

Policy Title: Home and Community Based Services (HCBS) Settings Final Rule Compliance

Policy Number: CW0016

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Applicable to: Providers applying for and/or currently designated for Children's Waiver HCBS

Purpose: This policy provides information regarding the requirements of the Home and Community Based Services (HCBS) Settings Final Rule and New York State Department of Health's (DOH) process to verify Children's Waiver HCBS providers' compliance with these requirements.

HCBS Settings Final Rule

The Medicaid Home and Community Based Services (HCBS) Settings Final Rule (§441.301(c)(4) and §441.710), known as the Final Rule, has several components which require DOH to verify Children's Waiver HCBS providers' compliance with the Final Rule. The Final Rule became effective in March 2014 and describes how Medicaid-funded HCBS are to be delivered by States and HCBS providers in general.

As part of the settings component of the HCBS Final Rule, Centers for Medicare and Medicaid Services (CMS) established:

- requirements for settings where HCBS can be provided and
- the heightened scrutiny process that sites would need to undertake if located in a building or on the grounds of a facility that is also providing inpatient institutional treatment or is otherwise presumed institutional under the rule.

According to CMS, settings that DO NOT MEET the definition of being home and community based are:

- A nursing facility;
- An institution for mental diseases;
- An intermediate care facility for individuals with intellectual disabilities;
- A hospital; or
- Any other locations that have qualities of an institutional setting, as determined by the Secretary.

In addition, the Final Rule §441.301(c)(5)(v) specifies that the following settings are presumed to have the qualities of an institution (and therefore likely do not meet the HCBS standard without documentation to support otherwise):

- Any setting that is located in a building that is also a publicly or privately operated facility that provides inpatient institutional treatment;
- Any setting that is located in a building on the grounds of, or immediately adjacent to, a public institution; or
- Any other setting that has the effect of isolating individuals receiving Medicaid HCBS.

In addition to the settings standards, the federal HCBS Final Rule also requires a person-centered planning process. This process must:

- Provide necessary information and support to the individual to ensure that they can direct their planning process as much as possible;
- Include people chosen by the individual;
- Be timely and occur at least annually at times and locations of the individual's convenience;
- Assist the person in achieving outcomes they define for themselves, and in the most integrated community setting(s) they desire;
- Ensure delivery of services in a manner that reflects personal preferences and choices;
- Help promote the health and welfare of those receiving services;
- Take into consideration the culture of the person served;
- Use plain language;
- Include strategies for solving disagreement(s);
- Offer choices regarding the services and supports the person receives, and from whom;
- Provide a method for the individual to request updates to their plan;
- Indicate what entity or person will monitor the primary or main person-centered plan; and
- Identify individual's strengths, preferences, needs (both clinical and support), and desired outcomes.

Additional information on the person-centered planning process is available [here](#) as well as in the [HCBS Manual](#).

Since Children's Waiver HCBS is designated by individual provider site, provider sites currently designated to provide HCBS and sites seeking HCBS designation must be fully compliant with all tenets of the Final Rule and maintain policies, procedures, and supporting documentation to confirm compliance with Final Rule standards. A comprehensive outline of all required Final Rule documentation can be found [here](#).

Additional information on the federal HCBS Final Rule is available [here](#).

HCBS Site Designation Process

When reviewing a provider's designation application for new providers that wish to become designated to provide Children's Waiver HCBS or previously designated providers who are becoming designated at a new site, the State Interagency Designation Team will initially review the designated site(s) address(es) to ensure that the site(s) applying for designation does not meet the criteria of an institution, based on the CMS criteria outlined above in this policy guidance. Please refer to Appendix A for an outline of requirements for newly designated and previously designation providers. For any sites that appear to meet the criteria of an institution, the State Interagency Designation Team will reach out to the provider to obtain further details regarding the setting and how services are provided.

In 2019-2021, DOH reviewed all designated HCBS providers through a rigorous process to ensure compliance with the Final Rule and report to the Federal CMS. All newly designated providers or currently designated HCBS providers requesting additional site designation, will therefore also be reviewed by DOH. These providers will be requested to submit the [documentation detailed below](#) to ChildrensWaiverHCBSFinalRule@health.ny.gov, which verifies their compliance with the Final Rule within six months of receiving their formal

designation letter. Following a review of the documentation, the State will schedule a meeting with the provider to discuss the results of the review and provide any necessary technical assistance. The State is available to engage in additional conversations with newly designated providers and providers seeking designation to provide assistance related to compliance with the Final Rule. Additionally, the State may conduct an onsite review to obtain further information to determine compliance with the Final Rule.

HCBS Final Rule Compliance Review Process

Permissible Setting Review

As described above, the Interagency Designation Team will review the provider's address(es) to determine compliance with the settings component of the Final Rule. Providers who operate, or intend to operate, programs out of a site that meets the CMS definition of an institution will not be permitted to provide HCBS out of that site.

Self-Assessment Survey

The DOH will distribute an HCBS provider Final Rule self-assessment survey to all newly designated HCBS providers to complete the survey for *each* HCBS setting/address where they are designated to provide services. This self-assessment survey is an essential step for assessing compliance with the settings component of the Final Rule. Depending on the responses to the survey questions, DOH may request further information. All questions must be answered. By completing the survey, the provider attests that the answers provided are factual, accurate, and complete.

The self-assessment survey also needs to be completed by previously designated providers that are adding a new site and/or changing the location of a previously designated site. While previously designated providers adding a new site will need to complete the self-assessment survey, they will not need to resubmit documentation, as noted below.

