# COMPLIANCE CHALLENGES & BEST PRACTICES

Providers of Medicaid Home & Community Based Services

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April 20, 2021

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## Course Outline

1. History of HCBS Waivers
2. Enforcement Actions & Penalties
3. Compliance Challenges
4. Compliance Risk Areas
5. Best Practices

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# Disclaimer

This presentation is not intended to constitute legal advice. The information provided is intended for education purposes only and does not represent the official opinion of any individual or entity.

Any examples discussed are meant as illustrative purposes only.

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# Poll Question 1:
# Who Provides Services Through Medicaid HCBS Program?

A. The majority of our services are provided through Medicaid HCBS.
B. HCBS Waiver services constitute a portion of our billed services.
C. We are a licensed HCBS provider, but provide nearly all of our services via other funding sources.
D. What's Medicaid HCBS?

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## History of the HCBS Waiver (1915 (c))

- The Home and Community Based Services waiver program was enacted by Congress in 1983 as part of the Omnibus Budget Reconciliation Act of 1981. It was authorized under 1915 (C) of the Social Security Act.
- Prior to 1981, the focus was on medical services in institutional settings.

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## History of the HCBS Waiver (1915 (c)) Cont'd

- The creation of the HCBS program stemmed from research in the early 1980s that showed:
  - A high percentage of Medicaid resources were being used for institutional LTC;
  - At least one-third of people residing in nursing facilities were capable of living at home or in the community if additional supportive services were offered; and
  - Residents in intermediate care facilities and nursing facilities reported an unsatisfactory quality of life.

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## History of the HCBS Waiver (1915 (c)) Cont'd

- The program allows states to develop home and community-based programs to meet the needs of people who qualify for institutional care but would prefer to receive their long term supports & services in their home or in the community.
- The program "waives" certain requirements of the Medicaid Act, which allows states to save money when compared with providing care in an institutional setting.

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## History of the HCBS Waiver (1915 (c)) Cont'd

- The Medicaid program requirements that states can waive include:
  - Income and resource rules – allows states to provide Medicaid services to people who would otherwise only be eligible to receive care in an institutional setting.
  - Comparability of services – allows states to make services available solely to certain groups of people.
  - Statewide applicability – allows states to target certain geographic areas of the state.

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## HCBS Program Growth

- State participation in the waiver program is optional.
- In 1982, only 6 states participated in the HCBS waiver program.
- By 1992, 48 states had developed waiver programs.
- By 1997, all 50 states plus DC had at least one approved waiver program (either Section 1915(c) or Section 1115).

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## HCBS Program Growth Cont'd

- Currently, there are over 300 HCBS programs nationwide.
- Over 2.5 million people receive HCBS through Section 1915(c) or Section 1115 waiver.
  - Fewer HCBS beneficiaries receive services under the Section 1915(i) waiver and Community First Choice program which are both state plan options.

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## HCBS Program Growth in Kentucky

- Supports for Community Living Waiver:
  - Only Medicaid waiver option for Kentuckians with intellectual and developmental disabilities until 2008.
  - 4,774 active recipients
- Michelle P. Waiver:
  - Established in 2008.
  - Does not include residential services.
  - 10,150 active recipients

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## HCBS Program Growth in Kentucky Cont'd

- Consumer Directed Option/Participant Directed Services:
  - Also established in 2008.
  - Allows individuals receiving 1915(c) HCBS Medicaid waiver services to hire their own providers for non-medical, non-residential waiver services.

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## HCBS Beneficiaries

- Beneficiaries of HCBS services include people with TBI/ABI, seniors, people with I/DD, people with physical disabilities, people with mental health disabilities, people with HIV/AIDS and medically fragile children.
- Most Section 1915(c) waiver spending (70%) is for waivers targeting individuals with I/DD.

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## Percentage of LTC Funding

- In 1990, only 4.3% of LTC expenses were associated with HCBS program.
- In 2000, it represented 18% of LTC expenses.
- According to the Long-Term Services and Supports Expenditure Report, in 2016, 57% of all Medicaid LTC spending was on HCBS services ($80.6 billion).
- HCBS spending varies by state, in 2016, states spent between 27% (MS) and 81% (OR) of their total LTC budget on HCBS.
- In 2018, joint federal and state HCBS spending totaled $92 billion dollars.

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## Services Rendered in a HCBS Setting

The services can be provided in both residential or non-residential settings.

- Case Management
- Homemaking Services
- Home Health Aid
- Personal Care
- Adult Day Training
- Respite Services
- Behavioral Modification
- Transportation

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## Waiver Requirements

States have a lot of leeway, but the federal government has provided some general guidelines.

- The combination of all service cannot cost more than the institutional alternative.
- The services must ensure the health, safety, and welfare of the service recipient.
- Provide adequate and reasonable provider standards to meet the needs of the target population.
- Ensure that services follow an **individualized & person-centered plan of care.**

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## *Olmstead v L.C.*
527 U.S. 581 (1999)

The U.S. Supreme Court found that under Title II of the Americans with Disabilities Act, states are required to provide community-based treatment for persons with mental disabilities when the state's treatment professionals determine that such placement is appropriate, the affected persons do not oppose such treatment, and the placement can be reasonably accommodated, taking into account the resources available to the state and the needs of others with mental disabilities.

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## *Olmstead v L.C.* Cont'd.

- The Court did not say that states had to accommodate everyone in non-institutional settings immediately.
- States needed to have an effective plan to provide community-based services.

