



ADMINISTRATIVE DIRECTIVE

Transmittal:	19-ADM- 01
To:	Executive Directors of Voluntary Provider Agencies Developmental Disabilities Regional Offices Directors Developmental Disabilities State Operations Offices Directors Care Managers and Care Manager Supervisors
Issuing OPWDD Office:	Counsel's Office
Date:	February 22, 2019
Subject:	Video Cameras, Monitoring and Recording in Home and Community-Based Services (HCBS) Residential Settings
Suggested Distribution:	Providers Quality Improvement Staff Care Managers and Care Manager Supervisors Regional Office Front Door Staff Central Office Leadership Team
Contact:	Counsel's Office, OPWDD Central Office (518) 474-7700
Attachments:	Centers for Medicare and Medicaid Services Memorandum: <i>The Use of Video Cameras in Common Areas in Intermediate Care Facilities for the Mentally Retarded (ICFs/MR)</i>

Related ADMs/INFs	Releases Cancelled	Regulatory Authority	MHL & Other Statutory Authority	Records Retention
		14 NYCRR §§ 633.16, 633.4, 636-1.4 42 CFR §441.301	MHL § 33.02	18 NYCRR 504.3(a)

Purpose:

The mission of the Office for People With Developmental Disabilities (OPWDD) is to enrich the lives of individuals by supporting them to enjoy meaningful relationships with friends, family and others, experience personal health and growth, live in the home of their choice and fully participate in their communities. Consistent with Mental Hygiene Law Section 33.02, 42 CFR 441.301, and 14 NYCRR Parts 624, 633, and 636, OPWDD is committed to serving individuals while protecting their rights to privacy, dignity and respect.

This policy governs the use of one-way video cameras and other audio or video monitoring and/or recording devices (hereinafter, “monitoring and/or recording technology”), when clinically necessary to ensure an individual’s health and safety, in the interior of OPWDD operated, OPWDD certified and provider-owned or controlled residential settings.

Please note that Intermediate Care Facilities (ICFs) must also comply with any CMS issued guidance, including the July 29, 2011 memorandum entitled *The Use of Video Cameras in Common Areas in Intermediate Care Facilities for the Mentally Retarded (ICFs/MR)*. Where the requirements may differ between the two guidance documents, the more stringent requirements will apply.

Background:

This OPWDD guidance is based on the federal HCBS Settings Final Rule compliance requirements pursuant to 42 CFR §441.301, as well as OPWDD regulations assuring individuals with intellectual and developmental disabilities privacy in their home settings.

Discussion:

The Office for People With Developmental Disabilities is committed to ensuring that individuals receiving HCBS and living in OPWDD operated, OPWDD certified or provider-owned or controlled residential settings live in a home that is integrated into the broader community, rather than one that is isolating and/or institutional in nature. Additionally, individuals’ rights to dignity, privacy and respect, as well as autonomy, control, independence and choice, must be protected. Therefore, the use of video cameras and other monitoring and/or recording technology are generally prohibited in OPWDD operated, OPWDD certified and provider-owned or controlled residential settings. These devices may contribute to creating an institutional-like environment, and also limit the privacy of individuals in their own living spaces. Video cameras and other

monitoring and/or recording technology may only be used in very limited circumstances as outlined in this ADM.

Definitions

- Audio Monitor: A one-way device that allows the listener to hear in real time, without keeping a recording of the monitored audio.
- Audio Recorder: A one-way device that allows the listener to record and retain sound.
- Video Monitor: A one-way video device used for visual observation that may include audio. The images and/or audio is not recorded or stored (i.e., watching a live video feed without video retention).
- Video Recorder: A one-way video device used for visual observation that may include audio, with the images and/or audio being recorded and retained.

