

**Addition of new Home and Community Based Services General Requirements
Addition of a new 14 NYCRR Subpart 636-2**

**Amendments to Rights and Responsibilities
of Persons Receiving Services
Protection of Individuals Receiving Services in Facilities
Operated and/or Certified by OPWDD
Amendments to 14 NYCRR Section 633.4**

ADOPTED REGULATIONS

Effective Date for Enforcement: October 1, 2021

**Subpart 636-2 Home and Community Based Services and Settings
Requirements, Effective October 1, 2021**

636-2.1 Applicability

- (a) This Subpart applies to the following services and settings:
 - (1) Medicaid Home and Community Based Services (HCBS) that are operated, certified, funded, authorized, approved, or subject to oversight by OPWDD and/or its authorized provider(s), except those services identified in subdivision 636-2.1(b); and
 - (2) Settings where HCBS are delivered, except those settings identified in subdivision 636-2.1(b).
- (b) This Subpart does not apply to HCBS Respite services and settings (see subdivisions 635-10.4(g) and 635-10.5(h) of this Title).

636-2.2 Background and Intent

**Note: Language in Subpart 636-2 is all new material, but is not underlined.
New material in Section 633.4 is underlined.**

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- (a) It is the intent of this Subpart to require Medicaid Home and Community Based Services (HCBS) that are operated, certified, funded, authorized, approved, or subject to oversight by OPWDD, and/or an OPWDD authorized provider, to be delivered in integrated settings that do not isolate individuals receiving Medicaid HCBS from the broader community of people not receiving Medicaid HCBS.
- (b) HCBS supports and services must encourage individuals to take part in the broader community in a way that is meaningful to the individual, in accordance with:
 - (1) a person-centered service plan developed, implemented, and reviewed in compliance with Subpart 636-1 of this Part;
 - (2) applicable HCBS requirements in Subpart 635-10 of this Title; and
 - (3) sections 636-2.3, 636-2.4, and 636-2.5 of this Subpart.

636-2.3. Definitions

- (a) Broader community. Community settings that are used by the general public, where individuals have opportunities to interact with people who do not have disabilities, do not receive Medicaid HCBS, and are not paid to provide services to individuals.
- (b) Heightened scrutiny. Review of a setting presumed to be isolating and/or having institutional qualities because it is:
 - (1) located in a building that is also a publicly or privately-operated facility that provides inpatient institutional treatment;
 - (2) in a building on the grounds of, or immediately adjacent to, a public institution; or
 - (3) any other setting that has the effect of isolating individuals receiving Medicaid HCBS from the broader community.
- (c) Institutional. Operation of a setting and/or delivery of supports and services in a manner that is regimented and/or isolates individuals receiving Medicaid HCBS from the broader community.
- (d) Institution, public. An institution that is the responsibility of a governmental unit or over which a governmental unit exercises administrative control. Medical

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institutions, intermediate care facilities, child care institutions, and publicly operated community residences are not included in this definition, nor does the term apply to universities, public libraries, or other similar settings.

- (e) Physically accessible. Characteristic of a setting, including, but not limited to: 1) the setting provides an individual's full/unrestricted access to typical spaces in the home or day setting and supports their use; 2) the setting reflects an individual's needs and/or preferences including the presence of any necessary physical modifications; or 3) the setting supports the independence, comfort, preferences, and needs of the individuals who live in the residence or attend the day setting.

- (f) Provider, OPWDD authorized. An organization that is authorized by OPWDD and/or the Department of Health (DOH) to deliver one or more Medicaid HCBS services operated, certified, funded, authorized, or approved by OPWDD, including:
 - (1) a care coordination organization authorized by DOH in collaboration with OPWDD pursuant to section 365-l of the Social Services Law;
 - (2) a managed care organization that is issued a certificate of authority to include OPWDD HCBS in its benefit package pursuant to Article 44 of the Public Health Law; or
 - (3) another organizational entity certified, contracted, or authorized by OPWDD to be responsible for operating, funding, authorizing, overseeing, or monitoring OPWDD HCBS.

- (g) Setting. Any location where Medicaid HCBS are delivered including, but not limited to: OPWDD certified facilities (such as Individualized Residential Alternatives (IRAs), Community Residences (CRs), Family Care Homes (FCHs), Site-based Prevocational Services sites and Day Habilitation sites); non-certified settings in the broader community; and private homes.

- (h) Setting, integrated. A setting where individuals receiving Medicaid HCBS have regular interactions with the broader community. Such settings afford individuals receiving HCBS opportunities to fully engage in community life and choose activities that optimize access to the broader community.

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- (i) Setting, isolated or isolating. A setting that is not integrated, where individuals receiving Medicaid HCBS typically only interact with other individuals receiving Medicaid HCBS or paid staff, and have limited/no access to, or interaction with, the broader community.
- (j) Setting, provider owned or controlled residential. A residential setting that is co-owned, rented, or occupied by the individual receiving Medicaid HCBS, where a provider agency owns, co-owns, leases, co-leases, or has a direct or indirect financial relationship with the property owner or operates/manages the residential setting. A setting is not provider owned or controlled if the individual owns his/her residential setting or leases directly from a third party that has no direct or indirect financial relationship with a provider, and where an OPWDD HCBS authorized provider has no role in operating or managing the residential setting. All OPWDD certified settings, including Family Care homes, are considered provider owned or controlled for the purposes of this Part.
- (k) Setting, provider owned or controlled non-residential. A non-residential setting where Medicaid HCBS are delivered, and a provider agency owns, co-owns, leases, co-leases, or has a direct or indirect financial relationship with the property owner or operates/manages the non-residential setting.
- (l) Setting, private home. A residential setting in which an individual lives independently or with others and the setting is not owned or controlled by a provider agency.

