



MEMORANDUM

To: Provider Associations
Voluntary Provider Agency Executive Directors
DDSOO Directors
DDRO Directors
OPWDD Regulations E-Mailing List
Quality Improvement E-Mailing List

From: Megan O'Connor-Hebert, Deputy Commissioner, 
Division of Quality Improvement

JoAnn Lamphere, Deputy Commissioner, 
Division of Person Centered Supports

Helene DeSanto, Deputy Commissioner, 
Division of Service Delivery

Roger Bearden, Deputy Commissioner and General Counsel 

Date: October 13, 2015

Subject: **Communication to Providers on the Home and Community Based Settings (HCBS) Heightened Scrutiny Process and Requirements for certified settings where waiver services are delivered:**

- (a) Certified Individualized Residential Alternatives (IRA) and Community Residences (CR); and,
- (b) Day Habilitation.
- (c) Also applicable to Intermediate Care Facilities (ICFs) that convert to IRAs on/after March 17, 2014.

Suggested Distribution:

Executive Level Staff
Management Staff
Quality Assurance Staff

Purpose

The purpose of this communication is to inform providers about how OPWDD intends to proceed with its heightened scrutiny review for certified Individualized Residential Alternatives (IRAs), Community Residences (CRs), and Day Habilitation and the actions that providers must comply with for the review process. This communication also includes the following:

- A. Criteria for designating a setting as subject to “heightened scrutiny” in OPWDD’s service system (**Attachment A**);
- B. OPWDD’s process and timeline for determining whether a setting is subject to heightened scrutiny (**Attachment B**); and,
- C. The actions that OPWDD and providers must take when a setting is subject to heightened scrutiny (**Attachments B and C**).

Please note that sheltered workshops (i.e. certified Day Training) in their current iteration do not meet HCBS setting standards and will no longer be deemed approved waiver settings after the conclusion of the HCBS transition period.

This communication is based upon guidance to date from CMS and is subject to change, if necessary, in order to achieve compliance with the HCBS settings rules and CMS requirements.

Background:

The Centers for Medicare and Medicaid Services (CMS) is seeking to ensure that individuals receiving services through HCBS Medicaid waiver programs have full access to the greater community in which they live. On March 17, 2014, CMS issued final regulations regarding characteristics and requirements for settings in order to be considered “home and community based” for purposes of Medicaid (42 CFR 441.301, *et. seq*). The federal regulations can be found at the following link: <https://www.federalregister.gov/articles/2014/01/16/2014-00487/medicaid-program-state-plan-home-and-community-based-services-5-year-period-for-waivers-provider>.

On October 20, 2014, OPWDD issued Administrative Memorandum (ADM) #2014-04, “HCBS Preliminary Transition Plan Implementation”, applicable to OPWDD certified residential settings, which can be found on OPWDD’s website at: <http://www.opwdd.ny.gov/node/5760>. This ADM describes the quality principles and standards that were assessed for a sample of certified residential settings during the prior survey cycle (i.e. October 2014 through

September 2015). In accordance with OPWDD's Transition Plan, OPWDD intends to enforce compliance with the HCBS settings standards for existing non-compliant waiver settings beginning October 1, 2018, for both residential and non-residential settings and there is much to be accomplished before that time.

To be considered a HCBS setting, it must neither be institutional in nature nor isolate individuals from the broader community. It must be a home, or work place, that is well-integrated in the community. Federal regulations and guidance help to identify settings that are *presumed to be institutional or isolating and therefore, do not meet the requirements of HCBS Settings*. Settings that are presumed to be institutional or isolating are subject to "heightened scrutiny".

States may only include settings that are presumed to be institutional or isolating in nature in their HCBS program with the approval of CMS. CMS requires these presumed institutional settings to undergo "heightened scrutiny" to verify that they, in fact, do not isolate individuals from the broader community, are not institutional in nature, and meet HCBS settings standards. The state must first determine whether the site does meet and/or can meet the HCBS requirements; the state will then submit the basis for its determination (the "evidence package") to CMS. The following will assist the state with making its determination:

- **Attachment A** includes the criteria for designating a setting subject to heightened scrutiny in OPWDD's system;
- **Attachment B** includes the actions required of providers when a setting is subject to heightened scrutiny and the anticipated timeline; and,
- **Attachment C** includes preliminary information on the evidence package that providers operating heightened scrutiny settings will need to prepare.