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## Impact of *Olmstead* on HCBS Programs

- *Olmstead* did not involve people that lived at home, but courts have determined that people living at home should not have to be institutionalized in order to receive necessary services offered by the state.
- Courts have not allowed states to rely on budget constraints or policies designed to devote funds to other programs as a way to avoid complying with the *Olmstead* decision.

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## Department of Justice

- The Civil Rights Division of the Department of Justice provides assistance on compliance with the ADA and *Olmstead*.
- Settlements and enforcement involving waivers has led to expansion of HCBS slots in some states including, Texas, Virginia, Nebraska and Georgia.
- Michelle P. waiver established in Kentucky following a 2002 lawsuit again the state for having 3,000 people on the Supports for Community Living waiver waiting list.

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## Waiting Lists

- HCBS waivers allow states to choose how many people will be served under a specific waiver program.
- Waitlists for services exist in most states. Only AZ, DC, DE, HI, ID, MA, NJ, RI, VT and WA have no waiting lists.
- In 2018, OH, IL, FL, PA and LA each had waitlists of more than 15,000 people.

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## Waiting Lists Cont'd

- In 2018, Texas had 323,434 adults with I/DD on a waiting list for services, as well as $35,224 people with physical disabilities and 26,550 children.
- In 2020, Kentucky had 2,891 adults with I/DD on the waiting list for residential services and 7,305 adults and children with I/DD on the waiting list for all other waiver services. The average length of time on the waiting list is 7 years.
- According to Kaiser Family Foundation research, for individuals with I/DD, the average length of time on a wait list is 71 months.

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## HCBS Final Rule
### The Focus is Community and Choice

- Makes changes to the regulations implementing the HCBS programs under 1915(c), 1915(i) and 1915 (k).
- Initial implementation 2014; required states to develop transition plan to meet new standards.
- Transition period for compliance is March 2022.

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## HCBS Final Rule Cont'd.

- Allows multiple target populations to be served under one 1915(c) waiver. Previously, a 1915(c) waiver could only serve one of three target groups: elderly people, individuals with disabilities, or both; individuals with intellectual disabilities, developmental disabilities, or both; or individuals with mental illness.
  - The state must be able to demonstrate that (1) it can meet the unique service needs of all of the individuals in each target group, and (2) that each individual in the waiver has equal access to all needed services.

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## HCBS Final Rule Cont'd.

- All home and community-based services (both residential and non-residential) must be integrated and support full access to the greater community. The services must optimize autonomy and independence and allow individuals choice.
- Specific guidelines for residential settings including ensuring that an individual has a lease or other legally enforceable agreement, privacy in his/her room, choice in roommates and room furnishings/decorations, control of schedule, including food access and visitors.

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## HCBS Final Rule Challenges

- Unsafe and costly to support significantly behaviorally challenging individuals outside of an institutional setting without additional staffing and supports nearby.
- Difficult to find appropriate housing in non-congregate settings within rural communities.

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## Enforcement and Trends

- OIG Workplan
  - States are being audited for appropriate classification of administrative costs and overpayments. These findings resulted in payback of federal dollars.
  - Proper delivery and billing for personal care services – the agency noted that prior reviews "identified significant problems with States' compliance" with personal care services requirements, and that the item remains a focus for 2021.
- CMS Audits
- State Audits
- Use of value-based payment model.
- Documented focus on resident rights and personal choice.

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## Penalties

- Financial Recoupment
- Penalties
- Monitoring by State or other group
- Termination of Medicaid Provider Agreement
- Exclusion List
- Admission Moratorium
- Loss of License or Certification
- Personal liability for Executive Director

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## Poll Question 2:

What is Your Organization's Biggest Compliance Challenge?

A. Low reimbursement rates.
B. Direct care staff shortages.
C. Lack of resources/support for compliance activities.
D. Low wages for direct care staff.
E. Other.

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## Compliance Challenges

- Low reimbursement rates.
- Staffing shortages
  - Can contribute to compliance and quality issues.
  - Can make it hard to undertake corrective action.
  - Are there staff dedicated to compliance reviews?
- Low wages for direct care staff.
- Lack of policies and procedures.
- Management oversight.

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## Compliance Challenges Cont'd

- Remote locations – access, staffing, confidentiality.
- Self-directed services and services provided in host home.
- Lack of resources for compliance activities.
- Ensuring compliance message is received by all employees across organization.
- Unfunded mandates.
- Variations in state programs as well as variations in how state regulations are treated by region.

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## Compliance Challenges Cont'd

- Employee adherence to Standard of Conduct.
- Presence of Compliance Dept. at operations.
  - Internal audits.
  - Frequent "touches" by Compliance Dept.
  - EVV
  - Transition EHR
- Creating an environment where employees will call hotline or report issues.
- Balance between quality and compliance.

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## Risk Areas

- Service Documentation
  - Ensuring that services are truly self-directed and service documentation demonstrates a focus on individual goals.
  - Limitation on cut and paste notes or those that are too brief.
  - Signatures and dates.
- Record Storage and Retention.

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## Risk Areas Cont'd.

- Monitoring of financial records.
- System for tracking required trainings, Medicaid eligibility, etc.
- Balance between individual rights and responsibilities for safety of the person served, employees and other residents.

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## Risk Areas Cont'd

- Lack of internal supports and standardized processes.
- Overly restrictive environment/ensuring community access and integration.
- Social media.
- Employees.

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## Best Practices

- Training.
- Development of internal monitoring processes.
- Culture of "doing the right thing."
- Cultivating employee engagement.
- Everyday root cause analysis.
- Thorough investigation process.
- Standardization.
- Focus on quality.

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# Questions?

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