



Center for Public Representation

P&A Advocacy and the HCBS Settings Rule

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HCBS SETTINGS RULE: REFRESHER

Characteristics of Home and Community Based Settings

The definition focuses on the nature and quality of individuals' experiences and requires that the setting:

- Is **integrated in and supports access to the greater community**;
- Provides **opportunities to seek employment and work in competitive integrated settings**, engage in community life, and control personal resources
- Is selected by the individual from among setting options, **including non-disability specific settings**

Characteristics of Home and Community Based Settings (cont'd)

- Ensures the individual receives services in the community to the **same degree of access** as individuals not receiving Medicaid HCBS
- Ensures an individual's rights of **privacy, dignity, respect, and freedom from coercion and restraint**
- Optimizes **individual initiative, autonomy, and independence** in making life choices
- Facilitates **individual choice** regarding services and supports, and who provides them

Additional Requirements for Provider-Owned Residential Settings

- A lease or other legally enforceable agreement
- Privacy in his or her unit and lockable doors
- Choice of roommate
- Freedom to furnish or decorate the unit
- Control of his or her schedule, including access to food at any time
- Right to visitors at any time
- Physical accessibility of the setting (not modifiable)
- Modification of these conditions **must** be supported by a specific assessed need and justified in the person-centered plan; **must** first attempt alternative strategies and have periodic reviews

Residential & Non-Residential Settings

- Rule applies to both residential and non-residential settings
- People must get an **option of a non-disability specific setting** (like employment in a community job or living in own home)
- Rule does not per se prohibit facility-based services but must ensure they comply with the Rule
 - Rule is a floor; states can choose to require all day services (including pre-vocational services) to be community-based
- **Reverse integration** is not alone a sufficient strategy to comply with the community integration requirements of the rule

States Must Assess and Categorize All Settings

- Meets **all requirements** of the Rule (or can with changes)
- Can **never meet requirements** of the Rule because it is an institution (nursing home, ICF, hospital, or IMD)
- Is **presumed institutional**
 - Setting is unallowable unless a state can prove through a “heightened scrutiny” process that the setting overcomes the institutional presumption and meets the rule’s requirements

Presumptively Institutional Settings

- Three categories of presumptively institutional settings:
 - Prong 1: Settings in facilities providing inpatient institutional services
 - Prong 2: Settings on the grounds of, or adjacent to, a public institution
 - Prong 3: Settings that **have the effect of isolating HCBS recipients from the broader community**

HEIGHTENED SCRUTINY

Heightened Scrutiny Process

- For **any** presumptively institutional setting identified by a state, the state must closely examine whether the setting overcomes the institutional presumption and **fully complies with the requirements of the Rule**
- If the state believes it does, state must submit a package of evidence to CMS as part of a heightened scrutiny review*
 - The package must go out for public comment first
 - * Some exceptions in new guidance

Heightened Scrutiny Guidance

- Advocacy starting in 2016 by providers of settings that had been identified as examples of “settings that isolate” to rescind the rule and/or amend to remove “settings that isolate”
- CMS released updated guidance in March 2019
 - Affirmed the rule in its entirety, including all three types of presumptively institutional settings and the heightened scrutiny process
 - It did remove examples of “settings that isolate,” including gated communities, farmsteads, and campuses
 - However, **removal of examples DOES NOT mean that states should assume these types of settings are not settings that isolate**
 - Most of these types of settings will meet one of the criteria for isolation

HS Guidance: Defining Settings that Isolate

New guidance streamlined but didn't change the definition of "setting that isolates" to be a setting that meets any one of these criteria:

- The setting's design or model **limits opportunities** for individuals to interact with the broader community
 - This includes looking at individuals' PCP and setting's policies and practices
- The setting **restricts choice** to receive services or engage in activities outside the setting
- The setting is **physically located apart** from the broader community and **does not facilitate access** to the community
 - For rural settings, compare to other non-Medicaid settings

HS Guidance: Public Comment

- Heightened scrutiny packages must go out for public comment and include, at a minimum:
 - State process for identifying presumptively institutional settings
 - How the state reviewed those settings to determine if they overcame the presumption
 - List of settings (by type) that the state believes have overcome the presumption or will be March 2022
 - List of settings that do not overcome the presumption and will be removed from the HCBS program by March 2022
 - Settings that isolate that fully remediated prior to July 2020

HS Guidance: HIPAA and Public Comment

- Guidance raised potential privacy concerns about including the name and address of “settings that isolate” for public comment
 - Under some circumstances, name and address of a setting could constitute Protected Health Information (PHI)
 - CMS encouraged states to provide generalized descriptions (w/o the name and address) of how it determined a setting was presumptively institutional and how it will overcome the presumption
 - State may disclose the name and address if a state determines it is permissible under state/local law or doesn’t constitute PHI
 - Some states have already said the name and address of any licensed setting can be shared

HS Guidance: HIPAA and Special Role of P&As

- Stakeholders raised serious concerns about the ability to meaningfully comment if can't identify the setting
 - Guidance says that non-PHI information should be provided to disability and aging organizations; this is not enough
- Guidance recognizes the special role of P&As and LTC ombudsmen as oversight agencies
 - “States may disclose information, including the address of the setting, to a state-designed Protection and Advocacy Organization if required by law, or to the LTC Ombudsmen requesting the information for oversight activities”

HS Guidance: Evidentiary Packages

States' packages should include evidence about:

- The breadth and scope of the interactions people in the setting have with the **broader community**
- Training and monitoring of the setting's staff, including regarding person centered planning and other HCBS waiver requirements
- Proximity to **public transportation** and/or how transportation is facilitated
- Other information showing how the setting overcame the presumption, including photos of the setting or information about how individuals chose the setting

HS Guidance: CMS Review Process

- CMS will conduct additional reviews on a sample of heightened scrutiny settings submitted by the state
- In the event that “significant public comment” is generated by a setting, it will likely be subject to additional review, even if not submitted by the state
- If CMS identifies problems with the state’s HS process, it may review additional settings

HS Guidance: Expectations for State HS Review Process

- Each state's review process should include:
 - Onsite observations
 - Reasonable sample of consumer interviews (ensuring that there is not a conflict of interest)
 - Review of person centered plans
- State should describe the remediation plan for the setting and its process to ensure compliance with the plan by March 2022
- State must provide a summary of stakeholder comments

Heightened Scrutiny Pilot

- CMS conducted a heightened scrutiny pilot with a few states in 2019 focused on a handful of residential settings that fell under prong 1 (inside an institutional setting) or prong 2 (on the grounds of or adjacent to a public institution)
- CMS issued detailed feedback letters but did not make an ultimate determination
- CMS has not reviewed HS packages for “settings that isolate” (and likely will not until after July 1, 2020 due to new guidance)

Themes from Heightened Scrutiny Pilot

- For settings on the grounds of/adjacent to institutional settings or co-located, CMS looked closely at **interconnectedness**
 - Setting unlikely to overcome HS if there is an overlap in staffing, programming, or other operational responsibilities with the institution
- CMS looked at whether individuals can **set their own schedules** and the extent to which they actually do, including making last minute changes to plans, eating outside of “mealtimes” and unrestricted access to personal resources (like phones)
- CMS looked closely at options for **transportation**, including public transportation; relying on family for transportation is not sufficient

Themes from Heightened Scrutiny Pilot

- CMS did not consider having friends and family come into a setting sufficient to meet the requirement of **access to the broader community**
- In evaluating **choice of provider**, CMS looked closely to make sure that the choice of a residential setting was not contingent on the individual choosing the same provider for non-residential services
- CMS said allowing locks on individual unit doors upon request is insufficient to meet the requirement for **privacy in individual units**
- People must be allowed **visitors** at any time, even if co-located institutional settings have visitor hours or lock the facility

STATUS STATE IMPLEMENTATION AND NEXT STEPS

Status of State Implementation

- Approvals of initial statewide transition plans (STPs)
 - All but 4 states have gotten approval of their initial STPs
 - The remaining 5 states are IL, MA, NJ, and TX
 - Several of these states have recently submitted initial STPs
- Approvals of final STPs
 - Approximately 24 states have received approval for their final STPs
 - This includes the *process* for heightened scrutiny but not all HS settings
- Heightened Scrutiny determinations
 - So far only the pilot on prongs 1 and 2

Potential Extension of Implementation Deadlines

- State associations (NAMD and Advancing States) have sent letters to Congress and CMS leadership requesting at least a one year extension due to COVID-19
- CMS is considering those requests
 - Likely will issue something soon, at least with respect to the July 1, 2020 heightened scrutiny deadline
- HCBS Advocacy Coalition is advocating that **any extension be targeted, have guardrails and interim deadlines to ensure progress, and that standards are not weakened in any way**

Need for Ongoing P&A Advocacy

Re: the Settings Rule

- P&As must continue to focus on the settings rule, especially as many states have “waived” the rule in emergency waivers
 - Waivers relate to issues like limiting visitors and community outings during the COVID-19 pandemic
 - As states are transitioning out of waivers, it is critical that the settings rule be part of the conversation
- Opportunities for public input remain in EVERY state
 - Some states have not gotten approval for initial or final STPs; no state has completed heightened scrutiny process
 - Other states have ongoing process for input

General Settings Rule Resources

- HCBS Advocacy Website
 - Sponsored by national disability groups including NDRN & CPR
www.hcbsadvocacy.org
- CMS HCBS Settings Rule Website
 - www.medicaid.gov/hcbs
- ASAN Easy Read Toolkit:
 - <https://autisticadvocacy.org/policy/toolkits/hcbsrule>
- “The HCBS Settings Rule: What You Should Know”
 - http://materials.ndrn.org/HCBS/HCBS-Settings-Rules_What-You-Should-Know-5-13-19-final.pdf

Heightened Scrutiny Resources

- The Medicaid HCBS Settings Rule: Heightened Scrutiny:
<https://hcbsadvocacy.files.wordpress.com/2020/03/heightened-scrutiny-explainer-3.18.20-final-2.pdf>
- How to Advocate for Truly Integrated Settings:
<https://hcbsadvocacy.files.wordpress.com/2020/03/how-to-advocate-for-true-community-settings-3.18.2020-final-2.pdf>
- Identifying, Evaluating and Remediating “Settings That Isolate”:
<http://materials.ndrn.org/HCBS/HCBS-Settings-Heightened-Scrutiny-CLPC-Document-Feb-2020.pdf>

Heightened Scrutiny Resources (cont'd)

- NDRN Q&A (March 2020): “The HCBS Settings Rule: P&As’ Role in Heightened Scrutiny Review of Residential, Employment and Other Day Settings”
 - Detailed description of the March 2019 Heightened Scrutiny Guidance
 - Specific tips for P&As around the heightened scrutiny process

QUESTIONS?