and conducts utilization reviews to ensure individuals receives services and supports

What Other States are Doing...

- **Illinois:** the entity that determines eligibility and provides case management services are separate from the entities that provide direct services.
- **Nevada:** Case Management System is conflict free (Already in place)
- **Georgia:** GA has five long-standing waiver programs, three of which are already conflict-free. One (Georgia Pediatric Program) does not provide case management services. One other program will be conflict-free in the near future

Discussion



QUESTIONS