In addition, the state must undergo a public input process for all residential and non-residential settings that are subject to heightened scrutiny. In accordance with CMS requirements¹, this public input process must:

- List the affected settings by name and location and identify the number of people served in each setting;
- Be widely disseminated with the intent of reaching HCBS participants, families and the community;
- Include any and all justifications from the state as to how the setting meets HCBS rules and is not institutional such as any reviewer reports, interview summaries, and other evidence;
- Provide sufficient detail such that the public has an opportunity to support or rebut the state's determination; and,

¹ see CMS HCBS Settings Questions and Answers dated June 26, 2015

- Provide responses to CMS from the public comments including explanations as to why the state is or is not changing its decision.

Once the public input process for heightened scrutiny is concluded, OPWDD must send evidence that each of the heightened scrutiny settings meets/will meet HCBS settings standards (if applicable) to CMS. According to its June 26, 2015 requirements document, CMS will review the information or documentation to ensure that all participants in the setting are afforded the degree of community integration required by the regulation and desired by the individual. The evidence must be sufficient to overcome the presumption that the site is institutional or isolating. If the setting withstands this “heightened scrutiny”, it will be deemed home and community-based.

Timeframe and Actions Required:

During the October 2015 to September 2016 survey cycle, OPWDD will review certified IRAs, CRs, Day Habilitation and Day Training (except sheltered workshops subject to conversion or closure) to determine which settings will be subject to heightened scrutiny. For residential settings deemed subject to heightened scrutiny, OPWDD will also review HCBS settings standards to obtain baseline information that is necessary in order to track progress toward full HCBS settings compliance.

The product of this review process (10/2015 - 9/2016), will be a complete inventory of settings subject to heightened scrutiny and for residential settings, their current level of HCBS settings compliance. During the period October 2016 to February 2017, OPWDD will review all heightened scrutiny settings (including day settings) to determine the amount of progress made toward full HCBS compliance. OPWDD will also collect, review and verify evidence of compliance compiled and/or submitted by providers (see Attachment C) for heightened scrutiny settings. These evidence packages, including the site review documentation, will be made available for public comment, and submitted later to CMS.

Also effective 10/1/2016, the HCBS settings standards and person- centered planning and process standards will become routine elements of OPWDD’s surveys with enforcement for non-compliance beginning October 1, 2018. Action will be taken by OPWDD, on a case-by-case basis, for any setting that OPWDD deems unlikely to comply with the HCBS settings standards prior to October 1, 2018.

Attachment A: Heightened Scrutiny Criteria²

A. Criteria for Determining Whether a Setting is Subject to the Heightened Scrutiny Process:

Any setting/site with one or more of the following characteristics will be subject to heightened scrutiny:

1. The setting/site is located in a building on the grounds of a public institution³;
2. The setting/site is located in a building that is also a publically or privately operated facility that provides inpatient institutional treatment⁴;
3. The setting/site is immediately adjacent to a public institution (i.e. the setting/site is next to and abuts the public institution);
4. The setting/site has been converted from an Intermediate Care Facility (ICF) on or after March 17, 2014;
5. The setting/site is part of a group of multiple settings co-located and operationally related such that the co-location and/or cluster serves to isolate and/or inhibit interaction with the broader community, including any of the following:
 - Setting/site is situated on a private campus where there are multiple group homes and/or facilities for people with intellectual and/or developmental disabilities (I/DD) on the same property (e.g., private campus, community, or village specifically for people with I/DD/disabilities; co-located sites such that people who participate do not leave the site/participate in the broader community and/or a large number of people with disabilities are congregated and this structure inhibits interaction with the broader community); and/or,
 - Other circumstances that meet the criteria (for multiple settings collocated and operationally related such that the co-location isolates people with disabilities and/or inhibits individuals from interacting with the broader community).
6. The setting/site's design, appearance and/or location appears to be institutional and/or isolating (includes one or more of the following criteria):
 - The setting/site is clustered (i.e. adjacent to, in close proximity to other settings/sites for people with disabilities) such that the cluster isolates people