For purposes of this guidance, references to monitoring and/or recording technology *do NOT include*:

- Assistive Technology: Communication and adaptive technology necessary to enable an individual to increase, maintain or improve his/her ability to live independently and safely at home and in the community (i.e., such as aids, controls, appliances, or supplies). Assistive technology is also known as SMART technology.
- Security Camera: A video device used for external security and surveillance purposes and which are limited to areas of ingress/egress.
- Remote Support: Technology that is part of a plan of support developed to assist the individual with meeting his/her Health and Safety support needs while maximizing independent living options. The support is two-way, real-time communication using audio and/or video technology to allow the individual to interact with remote staff.
- Telehealth: The use of electronic information and communication technologies by telehealth providers to deliver health care services, which shall include the assessment, diagnosis, consultation, treatment, education, care management and/or self-management of a patient. Telehealth shall not

include delivery of health care services by means of audio-only telephone communication, facsimile machines, or electronic messaging alone, though use of these technologies is not precluded if used in conjunction with telemedicine, store and forward technology, or remote patient monitoring. Telehealth shall be limited to telemedicine, store and forward technology, and remote patient monitoring.

Training Recording: Video recording used for training clinicians or staff in an OPWDD approved program, such as the New York Systemic, Therapeutic, Assessment, Resources and Treatment (NYSTART) program.

Video Cameras and Other Monitoring and/or Recording Technology

Generally, monitoring and/or recording technology are not permitted in the interior of OPWDD operated, OPWDD certified and provider-owned or controlled residential settings as the use of these devices is considered a rights limitation that interferes with an individual's right to privacy, consistent with OPWDD regulation 14 NYCRR § 633.4.

However, monitoring and/or recording technology may be permissible in the following limited circumstances when necessary to meet specific clinical (medical and/or behavioral) needs of an individual:

1. The use of monitoring/recording devices for medical purposes requires the following:
 - a) A need for the monitoring and/or recording technology is determined to be clinically necessary by an individual's treatment team;
 - b) The reason(s) for use of the monitoring and/or recording technology is incorporated as a right's limitation into the individual's person-centered service plan (i.e., Life Plan) pursuant to 14 NYCRR Subdivision 636-1.4; and
 - c) The limitation is documented and consents are obtained as required pursuant to 14 NYCRR Subdivision 636-1.4.

2. The use of monitoring/recording devices for behavioral purposes, requires the following:
 - a) a need for the monitoring and/or recording technology is determined to be clinically necessary by an individual's treatment team;
 - b) the reason(s) for use of the monitoring and/or recording technology is incorporated as a right's limitation into the individual's behavior support plan (BSP) pursuant to 14 NYCRR Subdivision 633.16; and

- c) the limitation is documented and consents are obtained as required pursuant to 14 NYCRR Subdivision 633.16.

Monitoring and/or recording technology shall not be used for the convenience of staff or in lieu of adequate staffing levels. Individuals, their guardians/involved family members, other residents, visitors and facility employees must be informed of the presence of monitoring and/or recording technology. Under no circumstances may monitoring and/or recording technology be used without consent from all individuals residing in the home that are impacted by any monitoring and/or recording technology.

If a monitoring and/or recording technology has been deemed necessary to meet an individual's assessed need, per his or her Life Plan/BSP, there must be clearly visible signage posted in the residence indicating that video and/or audio technology for purposes of monitoring or recording is in use.

Individuals must provide consent to being monitored or recorded. Additionally, the individual being recorded must be informed as to:

- The reasons why the monitoring/recording is taking place;
- When the monitoring/recording by video camera or device will be used;
- Who can listen to audio monitoring or view video monitoring;
- Who can review audio/video recordings;
- When audio/video recordings can be reviewed;
- When audio/video recordings may be released and for what purposes; and
- For how long audio/video recordings will be retained.

