

## Overview

On January 16, 2014, the Center for Medicare and Medicaid Services (CMS) published the final rule related to Home and Community Based Settings (HCBS) for Medicaid-funded long term services and supports provided in non-institutional residential settings under the following authorities of the Social Services Act: 1915(c), 1915(i) and 1915(k). This rule implements a number of changes to home and community based waivers, finalizes regulatory changes to the 1915(i) state plan home and community based services and imposes new requirements on what is considered an appropriate home/community based residential setting for all the authorities in its scope. The crux of this final rule is to provide person-centered requirements which identify the strengths, preferences and needs (clinical and support), as well as the desired outcomes of the individual. The inclusion of defined HCBS residential setting requirements is one part of this strategy.

The final rule took effect March 17, 2014. States are required to submit transition plans to CMS within one year of the effective date indicating how they intend to comply with the new requirements within a reasonable time period. If states amend or renew any waivers or state plan amendments in place prior to the effective date, that action serves as a trigger for the state to submit a transition plan for all its waivers under 1915(c), as well as any state plan amendments under 1915(i) or 1915(k) within 120 days of the initial amendment/renewal submission.

The following is New York State's statewide transition plan pursuant to this requirement.

## Background

New York State operates 12 1915(c) waivers across the four major offices that oversee programs and services to individuals who are aged and/or physically, behaviorally, mentally, developmentally or intellectually disabled. These agencies/offices are the Department of Health (DOH), Office of Mental Health (OMH), Office for People with Developmental Disabilities (OPWDD) and Office of Children and Family Services (OCFS). In addition, the Office for Alcohol and Substance Abuse Services (OASAS) also provides services to individuals in these waivers and participated in the development of the statewide transition plan. We do not currently offer services through our state plan under a 1915(i) or 1915(k) authority, although we have applied to CMS for approval of a 1915(k) Community First Choice Option state plan amendment.

The following 1915(c) waivers are currently operating in New York State:

- Long Term Home Health Care Program Waiver
- Nursing Home Transition and Diversion Waiver
- Traumatic Brain Injury Waiver
- Care at Home Waivers (I, II, III, IV, and VI)
- Bridges to Health (B2H) Waivers (B2H Serious Emotional Disturbances, B2H Developmental Disabilities and B2H Medically Fragile)
- OPWDD Home and Community Based Services
- OMH/SED (Serious Emotional Disturbances) Children's Waiver

In addition, the above agencies/offices offer significant home and community based LTSS through our Medicaid state plan and, in the case of those operated by the DOH and the OPWDD, through 1115 demonstration waivers. We do not read the rule to apply to state plan services outside of 1915(i) and

1915(k) authorities and understand that CMS does intend to apply the rule to 1115 demonstration waivers upon renewal or amendment through negotiation of the terms and conditions of approval.

Most individuals receiving services through these waivers are living in their own homes or those of family members, certain group homes or other adult care facilities where they enjoy the qualitative benefits of receiving services in the community as opposed to in an institution. However, there are individuals who live in congregate housing, adult care facilities and supportive housing where their autonomy, independence and community integration may be less apparent, including children and youth where their rights are delegated to their parents or guardians. New York has affirmed its commitment to serving individuals with disabilities in the least restrictive environment under Governor Andrew Cuomo's leadership. In 2012, the Governor introduced legislation to establish the Justice Center to ensure protection against abuse and neglect of individuals with special needs. The Justice Center became operational in 2013. Also in 2012, he convened the Olmstead Development and Implementation Cabinet, which met with over 160 stakeholder groups and reviewed over 100 position papers before releasing its report in October 2013 laying out recommendations for New York policymakers to continue efforts to ensure that individuals with disabilities are provided the services and supports they need that reflect their choice and support their goals to live an independent and fully integrated life in the community.

Consistent with these efforts, New York State convened an interagency workgroup in 2014 to address how best to comply with the requirements of the new settings rule. The group met a number of times to ensure that a cohesive statewide transition plan was developed to address the unique needs of individuals across a wide variety of community-based settings. The interagency workgroup includes representatives from the Executive Chamber, DOH, OMH, OPWDD, OCFS, and OASAS. Four meetings were held between January and June to develop the transition plan that follows.

#### New York State's Statewide Transition Plan for Community Based Settings

42 CFR §441.530 requires that all settings in which individuals receiving Medicaid-funded home and community based services live must have the following characteristics and qualities:

- (i) The setting is integrated in and supports full access of individuals receiving Medicaid HCBS to the greater community, including opportunities to seek employment and work in competitive integrated settings, engage in community life, control personal resources, and receive services in the community, to the same degree of access as individuals not receiving Medicaid HCBS.
- (ii) The setting is selected by the individual from among setting options, including non-disability specific settings and an option for a private unit in a residential setting. The setting options are identified and documented in the person-centered service plan and are based on the individual's needs, preferences, and, for residential settings, resources available for room and board.
- (iii) Ensures an individual's rights of privacy, dignity and respect, and freedom from coercion and restraint.
- (iv) 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.
- (v) Facilitates individual choice regarding services and supports, and who provides them.

The rule imposes further requirements on settings that are provider owned or controlled, as is often the case with supportive housing and certain independent residential alternatives (IRAs) where individuals receiving services through OPWDD's Home and Community Based Services Waiver may live. The following qualities and/or conditions must be assured in these settings:

(A) The unit or dwelling is 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 the landlord tenant law of the State, county, city or other designated entity. For settings in which landlord tenant laws do not apply, the State must ensure that a lease, residency agreement or other form of written agreement will be in place for each participant and that the document provides protections that address eviction processes and appeals comparable to those provided under the jurisdiction's landlord tenant law.

(B) Each individual has privacy in their sleeping or living unit:

(1) Units have entrance doors lockable by the individual, with only appropriate staff having keys to doors as needed.

(2) Individuals sharing units have a choice of roommates in that setting.

(3) Individuals have the freedom to furnish and decorate their sleeping or living units within the lease or other agreement.

(C) Individuals have the freedom and support to control their own schedules and activities, and have access to food at any time.

(D) Individuals are able to have visitors of their choosing at any time.

(E) The setting is physically accessible to the individual.

Finally, the rule asserts that hospitals, nursing homes, institutional care facilities (ICF) for the developmentally disabled and institutes for mental disease are not community-based settings and further that settings on the grounds of public or private institutions and those in close proximity to public institutions are presumed to be institutional rather than community-based. New York State understands that it has the burden of providing evidence to the Secretary of Health and Human Services (HHS) if it believes that such a setting should be considered community-based for the purpose of allowing the provision of Medicaid-funded HCBS LTSS to individuals who reside there.

New York State proposes the following time table and deliverables to come into compliance with this rule where settings do not yet exhibit these qualities and characteristics.

Timeline	Transition Plan Activity	Deliverables
September 2014 – August 2015	a. Develop detailed census of existing settings on an agency by agency basis; b. Evaluate settings based on exploratory questions in CMS toolkit; and c. Develop mitigation strategies for those settings not in compliance.	Evaluation indicating scope of any issues.  Menu of mitigation strategies.
September 2015 – August 2016	a. Begin transition plan implementation in a phased approach.	Progress Report
September 2016 – August 2017	Complete detailed transition process for all settings that are not provider owned or in, near or adjacent to a public institution.	Progress Report
September 2017 – August 2018	Develop plan for all settings that would require the Secretary to review under heightened scrutiny including Assisted Living Program facilities, Adult Care Facilities, Enriched housing, supportive housing, etc.	Completed plan
September 2018 – August 2019	Implement final stage of settings transition.	Implementation report