

# Improving HCBS Waivers through Public Comment

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# Housekeeping

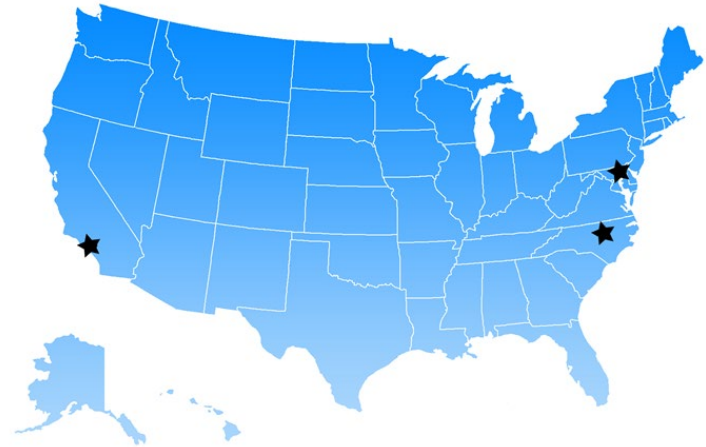
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- All attendees have been muted
- Slides were sent out in advance to those registered
  - Slides will also be available with the recording that is sent in a post-webinar email
- Please use the Q&A function for questions
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# About the National Health Law Program

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- National non-profit law firm committed to improving health care access, equity, and quality for underserved individuals and families
- State & Local Partners:
  - Disability rights advocates – 50 states + DC
  - Poverty & legal aid advocates – 50 states + DC
- National Partners
- Offices: CA, DC, NC
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# NHeLP's Equity Stance

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Health equity is achieved when a person's characteristics and circumstances — including race and ethnicity, sex, gender identity, sexual orientation, age, income, class, disability, health, immigration status, nationality, religious beliefs, language proficiency, or geographic location — do not predict their health outcomes.

<https://healthlaw.org/equity-stance/>

# Today's Outline

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- Introduction to Section 1915(c) waivers
- Commenting-Why and How?
- Navigating the Application
- Common Waiver Issues

# Today's Goal

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- You do not have to understand everything about a waiver to comment
- Describing how a waiver does or does not work for you is valuable information and effective commenting
- Depth of information today may be more than you need, or less
  - Ask questions!
- Goal: learn to navigate a waiver document and resources to get the level of information you want to help with comments and other advocacy

# Section 1915(c) Waivers

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- Common mechanism for states to provide a defined set of services to a target population
- Allows a state to:
  - provide HCBS to a limited number of people,
  - Maintain a waitlist and choose how to do so, and
  - provide different services to those enrolled in the waiver than in Medicaid generally
- Complements Medicaid services under the state plan
- States may offer similar HCBS programs through Section 1115 demonstrations or may have other HCBS programs like Community First Choice/1915(k)





# Section 1915(c) Waivers

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- Variety across states and even within a state
  - Often have multiple 1915(c)s, sometimes across agencies
- States have flexibility in how they design the waiver
- Centers for Medicare & Medicaid Services (CMS), the federal Medicaid agency, approves applications and amendments
- Application does not always match how the waiver functions in reality

# Resources:

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- NHeLP & Grassroots Project Papers:
  - [Commenting on Section 1915\(c\) HCBS Waivers: A Guide for Common Issues](#)
  - [Overview of Key HCBS Provisions in the Medicaid Access Rule](#)
- NHeLP Papers:
  - [Opportunities for Public Comment on HCBS Assessment Tools](#)
  - [Paying Family Caregivers: State Options, Limitations, and Policy Considerations](#)
- CMS
  - [Application for a § 1915\(c\) Home and Community-Based Waiver, Instructions, Technical Guide and Review Criteria](#)
  - [State Waivers List](#)

# Section 1915(c) Comment Requirements

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- Public comment of at least 30 days before submitting a proposed change to CMS
  - Some changes can be retroactive but not common
- State must:
  - Summarize public input on the waiver
    - Section 6.I
  - Explain why any comments were not adopted
- Often only see the summary in the approved waiver

# Ch- Ch- Ch- Changes!

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- Current waiver application is outdated
- Does not incorporate many of the changes over the past decade or so, such as:
  - HCBS Settings Rule – long implementation period
  - Medicaid Expansion
  - Access Rule – See [Overview of Key HCBS Provisions in the Medicaid Access Rule](#)
- CMS 1915(c) Technical Guide last updated 2019
- Expect the Application to be revised substantially in the next few years to reflect Access Rule and Settings Rule requirements

# Commenting on Waivers

# Why Comment?

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- Change the waiver!
- States do not always fully understand how a waiver works on the ground
- Structured opportunity for feedback on waiver issues
  - State is expected to respond
  - Funnels information to CMS
- Basis of advocacy to CMS about waiver issues and state responsiveness
  
- Note: if the waiver is being amended, the amendment will be summarized in section 2 (in the first few pages)

# How to Comment

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- All comments are serve a purpose
- There is no “right” way to comment
- Keep comments organized – consider a template
- You do not have to comment alone!

