

Identifying, Evaluating and Remediating “Settings That Isolate” in the Context of CMS Guidance on Heightened Scrutiny Requirements within the HCBS Settings Rule

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First issued in 2014, the Home and Community Based Settings Rule seeks to ensure that the limited Medicaid funding dedicated to Home and Community Based Services (HCBS) funds settings that are truly home- and community based in nature, rather than settings that retain the characteristics of institutions. As a result of advances in federal public policy and civil rights law, coupled by demands from people with disabilities and their advocates for greater community-based options, states have shifted funds and helped people transition from institutional settings to community-based ones, with the goal of delivering higher quality services consistent with the autonomy and integration available in the community. In order to ensure that these transitions truly reflect a change in the experience of the person receiving services, the Settings Rule articulates the minimum standards a setting must meet to qualify as community-based.

Among the Rule’s requirements are those pertaining to settings defined as “presumptively institutional”— settings that are presumed to be institutional in nature, unless a state offers compelling evidence to the contrary through a “heightened scrutiny” process. The rule describes three categories of settings that are presumed to have the qualities of an institution: a) those located in a building that is also a publicly or privately operated facility that

provides inpatient institutional treatment; b) those in a building located on the grounds of, or immediately adjacent to, a public institution; and c) any other setting that has the effect of isolating individuals receiving Medicaid HCBS from the broader community of those not receiving Medicaid HCBS. This policy brief focuses on the third prong: settings that isolate individuals from the broader community.

The Rule itself remains in effect and has not changed since 2014. In March 2019, the Centers for Medicare and Medicaid Services (CMS) issued additional guidance on heightened scrutiny and has since issued multiple letters in response to heightened scrutiny requests from states, including the results of a six-state pilot CMS implemented on heightened scrutiny. As a result, states may need to adjust their approach to implementing the heightened scrutiny provisions of the HCBS settings rule. This technical brief provides recommendations to state policymakers on how to implement the HCBS settings rule with fidelity in light of CMS’s recent updates, while highlighting certain promising practices states may adopt.

I. What are Settings that Isolate?

On March 22, 2019, CMS issued new guidance replacing prior guidance on settings that typically have the effect of isolating people receiving HCBS from the broader community

(hereafter referred to as “Settings that Isolate”). Below are the factors that CMS will take into account, along with analysis and recommendations for states. A Setting that Isolates meets one or more of the following factors:

1. Due to the design or model of service provision in the setting, individuals have limited, if any, opportunities for interaction in and with the broader community, including with individuals not receiving Medicaid-funded HCBS;¹
2. The setting restricts beneficiary choice to receive services or to engage in activities outside of the setting; or
3. The setting is physically located separate and apart from the broader community and does not facilitate beneficiary opportunity to access the broader community and participate in community services, consistent with a beneficiary’s person-centered service plan.

States may add additional factors beyond those CMS specifically articulated in defining a Setting that Isolates, but must clearly identify any additional characteristics of isolation so that stakeholders can understand what the state considers isolating.

Prior to March 22, 2019, CMS offered a non-exhaustive list of residential settings that typically have the effect of isolating people receiving HCBS from the broader community (hereafter referred to as “Settings that Isolate, including disability-specific farmsteads, gated or “secured” communities for people with disabilities and other large congregate settings.

¹ The nature of the opportunities for interaction in and with the broader community and the identified supports designed to provide this access to and participation in the broader community should be documented within the person centered plans of individuals receiving services in a setting and in the policies and practices of the setting, consistent with

The March 2019 guidance replaced all prior guidance, including this list of examples, shifting to a definition of Settings That Isolate that emphasizes the specific functional criteria listed above, irrespective of setting type. However, while the new guidance replaces the prior guidance, settings listed as typically qualifying as Settings that Isolate under the prior guidance might still be considered Settings that Isolate if they meet that criteria within the new guidance. States cannot automatically presume that the settings listed as examples of Settings that Isolate under the old guidance are now permissible as a result of its revision and instead must still carefully examine whether these settings might still meet the new Settings that Isolate criteria.

Any settings that meet one or more of these factors, like all settings that seek to receive HCBS funds, must be evaluated by the state on a case-by-case basis as a potential Setting that Isolates utilizing the criteria articulated by the new guidance. Many of these criteria reflect common characteristics identified in the non-exhaustive examples CMS had offered prior to this guidance.

