

MEMORANDUM

To: Home and Community-Based Service Providers

Via eMedNY Listserv Nursing Home Transition and Diversion (NHTD) and
Traumatic Brain Injury (TBI) Medicaid Waiver Providers

Date: October 6, 2016

Subject: New Program Applications and Home and Community-Based Services Final Rule - Settings Compliance

The HCBS Final Rule, issued by Centers for Medicare and Medicaid Services (CMS), effective March 17, 2014, identifies settings or services that present institutional qualities and therefore do not meet the requirements necessary for Medicaid-funded home and community-based settings. These settings include those located in a publicly or privately owned facility that provides inpatient treatment; are on the grounds of, or immediately adjacent to, a public institution; or that have the effect of isolating individuals receiving Medicaid-funded HCBS from the rest of the community. A state may only include a setting that has any of the above characteristics in its Medicaid HCBS programs *if* CMS determines that it has the qualities of an appropriate home and community-based setting, as explained below. This is done through a “heightened scrutiny” process, which involves the State collecting information and input from the public supporting that the setting meets the qualities of being home and community based and *does not* have the qualities of an institution.

While it *is not prohibited* to develop programs in settings that “trigger heightened scrutiny,” NYSDOH presents the following list of the qualities that programs will be expected to demonstrate in order to receive HCBS Medicaid funding if heightened scrutiny is triggered:

- Does the setting provide opportunities for regular, meaningful non-work activities in integrated community settings for the period of time desired by the individual?
- Does the setting afford opportunities for individual schedules that focus on the needs and desires of an individual and an opportunity for individual growth?
- Does the setting afford opportunities for individuals to have knowledge of, or access to, information regarding age-appropriate activities (including competitive work, shopping, attending religious services, medical appointments, dining out, etc.) outside of the setting, and who in the setting will facilitate and support access to these activities?

- Does the setting allow individuals the freedom to move inside and outside of the setting as opposed to one restricted room or area within the setting? For example, do individuals receive HCBS in an area of the setting that is fully integrated with individuals not receiving Medicaid HCBS?
- Is the setting in the community/building located among other buildings (residences, private businesses, retail businesses, restaurants, doctor's offices, etc.) that facilitates integration with the greater community?
- Does the setting encourage visitors or other people from the greater community (aside from paid staff) to be present, and is there evidence that visitors are present at regular frequencies? For example, do visitors greet/acknowledge individuals receiving services with familiarity when they encounter them, are visiting hours unrestricted, or does the setting otherwise encourage interaction with the public?
- Do employment settings provide individuals with the opportunity to participate in negotiating his/her work schedule, break/lunch times and leave and medical benefits with his/her employer to the same extent as individuals not receiving Medicaid-funded HCBS?
- In settings where money management is part of the service, does the setting facilitate the opportunity for individuals to have a checking or savings account or other means to have access to, and control of, his/her funds.
- Does the setting provide individuals with contact information, access to and training on the use of public transportation (such as buses, taxis, etc.) and are these public transportation schedules and telephone numbers available in a convenient location?

If a new waiver provider applicant has proposed to offer services that are not fully integrated in the community using the above criteria, it will not be approved. Therefore, at the time of application, the service site should meet all of the above criteria in order for the application to proceed through the waiver application process. Also, note that co-located service sites also require the approval of the other entities using the premise.

Thank you for your attention to this matter.

For further information please contact: nhtdwaiver@health.ny.gov or tbi@health.ny.gov or 518-474-5271.