Addressing CMS Conflict-of-Interest Issues and Implications for Consumers and the Aging Network
Final Rule Conflict of Interest
Medicaid HCBS

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Today’s Discussion

• Brief summary of the HCBS Final Rule published in March, 2014

• Definition and discussion on why conflict of interest is a concern

• CMS requirements on conflict of interest

• Questions and audience discussion
Final Rule
CMS 2249-F and CMS 2296-F

Published in the Federal Register on 01/16/2014

Title:
Medicaid Program; State Plan Home and Community-Based Services, 5-Year Period for Waivers, Provider Payment Reassignment, and Home and Community-Based Setting Requirements for Community First Choice (Section 1915(k) of the Act) and Home and Community-Based Services (HCBS) Waivers (Section 1915(c) of the Act)
Intent of the Final Rule

• To ensure that individuals receiving long-term services and supports through home and community based service (HCBS) programs under the 1915(c), 1915(i) and 1915(k) Medicaid authorities have full access to 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
Input to the Final Rule

The final rule reflects:

• Combined response to public comments on two proposed rules published in the Federal register –
  – May 3, 2012
  – April 15, 2011
• More than 2000 comments received from states, providers, advocates, employers, insurers, associations, and other stakeholders
• Defines, describes, and aligns home and community-based setting requirements across three Medicaid authorities

• Defines person-centered planning requirements for persons in HCBS settings under 1915(c) HCBS waiver and 1915(i) HCBS State Plan authorities

• Defines conflict of interest provisions for 1915(c) HCBS waivers and 1915(i) HCBS State Plan authorities

• Implements regulations for 1915(i) HCBS State Plan benefit
Highlights of the Final Rule

• Provides option to combine multiple target populations within one 1915(c) waiver
• Provides CMS with additional compliance options for 1915(c) waiver programs
• Establishes five-year renewal cycle to align concurrent authorities for certain demonstration projects or waivers for individuals who are dual eligible
• Includes a provider payment reassignment provision to facilitate certain state initiatives
Conflicts of Interest Defined

- A “real or seeming incompatibility between one’s private interests and one’s public or fiduciary duties.”

Case Management Conflict of Interest

When the same entity helps an individual gain access to services and provides services to that individual, there is potential for COI in:

– Assuring and honoring free choice
– Overseeing quality and outcomes
– The “fiduciary” relationship
• A key tenet of person-centered planning -- and a key requirement for Medicaid -- is full freedom of choice of types of supports and services and individual providers except where the program has authorized restrictions (such as managed care).

• A case manager's job is to help the individual and family become well-informed about all choices that may address the needs and outcomes identified in the plan.

• Conflict of interest may promote conscious or unconscious “steering.”
Quality and Outcomes: “Self-Policing”

• Self-policing occurs when an agency or organization is charged with overseeing its own performance.

• Puts the case manager in the difficult position of:
  – Assessing the performance of co-workers and colleagues within the same agency.
  – Potentially having to report concerns to their mutual supervisor or executive director.
Incentives for either over- or under-utilization of services

Possible pressure to steer the individual to their own organization.

Possible pressure to retain the individual as a client rather than promoting choice, independence, and requested or needed service changes.
According to National Core Indicators (NCI) in one state that allows direct service providers to supply case management:

- Individuals or their representatives indicate satisfaction with their case managers.
- 90% say case manager helps with getting what they need or want.
- **But** only 33% indicate they can make changes to their services and budget if needed – versus the national average of 73%.
- **Although** the state’s system is based on full freedom of choice of case management agency, only 53% of respondents indicated they chose their case manager.
1915(c) HCBS Waiver Conflict of Interest Requirements

- Requirements at 42 CFR 431.301(c)(1)(vi)
- Person-centered service plan development cannot be performed by the individual’s provider of direct services unless there is no other willing and qualified entity available to that individual.
- Conflict occurs not just if they are a provider but if the entity has an interest in a provider or if they are employed by a provider.
- Case management is **not** considered to be a direct service in conflict with person-centered planning
When Conflict of Interest is Present, the State needs to:

- Demonstrate to CMS that the only willing and qualified case manager for the individual is also, or affiliated with, a direct service provider.
- Provide full disclosure to participants and assurances that participants are supported in exercising their right of free choice in providers.
- Describe individual dispute resolution process.
- Assure that entities separate case management and service provision (different staff).
- Assure that entities provide case management and services to the same individual only with the express approval of the state.
- Provide direct oversight and periodic evaluation of safeguards.
Conflict of Interest

• The requirements listed are the minimum; states may impose additional ones.

• CMS is actively engaged in conversations with states regarding situations that arise as states submit applications and renewals, about how states will meet these requirements.
All of the requirements of 1915(c) apply.

Additional requirements at 42 CFR 441.730(b)

Direct service providers may not determine eligibility – this applies to financial and functional eligibility.

Individuals or entities that perform assessments or provide case management services cannot:

– Be related by blood or marriage to the individual;
– Be empowered to make decisions for the individual; or
– Have a financial interest in any entity paid to provide care to the individual.
Conflicts of Interest Under 1915(k): Basics

- Requirements at 42 CFR 441.550(c)
- Not directly connected to COI requirements for 1915(c) or 1915(i).
- Individuals or entities providing case management (developing person-centered service plan and/or assessment) cannot be:
  - Related by blood or marriage to the individual or a paid caregiver
  - Financially responsible for the individual
  - Empowered to make health-related decisions
  - Individuals who would benefit financially from service provision
  - Providers of that individual’s State Plan HCBS
Providers of State Plan HCBS can provide case management only when:

- The state demonstrates that they are the only willing and qualified entity/entities available to the individual;
- The state devises conflict of interest protections, including separation of assessment/planning and HCBS provider functions within entities; and
- Individuals are provided with a clear and accessible alternative dispute resolution process.
Conflict of Interest and Managed Care Entities (MCEs)

- MCEs can provide case management and perform functional assessments.
- BUT: If MCEs do operate direct LTSS services and provide case management, the state must demonstrate to CMS that they are the only willing and qualified case manager. If the MCE contracts but doesn’t operate or own direct services, it is not considered a conflict of interest for the MCE to perform case management.
- MCEs cannot determine eligibility for programs. If an MCE performs direct assessments that result in scores that determines level of care (LOC), the state must perform representative sampling to ensure accuracy of LOC.
- Appeals process must be in place to address decreases in care with the State Medicaid Agency.
Final Points

• Case management is considered to be inclusive of person-centered service planning and/or assessments. Case management alone is not a conflict of interest.

• States may elect to have more stringent requirements than those found in CMS regulations. This is the state’s prerogative as long as not conflicting with a Federal Medicaid regulation.

• “Willing and Qualified” providers are defined at an individual and population level by the state and may take into consideration:
  – Language and communications
  – Specialty expertise needed for effective assessment and/or planning for a given population
Questions?
For more information

More information about the final regulation is available:

http://www.medicaid.gov/HCBS

A mailbox to ask additional questions can be accessed at:

hcbs@cms.hhs.gov