636-2.4 General Provisions

- (a) Any setting where Medicaid HCBS are delivered must have all the following qualities and meet all the following conditions based on the needs and goals of the individual receiving HCBS as identified in his/her person-centered service plan:
 - (1) The setting must be integrated and support full access of individuals receiving HCBS to the broader community. It must support opportunities to seek employment and work in competitive integrated settings, engage in community life, control personal resources, and receive services in the community with the same degree of access as the broader community.
 - (2) The setting must be selected by the individual from among setting options, including non-disability specific settings, and an option for a private home or private bedroom in a residential setting, where applicable. The setting options must be identified and documented in the person-centered service

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plan or other planning/service related documents and must be based on the individual's needs, preferences and, for residential settings, resources available for room and board.

- (3) The setting must ensure the individual's rights of privacy, dignity, and respect, and freedom from coercion and restraint.
 - (4) The setting must optimize, and not regiment, individual initiative, autonomy, and independence in making life choices including, but not limited to, the individual's decisions regarding daily activities, physical environment, and with whom to interact.
 - (5) The setting must facilitate individual choice regarding services and supports and who provides them.
 - (6) The individual must have freedom and support to control his or her own schedules and activities, consistent with the same or similar settings for the broader community.
 - (7) The individual must have access to food at any time, consistent with the same or similar settings for the broader community.
 - (8) The individual must be able to have visitors of his or her choosing at any time, consistent with the same or similar settings for the broader community.
 - (9) The setting must be physically accessible to the individual.
- (b) In addition to those qualities and conditions described in paragraphs 636-2.4(a)(1) through (9), all the following conditions must be met in OPWDD-operated or provider owned or controlled residential settings:
- (1) The individual's residence must be a specific physical place that can be owned, rented, or occupied under a legally enforceable agreement by the individual receiving services, and the individual has, at a minimum, the same responsibilities and protections from eviction that tenants have under applicable landlord/tenant law. For a residence in which landlord/tenant laws do not apply, there must be a lease, residency agreement, or other

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form of written agreement for the individual that provides for eviction processes and appeals comparable to those provided under applicable landlord/tenant law.

- (2) The individual must have privacy in his or her residence and bedroom to the extent applicable.
 - (i) Residences and bedrooms within residences must have entrance doors lockable by the individual, with only appropriate parties having keys/access to doors as needed.
 - (ii) The individual sharing a bedroom in an OPWDD-operated, provider owned or controlled, or certified residential setting must have a choice of roommates in that setting. In non-certified provider owned or controlled residential settings, individuals must freely choose to share their residence and have a choice of roommates in the residence and in bedrooms, where applicable.
 - (iii) The individual must have freedom to furnish and decorate his or her residence and bedroom within the lease or other agreement.
- (c) In OPWDD-operated or certified settings and other provider owned or controlled residential and non-residential settings, any modification to the qualities or conditions in paragraphs 636-2.4(a)(6), (a)(7), or (a)(8) or subdivision 636-2.4(b) must be supported by a specific assessed need, justified, and documented in the individual's person-centered service plan or other internal guidance document(s) pursuant to section 636-1.4 of this Part. The Medicaid HCBS provider agency must maintain such documentation as required by OPWDD.

Note: Providers subject to section 633.16 of this Title must consult that section for additional documentation requirements concerning person-centered behavioral intervention. Providers subject to section 633.4 of this Title must consult that section for documentation requirements concerning modifications of rights of individuals receiving services that are not duplicated in paragraphs 636-2.4(a)(6), (a)(7), (a)(8) and subdivision (b) of this section.

- (d) HCBS settings do not include the following:
 - (1) A nursing facility;
 - (2) An institution for mental diseases;

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- (3) An Intermediate Care Facility for Individuals with Intellectual Disabilities (ICF/IID);
- (4) A hospital providing long-term care services;
- (5) A sheltered workshop that is not integrated (on or after March 17, 2022);
- (6) A private residential school; or
- (7) Any other setting that does not pass a heightened scrutiny review process as prescribed and determined by the Centers for Medicare and Medicaid Services (CMS), DOH, and/or OPWDD.

636-2.5 Heightened Scrutiny

A Medicaid HCBS setting subject to heightened scrutiny, as defined in subdivision 636-2.3(c) of this Subpart, will be reviewed in the form and format specified by CMS, DOH, and/or OPWDD.

- **Subparagraph 633.4(a)(4)(xxiv) is amended as follows:**

(xxiv) the opportunity to receive visitors at reasonable times; to have privacy when visited, provided such visits avoid infringement on the rights of others, and to communicate freely with anyone within or outside the facility; except that in settings where Medicaid Home and Community Based Services (HCBS) are delivered, rights regarding visitors shall be governed by subparts 636-1 and 636-2 of this Title; or

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