² Source: <http://www.medicaid.gov/medicaid-chip-program-information/by-topics/long-term-services-and-supports/home-and-community-based-services/downloads/settings-that-isolate.pdf>

³ A public institution is an institution that is the responsibility of a governmental entity over which a governmental entity exercises control. OPWDD developmental centers, OMH psychiatric centers, institutions for mental diseases, prisons and addiction treatment centers and state run nursing homes are considered public institutions. A former developmental center (i.e. one that has been closed) is also considered a public institution. A public institution does not include: a medical institution (i.e. hospital including a VA hospital); child care institution; or publically-operated community residences, universities, libraries, and public schools.

⁴ Inpatient institutional treatment includes all settings listed under the definition of public institution as well as any private settings delivering inpatient treatment such as a private mental health facility delivering care.

with disabilities and/or inhibits individuals from interacting with the broader community;

- The setting is designed to provide people with disabilities multiple types of services and activities on the same site (e.g., housing, day services, medical, behavioral, therapeutic, and/or social and recreational activities); (i.e., people with disabilities have little to no interaction/experiences outside of the setting); resulting in limited autonomy and/or regimented services.
- People in the setting have limited if any interaction with the broader community (i.e. the setting is set up and operated in such a way that people with disabilities have limited to no interactions/experiences outside of the setting, regardless of the settings location); and/or,
- The setting/site under review appears to be more isolating than other settings in the same vicinity/neighborhood and/or CMS guidance has specifically mentioned the setting type as a setting presumed to isolate. For example:
 - setting is a gated community;
 - setting is a farmstead or disability specific farm community;
 - setting is a residential school;
 - setting has fencing, gates, or other structural items setting it apart from homes/settings in the vicinity;
 - setting is labeled by signage as a setting for people with disabilities, thus not blending with the broader neighborhood/community;
 - setting is close to a potentially undesirable location (e.g., dump, factory, across the street from a prison or other institutional setting, etc.) that is isolating and/or inhibits individuals from interacting with the broader community; and/or,
 - setting has video camera surveillance.

Attachment B: OPWDD's Process for Determining if a Setting is Subject to the Heightened Scrutiny Process and the Timeline:

In late 2015/early 2016, OPWDD plans to provide agencies (through a separate communication) with a heightened scrutiny self-survey tool. Agencies will be asked to identify, to the best of their ability, which of their settings will be subject to heightened scrutiny. It is in the providers' interest to help OPWDD identify sites that may be subject to heightened scrutiny as soon as possible, so providers can have as much time as possible to prepare the evidence that will be necessary for submission to CMS. This provider self-survey will assist OPWDD with:

- Assessing the full scope of heightened scrutiny in the system;
- Developing its survey schedule for full review of heightened scrutiny settings; and,
- Collection and verification of evidence during the survey cycle beginning October 1, 2016.

OPWDD's Division of Quality Improvement (DQI) will inventory settings during routine site visits to determine whether a setting meets one of the criteria listed in Attachment A beginning 10/1/2015 through 9/30/2016. Residential settings triggering heightened scrutiny will also be reviewed for baseline HCBS settings compliance information if the setting wasn't previously reviewed for this information.

During the 10/1/2016 through 2/2017 period, all residential and non-residential settings deemed subject to heightened scrutiny will be reviewed to determine the status of HCBS compliance and evidence packages will be collected and/or verified. Survey results for this period will be included as evidence of HCBS compliance. If the provider is not in full compliance with HCBS settings standards at the time of this review, the provider will be required to submit a compliance work plan along with other documentation (see Attachment C for more detail) that describes steps the provider will take to fully comply with HCBS settings standards by October 1, 2018 and maintain compliance thereafter.

No formal deficiencies will be issued for HCBS settings standards until after October 1, 2018. Instead, DQI will provide quality recommendations to settings/providers through the routine Exit Conference process and on an Exit Conference Form regarding the results of the HCBS settings standards review.