It is also worth reiterating that the HCBS Settings Rule applies beyond residential settings, and that states may need to submit certain day and employment settings for heightened scrutiny if they wish to continue funding them using Medicaid HCBS funds.

CMS requires that opportunities for interaction, along with the supports necessary to access and participate in the broader community, be reflected within the individual’s person-centered plan, and must be consistent with other components of Medicaid HCBS regulations regarding person-centered planning. In the planning process, the state and the provider in question must ensure that individuals have

the person-centered planning requirements of the rule and the requirements for modification of the additional conditions required for provider-owned or controlled residential settings. See Centers for Medicare & Medicaid Services. (March 22, 2019). SMD # 19-001 Re: Home and Community-Based Settings Regulation, Heightened Scrutiny.

access to people chosen by the individual to support them in the planning process, receive necessary information and support to ensure that they can direct the process to the maximum extent possible, and are enabled to make informed choices and decisions. In addition, the planning must be timely and occur at times and locations of convenience to the individual. CMS makes explicit reference to these requirements in existing federal regulation on person-centered planning.

The HCBS settings rule also requires that any modifications of an individual's rights within a provider-owned or controlled residential setting² under the HCBS Settings Rule must be supported by a specific assessed need, justified in the person-centered service plan, and undergo regular review.³ CMS will factor any failure to comply with this individualized exceptions process into its determination of whether a setting limits opportunities for interaction with the broader community.

In the March 2019 guidance, CMS provided additional clarity regarding settings located in rural areas. Such settings are not automatically presumed to have qualities of an institution, and more specifically, are not considered by CMS as automatically isolating to HCBS beneficiaries. States should compare the opportunities for accessing the greater community for individuals in that setting against the experience of other individuals living in the same geographical area (but who are not receiving Medicaid HCBS).

² Some states have chosen to apply some of these requirements, such as access to food and visitors, beyond residential settings.

³ The person-centered plan must include: identification of a specific and individualized assessed need; documentation of the positive interventions and supports used prior to any modifications to the person-centered service plan; documentation of less intrusive methods of meeting the need that have been tried but did not work; inclusion of a clear description of the condition that is directly proportionate to the specific assessed need;

Recommendations:

1. States should look closely at the effective implementation of person-centered planning requirements as a key indicator for whether a provider-owned or controlled setting may have isolating characteristics. In particular, states should closely scrutinize large congregate residential settings and any other setting previously considered to be likely to isolate for compliance with person-centered planning regulations.

Poor compliance with the person-centered planning regulations may indicate that the setting limits individuals' opportunities for interaction with the broader community. States should review the person-centered plans of individuals in such settings and ensure that they are actually complied with by evaluating the person's lived experience in any HCBS setting (including residential and/or non-residential settings).

2. If public comments or other mechanisms identify any setting as a potential Setting that Isolates, CMS has indicated that they reserve the right to review "any setting that the state has attested has remediated isolating characteristics if the state receives significant public comment disagreeing with the state's assessment."⁴ States should bear this in mind and proactively seek to identify as possible Settings that Isolate settings that they feel may be the subject of significant public comment.
3. States should anticipate that any residential settings that are presumed institutional or

inclusion of a regular collection and review of data to measure the ongoing effectiveness of the modification; inclusion of established time limits for periodic reviews to determine if the modification is still necessary or can be terminated; inclusion of the informed consent of the individual; inclusion of an assurance that interventions and supports will cause no harm to the individual.

⁴ Centers for Medicare & Medicaid Services. (March 22, 2019). SMD # 19-001 Re: Home and Community-Based Settings Regulation, Heightened Scrutiny.

isolating in nature, and fail to comply with all of the general settings criteria as well as requirements specific to provider-owned residential settings, will likely need to make significant modifications and remediate areas of non-compliance with the federal HCBS requirements in order to pass the heightened scrutiny process, if they are able to do so at all. To facilitate compliance, states may explore requiring providers to submit exceptions to the provider-owned residential settings requirements to a state-managed process, so as to better enable the state to provide assurances to CMS that settings receiving HCBS funding are in compliance with this regulatory provision.