# Tips for Effective Comments

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- Most effective when you can tie together:
  - State choice in a waiver
    - Including choice not to do something
  - How it causes problems or limits access to the community
  - An example of what this looks like on the ground
  - A solution
  - Why that solution is allowed in the waiver



# Navigating the Waiver

# Common Issues

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- Eligibility – who can get into the waiver?
  - Reserved capacity
- Services:
  - Design, including who may provide
    - Paid family caregivers
  - Limits – hours, how services may be combined, etc.
- Cost limits
  - Overall cost limits
  - Individual budgets
- Person-centered planning processes
- Rates

# Navigating Waivers: The Basics

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- Very long – but all the same, with clear structure
  - CMS Technical Guide is arranged just like the waiver application
- Once you know where to go, you can get to it easily
- Basic Structure:
  - Appendix B: Eligibility
  - Appendix C: Services
  - Appendix D: Person-centered planning and service delivery
  - Appendix E: Participant direction
  - Appendix F: Participant rights
  - Appendix G: Participant safeguards
  - Appendix I & J: Rate & Cost Neutrality

# Appendix B: Participant Access & Eligibility

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- B-1: Target group: who is in and out?
  - Age
  - Level of care
  - Further targeting
- B-3: Number served by the waiver and reserved capacity
  - Reserved capacity for leaving institutions, age transitions, emergency placement, military families?
- B-3-f: Waitlist process
- Commenting:
  - Are people left out of the target group?
  - Need for reserved capacity?
  - Changes to the management of the waitlist process?

# Appendix B: Participant Access & Eligibility

- B-4: Medicaid Eligibility Groups Served in the Waiver
- Commenting:
  - Are groups left out?
    - Ex) Should the state include workers with disabilities?
  - Are income limits too low?

## Appendix B: Participant Access and Eligibility

### B-4: Eligibility Groups Served in the Waiver

a. 1. **State Classification.** The state is a (*select one*):

- §1634 State
- SSI Criteria State
- 209(b) State

2. **Miller Trust State.**

Indicate whether the state is a Miller Trust State (*select one*):

- No
- Yes

b. **Medicaid Eligibility Groups Served in the Waiver.** Individuals who receive services under this waiver are eligible under the following eligibility groups contained in the state plan. The state applies all applicable federal financial participation limits under the plan. *Check all that apply:*

Eligibility Groups Served in the Waiver (excluding the special home and community-based waiver group under 42 CFR §435.217)

- Low income families with children as provided in §1931 of the Act
- SSI recipients
- Aged, blind or disabled in 209(b) states who are eligible under 42 CFR §435.121
- Optional state supplement recipients
- Optional categorically needy aged and/or disabled individuals who have income at:

*Select one:*

- 100% of the Federal poverty level (FPL)
- % of FPL, which is lower than 100% of FPL.

Specify percentage:

- Working individuals with disabilities who buy into Medicaid (BBA working disabled group as provided in §1902(a)(10)(A)(ii)(XIII) of the Act)
- Working individuals with disabilities who buy into Medicaid (TWWIA Basic Coverage Group as provided in §1902(a)(10)(A)(ii)(XV) of the Act)
- Working individuals with disabilities who buy into Medicaid (TWWIA Medical Improvement Coverage Group as provided in §1902(a)(10)(A)(ii)(XVI) of the Act)
- Disabled individuals age 18 or younger who would require an institutional level of care (TEFRA 134 eligibility group as provided in §1902(e)(3) of the Act)

# Appendix B: Participant Access & Eligibility

- B-2: Individual Cost Limit
- B-6: Evaluation/Reevaluation of Level of Care
- Commenting:
  - Too restrictive?
  - Process for level of care does not properly reflect the standard?
    - Assessment tools
  - Is there institutional bias?

## Appendix B: Participant Access and Eligibility

### B-2: Individual Cost Limit (1 of 2)

a. **Individual Cost Limit.** The following individual cost limit applies when determining whether to deny home and community-based services or entrance to the waiver to an otherwise eligible individual (*select one*). Please note that a state

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may have only ONE individual cost limit for the purposes of determining eligibility for the waiver:

- No Cost Limit.** The state does not apply an individual cost limit. *Do not complete Item B-2-b or item B-2-c.*
- Cost Limit in Excess of Institutional Costs.** The state refuses entrance to the waiver to any otherwise eligible individual when the state reasonably expects that the cost of the home and community-based services furnished to that individual would exceed the cost of a level of care specified for the waiver up to an amount specified by the state. *Complete Items B-2-b and B-2-c.*

The limit specified by the state is (*select one*)

- A level higher than 100% of the institutional average.

