

BRIAN K. FITZPATRICK  
1ST DISTRICT, PENNSYLVANIA

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**Congress of the United States**  
**House of Representatives**  
**Washington, DC 20515**

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April 28, 2021

Melissa Harris  
Deputy Director, Disabled and Elderly Health Programs Group  
Centers for Medicare and Medicaid Services  
7500 Security Boulevard  
Baltimore, Maryland 21244-1850

Dear Deputy Director Harris:

I am writing regarding the rules applicable to individuals who receive home and community-based services (“HCBS”) under the January 2014 home and community-based settings rule. In my meetings with constituents and other interested parties my staff and I are asked about the scope of the Settings Rule. While CMS issued guidance on March 22, 2019, I ask that you please review and provide a written response to the following questions regarding the Settings Rule considering the guidance:

1. Does the Settings Rule prohibit the use of HCBS funding for farmsteads, intentional communities, and campus settings?
2. Does the Settings Rule require that an individual receiving HCBS funding first try another HCBS setting before receiving services in an HCBS compliant farmstead, intentional community, or campus setting?
3. Does the Settings Rule require that an individual receiving HCBS spend a certain percentage of their day or week (e.g., 25%) “in the community?”
4. Is a setting considered not to be isolating under the Settings Rule if all of the following are true: (a) the setting offers the individuals it serves opportunities to receive services and engage in activities in the broader community and offers to provide the supports each individual needs to access those services and activities; (b) individuals then choose whether to receive services and engage in activities in the community or at the setting; (c) the setting honors those choices; and (d) all of this is documented in the individuals’ personal plans?
5. Does the Settings Rule impose a density cap on housing for people with disabilities (e.g., that no more than 25% of a multi-unit building be occupied by individuals receiving HCBS funding)? If so, what is the density cap?
6. Does the Settings Rule limit the number of community program participants to three individuals?
7. Does the Settings Rule limit the capacity in HCBS residential settings to four individuals?
8. Does the Settings Rule limit to 25 the number of individuals who may receive day services from an HCBS provider at any one time?

These questions are arising on an increasingly frequent basis, I respectfully request your written response at your earliest convenience. Thank you in advance for your attention to this matter.

Sincerely,

A handwritten signature in blue ink that reads "Brian Fitzpatrick".

Brian K. Fitzpatrick (PA-01)  
*Member of Congress*



June 11, 2021

The Honorable Brian K. Fitzpatrick  
U.S. House of Representatives  
Washington, DC 20515

Dear Representative Fitzpatrick:

Thank you for your letter regarding the scope of the home and community-based services (HCBS) settings rule. I appreciate your concern about specific characteristics of settings in which Medicaid-funded HCBS can be delivered.

I would like to first clarify that the HCBS settings rule does not prohibit HCBS funding in farmsteads, intentional communities, and campus settings, nor does the settings rule require that individuals receive services in other setting types prior to choosing to receive services in a compliant farmstead, intentional community, or campus setting. The settings criteria contained in the regulation require that individuals receiving Medicaid-funded HCBS have the same degree of access to the community as individuals not receiving Medicaid-funded HCBS; there is no numerical threshold defining this requirement. The degree of interaction with the community should be determined by each individual, as outlined in his or her person-centered service plan.

With regard to settings that are presumed to be institutional, the March 22, 2019 guidance that you reference outlines the characteristics of settings that isolate HCBS beneficiaries from the broader community. In your letter, you outline four characteristics of home and community-based settings; however, those will not alone meet all of the settings criteria outlined in the regulation. The state must assess each setting to determine that all of the settings criteria are met in order for a setting that meets the characteristics of isolation to overcome its institutional presumption.

Lastly, CMS does not believe that there is a threshold number of individuals receiving services beneath which it can be presumed that a setting would meet the HCBS settings criteria, or above which it can be presumed that a setting would not meet the criteria. Therefore, there is no cap as mentioned in your letter on the number of individuals who can receive services in a setting. In determining a setting's compliance with the regulatory criteria, the focus should be on the experience of the individuals in the setting. This applies to both residential and non-residential settings in which individuals receive Medicaid-funded HCBS.

We continue to engage with our state partners, Medicaid beneficiaries and their families, and other stakeholders to discuss the settings criteria in the HCBS final rule. Your questions are helpful for informing this ongoing work.

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Thank you again for contacting CMS with these questions.

Sincerely,

A handwritten signature in black ink, reading "Anne Marie Costello". The signature is written in a cursive style with a large initial "A" and "C".

Anne Marie Costello  
Acting Deputy Administrator and Director