4. States should also carefully monitor the extent to which a setting facilitates access to the broader community, given the importance of this issue to the new criteria for Settings that Isolate. For example, transportation is one key access barrier, even when comparing individuals receiving Medicaid HCBS to other community members in their environments. People in rural settings depend on private vehicles to engage in community activities far more than people in urban settings. The fact that many people receiving Medicaid HCBS do not have ready access to a private vehicle can create serious access barriers in rural settings. Such factors should be considered, along with CMS's prior statements that "reverse integration" measures are insufficient to comply with the community integration requirements of the HCBS Settings Rule, when determining if a setting is presumptively institutional.⁵

II. How Should States Approach Potential Settings that Isolate?

Below is an explanation of the timelines and processes for Settings that Isolate, with recommendations for implementation.

⁵ Centers for Medicare & Medicaid Services. (August 14, 2018). Letter from Ralph Lollar to Marie Matthews

A. Timeline

States must be in full compliance with the HCBS Settings Rule by March 17, 2022. Any settings found not compliant must have been remediated by then or individuals receiving services within them must be transitioned to other settings that meet the requirements of the Rule. Note that individuals who wish to continue to receive services at a setting that cannot meet the federal HCBS requirements may use other funding streams to finance their continued services, or alternatively look at receiving similar services under other non-Medicaid HCBS programs.

According to the new guidance, if a state initially determines that a setting has the effect of isolating individuals but verifies that remediation to fully comply with the regulatory criteria has been completed prior to July 1, 2020, the state is not required to (but may) submit information on that setting to CMS for a heightened scrutiny review. States, however, must submit any settings that have not completed remediation prior to July 1, 2020 if the state believes they can meet the regulatory criteria and will finish needed changes prior to the March 2022 deadline. CMS requests that states submit settings for heightened scrutiny review by October 31, 2020.

Although a state need not submit to CMS an evidentiary package for a setting remediated by July 1, 2020, it must post a list of remediated settings in its Statewide Transition Plan (or disseminate the list separately) and provide opportunity for public comment. States must include a statement of information supporting remediation for those settings that is available upon request.

B. Reconciling HIPAA and the HCBS Settings Rule Public Comment Process for Settings that Isolate

CMS has indicated that there may be some Health Insurance Portability and Accountability Act (HIPAA) implications for states to consider in the public comment process, under those circumstances in which the name and address of a setting could lead to disclosure of Protected Health Information (PHI) “if it relates to the past, present or future physical or mental health or condition of an individual, the provision of health care or payment for care, and there is a reasonable basis to believe the information can be used to identify the individual.”

CMS has indicated that name and location is fine to disclose for the first two categories of settings that are presumptively institutional. For Settings that Isolate, further review by state HIPAA attorneys may be necessary to ascertain what information can appropriately be included in packages made available for public comment for a particular setting. To the extent that information is not PHI, detailed information should be made available to disability and aging advocacy organizations. To the extent that there is PHI, Protection and Advocacy agencies and long-term care ombudsmen programs have a right to access such information as part of their oversight activities, and states are encouraged to proactively share this information with these entities.

Recommendation:

- To the extent that there is PHI in an evidentiary package regarding a Setting that Isolates, Protection and Advocacy agencies and long-term care ombudsmen programs have a right to access such information as part of their oversight activities, and states

are encouraged to proactively share this information with these entities.

C. Public Comment Process

The opportunity for meaningful public comment is absolutely critical to the heightened scrutiny process. States must offer a minimum 30-day public comment period any time they make a substantial modification to a statewide transition plan (STP), such as developing processes for setting validation and remediation or adding assessment findings. With regards to heightened scrutiny, states must include within their STP information on their process for identifying settings falling into any of the three presumptively institutional categories, their approach to reviewing such settings, and the factors that the state will utilize to determine whether a setting has overcome its institutional presumption or isolating characteristics and complies with the rule.

Heightened scrutiny requests must be posted for public comment, and states must also make the list of remediated settings available for public comment.⁶ For settings that a state has considered for heightened scrutiny review, states must provide a list of settings identified for each category, including a list of settings believed to be unable to overcome the presumption and a list of settings that were previously identified and subsequently demonstrated compliance.