Any ICFs that intend to convert to an IRA on or after January 1, 2016 must submit with their conversion proposal a HCBS Settings Compliance Work Plan (See Attachment C item 3) for review by OPWDD. Providers must receive OPWDD approval of this Work

Plan before the ICF can convert. In addition, ICFs that intend to convert to an IRA on or after January 1, 2016 may undergo the Heightened Scrutiny process at the time of conversion by submitting a heightened scrutiny evidence documentation package with the conversion proposal (See Attachment C for more detail). OPWDD approval of the evidence/documentation for Heightened Scrutiny is not required prior to conversion.

The following is a summary of the heightened scrutiny timeline and required action that applies to all residential and non-residential settings⁵ where waiver services are delivered.

Heightened Scrutiny Timeline	OPWDD Actions	Actions Required of Voluntary and state operated providers
Late 2015/early 2016	Distribute a provider self-survey; each agency will self-report potential heightened scrutiny settings including residential and day settings.	Complete provider self-survey within required timeframe.
October 1, 2015 through September 30, 2016	<p>OPWDD DQI completes routine on-site surveys of certified residential and non-residential settings and determines which ones are subject to heightened scrutiny.</p> <p>DQI reviews certified residential settings (IRAs and CRs) for baseline HCBS settings compliance for those settings that are deemed subject to the heightened scrutiny process.</p>	Continue to make progress towards full compliance with the HCBS settings rules and person-centered planning and process requirements
Spring/Summer 2016	Distribute specific information to provider agencies on developing evidence package.	Complete and submit information required for evidence package with copy remaining on-site for verification by DQI.
October 1, 2016 through February 2017	<p>OPWDD DQI reviews HCBS settings compliance for all heightened scrutiny settings (residential and non-residential) and verifies provider self-survey/evidence information. Review information will be made public and becomes part of the evidence package</p> <p>Effective 10/1/16, HCBS settings standards become part of routine survey activity going forward for all settings where waiver services are delivered.</p>	Continue to make progress towards full compliance.
Summer/Fall 2017	OPWDD opens heightened scrutiny public input process	Continue to make progress towards full compliance.

⁵ Except Sheltered Work Shops as previously noted

Heightened Scrutiny Timeline	OPWDD Actions	Actions Required of Voluntary and state operated providers
Winter 2017	OPWDD submits heightened scrutiny settings to CMS	Continue to make progress towards full compliance.
October 2018	OPWDD begins to enforce HCBS settings requirements	Full compliance required.

Attachment C: Required Evidence/Documentation for Settings Subject to Heightened Scrutiny:⁶

All settings that are determined to be subject to heightened scrutiny will be required to prepare, submit and maintain on-site information that verifies and validates that the heightened scrutiny setting does not isolate individuals from the broader community, is not institutional in nature, and meets/can meet HCBS settings standards no later than October 1, 2018 and will maintain compliance thereafter.

This information will become part of the evidence package that will be made public through the public input process and will be part of the submission to CMS.

The following describes the **preliminary** evidence/documentation that OPWDD expects to request from providers during the **Spring of 2016**. Further details will be provided as we implement the heightened scrutiny timeline.

1. HCBS Settings Evidence Narrative/Package (required for all heightened scrutiny settings)

The HCBS Settings Evidence Narrative/Package is a detailed written narrative/description describing the specific setting and its unique characteristics, activities, operational practices and other relevant “evidence” that indicates how the setting is or will be compliant with the HCBS Settings Standards by October 2018. It also describes how the setting overcomes the presumption that it is isolating and/or institutional in nature for all individuals residing therein.

OPWDD intends to develop a standardized questionnaire for providers to include in their evidence package. This document is based on CMS requirements issued June 26, 2015 and the CMS Exploratory Questions (see OPWDD website link at: http://www.opwdd.ny.gov/opwdd_services_supports/HCBS/hcbs-settings-toolkit) Providers are encouraged to include additional supporting evidence such as maps, pictures of the setting and/or other information that provides strong evidence that the setting is an HCBS setting.

⁶ Information in this attachment is derived from the CMS HCBS Settings Questions and Answers document dated June 26, 2015.