Specify the percentage:

- Other**

Specify:

- Institutional Cost Limit.** Pursuant to 42 CFR 441.301(a)(3), the state refuses entrance to the waiver to any otherwise eligible individual when the state reasonably expects that the cost of the home and community-based services furnished to that individual would exceed 100% of the cost of the level of care specified for the waiver. *Complete Items B-2-b and B-2-c.*
- Cost Limit Lower Than Institutional Costs.** The state refuses entrance to the waiver to any otherwise qualified individual when the state reasonably expects that the cost of home and community-based services furnished to that individual would exceed the following amount specified by the state that is less than the cost of a level of care specified for the waiver.

*Specify the basis of the limit, including evidence that the limit is sufficient to assure the health and welfare of waiver participants. Complete Items B-2-b and B-2-c.*

# Checking In!

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- Remember – take what you need!
- You can use this as a starting point to do **any** of the following:
  - Get more familiar with your state's waivers
  - Know more so you can ask more
    - You may learn about limits (or lack of them) for services
  - Dive deep into what your state is doing
  - Understand what states choose to do in versus the federal limits
  - Equip yourself to push back on states
  - Whatever helps you most!

# Appendix C: Participant Services

## Appendix C: Participant Services

### C-1: Summary of Services Covered (1 of 2)

a. **Waiver Services Summary.** List the services that are furnished under the waiver in the following table. If case management is not a service under the waiver, complete items C-1-b and C-1-c:

Service Type	Service		
Statutory Service	Community Navigator		
Statutory Service	Community Networking		
Statutory Service	Day Supports		
Statutory Service	Residential Supports		
Statutory Service	Respite		
Statutory Service	Supported Employment		
Supports for Participant Direction	Financial Support Services		
Other Service	Assistive Technology		
Other Service	Benefits Counseling		
Other Service	Community Living and Support		
Other Service	Community Transition		
Other Service	Crisis Services		
Other Service	Home Delivered Meal		
Other Service	Home Modifications		
Other Service	Individual Goods and Services		
Other Service	Natural Supports Education		
Other Service	Specialized Consultation		
Other Service	Supported Living - Periodic		
Other Service	Supported Living - Transition		
Other Service	Supported Living		
Other Service	Vehicle Modifications		

- C-1: Summary of Services Covered
  - Navigation starting point
  - Services and their type; order
- C-3: Service Specifications
  - Type, title, definition
  - Limits on amount, frequency, or duration
  - Participant directed?
  - Providers
    - Relatives, legal guardians?
    - Specifications



# Appendix C: Participant Services

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- C-2-d & e: Paid Services by Legally Responsible Individuals/Relatives/Legal Guardians
  - C-2-d: Waiver personal care services
  - C-2-e: Other waiver services
- Identifies any limitations and safeguards if state allows
- Commenting:
  - Impacts of any limits, including mixing services
  - Whether paying family caregivers should be allowed

# Appendix C: Participant Services

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- C-4 Additional Limits on Amount of Waiver Services:
- Common area for disliked limits like:
  - Budgets
  - Limits by level of support
  - How services may be combined
  - Other limitations not listed by service
- Commenting:
  - How does this work on the ground?
  - Great opportunity for addressing issues with service design
  - Questions that probe the basis of the limits and why they do not work
  - Exceptions process
  - Safeguards for when limits mean individuals do not get the services they need

# Appendix D: Person-Centered Planning

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- Helpful to understand the changes from the 2014 HCBS Settings Rule
- D-1: Service Plan Development
- D-2: Implementation and monitoring
- Commenting
  - Is the process described what actually happens?
  - Are certain common practices, like discouraging requests for services, left out?
  - Are natural supports compelled to provide care in the process?
  - Do the monitoring efforts actually catch and fix problems?

# Appendix F: Participant Rights

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- F-1: Fair hearing
- Commenting:
  - Do participants get discouraged from asking for services and denied verbally without access to a hearing?
  - What kind of assistance is available? Is there a need for assistance; if so why and what is needed?
  - Any differences between what the state describes and participant's reality that interferes with access to a hearing. Can a person self-direct the services they need to?

# Appendix F: Participant Rights

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- F-3: State Grievance/Complaint System
  - Optional for states to fill out, but still opportunity for comment if the state's system for addressing complaints does not work well or the description does not match people's experiences
- Commenting:
  - Issues with the complaint system, if available
  - Examples of the types of issues it is supposed to address and does not
  - Examples of issues that there are not ways to complain about
- Note: Access rule requires changes to complaint system for fee for service systems (i.e., not managed care)

# Back to Commenting

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- It's so much information!!!
  - Layers of information
  - You do not have to figure it out all at once
- Take what is helpful to you
- Effective comments simply explain what does not work and/or what is needed
- You do not have to address everything in a waiver
- Improving waivers through comment may be a slow, repeated process.

Questions?

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