In its March 2019 guidance on heightened scrutiny, CMS published suggested content for a heightened scrutiny evidentiary package. When submitting a setting for heightened scrutiny review, states should provide evidence of how the state has determined that a setting overcomes the presumption that it has the qualities of an institution. Information should focus on the qualities of the setting and how the setting is integrated in and supports access of individuals

⁶ CMS has indicated that states must publish a list of settings that were considered presumptively institutional but that the state believes have fully remediated by July 2020; the list can either be published in the settings transition plan or provided separately for public comment. See question 8 from

Centers for Medicare & Medicaid Services. (March 22, 2019). SMD # 19-001 Re: Home and Community-Based Settings Regulation, Heightened Scrutiny.

receiving HCBS into the broader community via the organization’s policies and practices as well as how the setting supports individuals consistent with their person-centered service plans.

Recommended Best Practices:

1. States should collect required information from each setting they submit for heightened scrutiny and publish a detailed summary of it alongside the initial heightened scrutiny request, with the exception of any Protected Health Information under HIPAA.
2. States should also articulate a formal role for the state Protection & Advocacy entity and, where relevant, the Long-Term Care Ombudsman, in reviewing heightened scrutiny requests and the supporting evidence collected by the state. Given the importance of an independent review of service-provision settings and the challenges the new guidance’s language around HIPAA may raise for meaningful review by the general public, states should offer P&A and Long-Term Care Ombudsman entities sufficient opportunity to contribute written observations for each potential Setting that Isolates prior to the submission of a heightened scrutiny package for public comment.
3. States should consider establishing dedicated advisory councils to review and evaluate heightened scrutiny requests, supporting evidence collected by the state, and documentation of successful remediation to supplement public comments. Several states have created advisory councils that include people with disabilities and other advocates to review and evaluate heightened scrutiny evidence packages alongside the broader public comment process.

D. Ongoing Monitoring

States must maintain an ongoing quality assurance framework for ensuring compliance with the HCBS Settings Rule for all settings serving Medicaid HCBS participants, even after

the March 2022 deadline for full compliance. This quality assurance framework must include the broad array of settings, including residential, day, and employment settings, along with private residences. This also includes any settings that underwent a heightened scrutiny process and were deemed to meet the settings criteria by the state and CMS.

CMS has cited the licensure process as a mechanism through which individual providers may be held accountable for continued compliance with the Settings Rule after March 2022, and the waiver and state plan amendment renewal process as a mechanism to hold states accountable. However, this requirement will likely prove insufficient to ensure that people receiving Medicaid HCBS enjoy the full range of rights guaranteed by the HCBS Settings Rule. States must view implementation of the Rule as an ongoing responsibility, one that involves regular work to ensure that settings remediate violations and continuously improve quality even outside the licensure and certification process.

Given the importance the new definition of Settings that Isolate places upon lived experience within a service setting as it relates to individuals’ person-centered plans, states should consider adopting a best practice of maintaining a mechanism for assessing continued compliance with the person-centered planning process, especially given that these requirements are already in effect. Each setting must be able to show not only intentions and “opportunities,” as documented in a person-centered plan, but also positive outcomes. In the absence of such ongoing oversight, settings’ compliance with federal rules will degrade over time and individuals receiving HCBS will not be able to enjoy the full protections guaranteed by the HCBS Settings Rule.

Recommended Best Practices:

1. States should ensure that compliance with the HCBS Settings Rule is embedded in their licensure and oversight processes and put in place a process for ongoing training on the requirements of the Settings Rule for licensure and oversight entity staff. States

should also conduct quality assurance spot-checks to ensure compliance with the Rule.

2. States must also offer individuals receiving HCBS an accessible, state-operated or state-funded complaint process to report potential violations of the Settings Rule, taking reports and complaints via phone, e-mail, and postal mail and in person. States should dedicate resources to investigate complaints and offer adequate recourse to individuals with disabilities receiving Medicaid HCBS, either through a direct state investigation process or through funding the state's Protection and Advocacy agency to adequately investigate and respond to individual complaints. States should similarly require provider-owned and controlled residential settings to clearly post in common areas the rights guaranteed by the HCBS Settings Rule in a plain language format accessible to residents, along with contact info for filing complaints.
3. States should assess compliance with the community integration components of the rule through unscheduled on-site observation and interviews with staff and participants (not selected by the provider) to determine if the lived experience matches what is laid out in individualized person-centered plans. States should also conduct regular audits of person-centered plans alongside unscheduled visits to ascertain if the person-centered planning process truly reflects an individualized process that ascertains an individual's wishes and desires, rather than the use of boilerplate language more consistent with provider convenience than beneficiary autonomy. Such efforts can be embedded into the existing auditing and quality assurance infrastructure.