Protecting Individuals from Abuse and Neglect

Monitoring and/or recording technology may not be used solely for the purpose of protecting individuals from abuse or neglect or for general surveillance. Instead, other less-intrusive and non-institutional measures must be used. Examples include, but are not limited to:

- Training staff on preventing and reporting abuse and neglect of individuals;
- Increasing levels of staff, levels of supervision, and staff to resident ratios;
- Heightening agency oversight of staff;
- Investigating reports of alleged abuse and neglect;
- Teaching individuals to identify when and how to report concerns including mistreatment and abuse; and
- Empowering individuals to advocate for themselves.

However, if a monitoring and/or recording technology is approved for clinically required medical and/or behavioral purposes and, during its intended use, it inadvertently

captures inappropriate staff or resident conduct, the footage may be used for staff disciplinary purposes or abuse/neglect/incident reporting purposes.

Use in Common Areas or Spaces that Affect Other Individuals' Right of Privacy

Monitoring and/or recording technology may be used in common areas of a residence if an individual's treatment team determines a clinical need for the device in such area. In this circumstance, the monitoring and/or recording technology will affect other individuals receiving services in the setting who do not require a rights modification. For other individuals in the residence, the residential provider must ensure that there is documentation of their agreement to the use of the monitoring and/or recording technology for their housemate prior to implementation of the monitoring and/or recording technology, pursuant to 14 NYCRR 636-1.4.

Family members and other visitors to the residence do not need to provide consent to the use of monitoring and/or recording technology. However, they must be informed of any monitoring and/or recording technology in use when they enter the premises. This may be accomplished by way of signage, verbal communication by onsite staff or in writing prior to visits.

Fading

As with any rights limitation, use of technology to meet behavioral needs must include a plan to fade the limitation, if possible, in accordance with 14 NYCRR § 633.16. If it is determined that the use of the monitoring and/or recording technology are no longer clinically warranted, the technology must be immediately removed from the residence.

All other uses of monitoring and/or recording technology must be time limited with periodic reviews to assess whether the modification remains necessary or can be terminated, pursuant to 14 NYCRR § 636-1.4.

Private Spaces

Careful consideration (per steps laid out in 14 NYCRR §§ 633.16 and 636-1.4) must be shown when placing monitoring and/or recording technology in all areas, but especially in those areas where there is the highest expectation of privacy. Private spaces include:

- Bedrooms;
- Bathrooms;
- Places in which a resident receives medical or nursing services;
- Places in which a resident meets privately with visitors; or
- Places in which a resident privately makes phone calls.

Monitoring and/or recording technology may, in very rare circumstances, be used in an individual's bedroom. However, any roommate(s) who are collaterally affected must be notified and provide the required consent prior to implementation of the device.

Costs

The provider will bear the full cost of installing and maintaining monitoring and/or recording technology for any of its residents who require the use of such devices.

Audio/Video Retention Policies and Procedures

Agencies must develop audio/video retention policies and procedures to:

- a. Ensure that recordings may only be viewed/listened to by agency personnel, representatives from OPWDD, and any other entity having authority to review who have a legitimate need to view/listen to such recordings as part of their clinical function;
- b. Create appropriate and secure storage for recordings to minimize the risk that individuals without a legitimate need for such information can get access; and
- c. Maintain recordings in accordance with an agency-approved retention schedule.

Billing Standards/ Restrictions on Billable Service Time:

N/A

Service Documentation:

Agencies must follow the documentation requirements in 14 NYCRR §§ 633.16, 633.4, and 636-1.4, in addition to all other State and Federal requirements.

Other Documentation Requirements:

N/A

Records Retention:

New York State regulations require each Medicaid provider to prepare records to demonstrate its right to receive Medicaid payment for a service. These records must be "contemporaneous" and kept for six years from the date the service was provided. 18 NYCRR 504.3(a).

All documentation specified above, including service documentation and the Life Plan/ISP must be retained for a period of at least six years from the date the service was delivered or when the service was billed, whichever is later.

Recordings that include images of individuals who receive OPWDD services must be treated as confidential information subject state and federal requirements, including but not limited to: Mental Hygiene Law §§ 33.13; 33.16; and 33.25 where applicable.