2. Evidence Package/Documentation that heightened scrutiny settings support full access to the broader community for all participants such as community inclusion (required for all heightened scrutiny residential and non-residential settings):

As indicated in ADM 2014-04, the Habilitation Planning process is person-centered, person-directed, and must reflect what is important to the individual. Accordingly, the Habilitation Plan (or alternative documentation that becomes part of the habilitation/service plan) reflects the personally meaningful community inclusion/integration activities, the timing and desired frequency/duration of these activities, and the supports needed for the person to fully participate.

Settings subject to Heightened Scrutiny are required to maintain documentation demonstrating that individuals have activities and opportunities for full access to the broader community that are meaningful to them in accordance with their individualized preferences and priorities.

OPWDD intends to develop a HIPAA compliant summary template where providers can capture the essential community inclusion information for each individual in a setting. This template is expected to include a summary of the elements outlined below. Providers must ensure that identifying details are maintained and secured on-site for purposes of validation of the template information by DQI or other auditors/reviewers.

- (1) **Community Inclusion Activities** expressed by the individual as meaningful to him/her. If the individual is unable to communicate verbally, the provider must have evidence of a leisure time preference assessment, which includes discussion with the individual's advocates and/or people that know him/her best.
- (2) **Community Inclusion Documentation** that shows when these community inclusion activities have occurred, their frequency, duration, number of individuals with I/DD that participated (as well as other community inclusion opportunities the person may have engaged in, such as going to the bank, shopping, etc.) and any other pertinent information such as the person's response to the activities; who accompanied and supported the person during the activities (e.g., natural support advocate; mother; sister; etc.). See page 5 of ADM #2014-04, "HCBS Preliminary Transition Plan Implementation", <http://www.opwdd.ny.gov/node/5760> for additional information.
- (3) Evidence that **a review of the person's interests, priorities, and necessary supports** occurs at least twice per year, preferably every six months, or more frequently as a person's needs, preferences and/or capabilities require (this can take place as part of the ISP/Hab Plan review process as long as documentation includes the required components and this information is integrated into the person's Habilitation Plan goals/activities).

- (4) Efforts made to support and promote new experiences and experiential learning for individuals within the broader community and efforts to promote and support “full access to the broader community”.

Note: Special Consideration Regarding Individuals Who Are Medically Frail, Elderly/Aged, or Who have Extremely Challenging Behaviors: Please note that CMS has been very clear in their guidance on HCBS Settings that EVERY individual receiving residential or non-residential supports funded under the HCBS waiver, regardless of disability, shall have opportunities, consistent with their interests and choices, to fully participate in their community to the same extent as individuals without disabilities. Providers may not impose restrictions on individuals who express a desire to participate in their community unless such participation would jeopardize the health or safety of the individual or other individuals and this determination is based upon an individualized assessment. Such modifications must be properly reviewed during person-centered planning processes and incorporated into plans of support as safeguards, restrictions and/or modifications as applicable and documented in accordance with OPWDD’s Person-centered behavioral intervention regulations (633.16), regulations pertaining to individual rights (633.4), and/or the rights modification requirements of the HCBS settings and person- centered planning rules. Individuals who do not desire to avail themselves of opportunities to fully participate in the community shall not be required to do so. However, providers shall document all efforts to encourage this community participation.

3. Compliance Work Plan (required for settings subject to heightened scrutiny that do not yet fully meet the HCBS settings standards at the time of the review)

Settings that are subject to heightened scrutiny and **do not yet meet** HCBS settings standards at the time of review (during the survey period 10/1/2016 - 2/2017) will be required to develop a Compliance Work Plan outlining how the setting will achieve HCBS settings compliance by 10/1/2018. The work plan will be reviewed and verified by DQI. The plan must be submitted to quality@opwdd.ny.gov no later than 20 days after the on-site review and will become part of the evidence package.

The Compliance Work Plan must include the following:

- Action items, including timeframes to come into compliance with the HCBS settings requirements;
- Milestones with timelines;
- Responsible parties for implementing the action items;
- Method for tracking and monitoring the plan to ensure ongoing compliance (e.g., self-assessment and data collection activities); and
- Other evidence demonstrating progress toward full HCBS compliance.

OPWDD intends to develop a work plan template to assist providers with work plan submittal.