Documentation Request

As part of its validation of a site's Final Rule compliance, DOH will forward a documentation worksheet simultaneously with a provider self-assessment survey. The [Children's HCBS Provider Final Rule Documentation Worksheet](#) is a log, in which each HCBS provider should note all the agency policies, procedures, and practice documents which demonstrate the provider's compliance with each HCBS Final Rule Standard listed. For multi-page documents, providers should note the page number(s) which supports fulfillment of the Final Rule standard. The first tab of the tool contains instructions for completion of the documentation spreadsheet.

Documentation which should be submitted includes, but is not limited to:

- Policies supporting compliance with the HCBS standards, such as staff training, individual rights, and where applicable, visitation policies, managing money and possessions, and allowable social practices;
- Procedures, such as care planning, person-centered planning, and securing informed consent;
- Provider qualifications, such as licensing information;
- Redacted Service Plans and/or service notes;
- Restraint policy;

- Participant handbooks;
- Staff training materials, evidence of continued education, and tracking of staff training; and
- For residential sites, additional documentation such as lease or occupancy agreements, floor plans or evidence of private units, etc. may be required

The list above is not exhaustive of all documentation providers are required to submit; providers should submit any documentation they feel explicitly supports their compliance with the Final Rule. The DOH may request additional materials, if necessary, to demonstrate full compliance with the Final Rule.

Required documents should be compiled into a zip file and attached to an email, along with the completed Documentation Worksheet, to ChildrensWaiverFinalRule@health.ny.gov. Providers will have three weeks from the date of receipt to complete and submit the survey and documentation request. Further information regarding how to complete this worksheet can be viewed [here](#).

Onsite Review

After reviewing each site's returned self-assessment and documentation submission, DOH may communicate with HCBS providers to schedule in-person or virtual onsite assessments to confirm their level of compliance. Residential sites, and non-residential sites which provide HCBS on site, may be selected for a site review. Likewise, if there are any questions or concerns that cannot be addressed during the documentation review, DOH may schedule a site review to ensure provider compliance. Providers will receive an agenda that outlines the onsite review process and expectations.

As part of the site review, the State will conduct interviews with provider representatives (administration and staff) to understand how the program/residence is structured. Reviewers will also conduct interviews with at least one individual (residents or program participants or their caregivers) to establish if the setting has the effect of isolating individuals receiving HCBS from the broader community by determining whether:

- The setting is integrated in and supports full access to the greater community;
- The setting is selected by the individual from among setting options;
- The setting ensures an individual's rights of privacy, dignity, and respect, and freedom from coercion and restraint;
- The setting optimizes but does not regiment, individual initiative, autonomy, and independence in making life choices, including but not limited to daily activities, physical environment, and with whom to interact; and
- The setting facilitates individual choice regarding services and supports, and who provides them.

For provider-owned or controlled residential settings, the State will also confirm:

- The unit or dwelling is a specific place owned, rented, or occupied under a legally enforceable agreement by the individual receiving services;
- Each individual has privacy in their sleeping or living unit;
- Individuals have freedom and support to control their schedules and activities, and have access to food at any time;

- Individuals can have visitors of their choosing at any time;
- The setting is physically accessible to the individual; and
- Any modifications of the conditions for provider-owned and controlled residential settings are supported by a specific assessed need and justified in the person-centered plan.

If conducted virtually, the site review will be conducted via Webex, and will be recorded. If a site review is in-person, photos and video of the setting will be taken to support the reviewers' observations.

Remediation

Once site assessments have been completed and documentation has been reviewed, the State will work with providers to develop a plan for remediating any identified areas of non-compliance, if needed. DOH will provide each setting with a copy of the site assessment report, as well as required or recommended actions needed to come into compliance with the Final Rule standard(s).

The State will provide ongoing guidance and technical assistance to providers to ensure remediation plans are developed that outline realistic goals and tasks to ensure the provider can come into compliance with all requirements for an HCBS setting.

The DOH will make a determination as to whether the settings identified will likely meet the HCBS Final Rule requirements, need further training and technical assistance to meet the requirements, or are unlikely to meet the requirements of the HCBS Final Rule with remediation. If a site is unable to remediate to comply with the Final Rule, the site will be recommended for de-designation, at least until such time as they are able to come into full compliance. Sites that are not compliant with the settings component of the Final Rule will not become designated until the site aspect resulting in non-compliance with the settings component is remediated.

Ongoing Monitoring

Following the compliance review, the DOH will continue to monitor providers' compliance with the Final Rule on an ongoing basis. Ongoing monitoring of compliance with the Final Rule will be included in the HCBS case record review process, which is conducted on a yearly basis. HCBS providers will be required to sign the attestation and attest to compliance with all Final Rule standards every three years during the Children's Waiver redesignation process.

Appendix A – Responsibilities for Newly Designated and Existing Providers

The chart below outlines the requirements for providers who are requesting to become designated for HCBS and for providers who have been previously designated and are requesting for an additional site to be designated.

Requirement	Newly Designated Provider	Previously Designated Provider
Provider to submit designation request to the Interagency Designation Team	✓	✓
Interagency Designation Team review of setting address against Final Rule settings criteria	✓	✓
Provider to complete Final Rule self-assessment survey	✓	✓
Provider to submit complete Final Rule documentation worksheet and submit documentation	✓	
Interagency Designation Team to meet with provider to discuss designation application, documentation submitted, and/or additional technical assistance	✓	
Onsite review of residential sites and non-residential sites that provide HCBS on-site	✓	✓
Final Rule site assessment report completed by the State	✓	✓
Provider conducts remediation activities as outlined in the site assessment report	✓	✓