III. How is CMS Likely to Approach Evaluating Heightened Scrutiny Submissions?

After receiving submissions from states, CMS will use each state's list to compile a random sample of heightened scrutiny settings to review. The review sample will also include any setting

the state requests CMS to review and any setting that generated – in CMS's words – "significant public comment" raising concerns/questions about the setting or about the state's assessment process. CMS will review all information from the state and other parties on the settings selected within the review sample and either approve or detail why the setting cannot be approved at the time. In the event that CMS's review reveals problems in the state's heightened scrutiny review process, it may review additional settings. If CMS receives public comments about settings that commenters believe are presumptively institutional but are not included on the state's heightened scrutiny list, it may request information on such settings.

In 2019, CMS released results from a six-state pilot of the heightened scrutiny process, focusing on the other two categories of settings that require heightened scrutiny to receive Medicaid HCBS funding: settings located in a building that is also a publicly or privately operated facility that provides inpatient institutional treatment, and settings on the grounds of, or immediately adjacent to, a public institution.

While the elements that trigger heightened scrutiny are very different between Settings that Isolate and these other two categories, CMS will likely pursue a similar process for reviewing Settings that Isolate. While CMS says it will review settings for compliance with all settings criteria outlined in the federal HCBS rule, CMS appears to be prioritizing a clear evidence base that settings are promoting, facilitating, and supporting access to the greater community among Medicaid HCBS participants.

In its pilot, CMS gave particular emphasis to (a) whether a setting is facilitating and promoting access to the broader community; (b) whether individuals have control over their own schedules and options for participating in individualized rather than solely group activities in the community; and (c) whether people have access to transportation options to make access to the broader community a reality. This section provides further information on how CMS has chosen to operationalize these requirements, citing examples from the six-state pilot. What

follows are expectations reflected in CMS's responses to state heightened scrutiny requests within the six-state pilot. This is not intended as an exhaustive list of expectations, but represents illustrative examples of how CMS has approached enforcement of particular parts of the Settings Rule's requirements.

A. State Evaluation Responsibilities

The majority of states participating in the pilot conducted on-site interviews. States should also conduct an extensive review of the person-centered plans of the individuals residing in settings submitted for heightened scrutiny and conduct interviews of individuals residing/receiving services within the setting.

In its feedback to states, CMS has emphasized that participant interviews must be conducted "outside of the presence of staff with a clear understanding that staff would not be informed of the specific information the individual shared."⁷

The State must directly assess the setting, rather than relying solely or primarily on a provider's self-assessment. As indicated in CMS's correspondence with the State of Montana regarding Boulder Meadows, a Residential Assisted Living Facility attached to a Community Access Hospital in Big Timber, CMS expects states to validate all settings for compliance with all of the settings criteria through at least one independent validation strategy rather than solely through provider self-assessments.⁸

Though states may take into account interviews with providers and family members, states are expected to conduct enough consumer interviews to obtain data that is representative of the overall experience of individuals in the setting.⁹ When there is a low number of consumers interviewed and the overall evidentiary package lacks sufficient information

of the level, frequency, and types of access participants have to the broader community, CMS often requests additional information in its formal feedback to states.

Recommendations:

1. States should describe how their interview processes, and all HCBS Settings Rule compliance activities, allow for interviews to be conducted outside of the presence of staff, and how it communicates that staff will not be informed of the specific information shared. In the event that there are discrepancies between consumer feedback and provider self-assessment, states should subject any setting where such discrepancies exist to further investigation and assessment.
2. States should directly assess the setting through on-site visits, and not rely on second-hand accounts provided by the provider.
3. States should conduct consumer interviews with a sample size sufficient and a sampling strategy appropriate to obtain data that is representative of the overall experience of individuals.

B. Evaluating Administrative Relationships Between Multiple Providers

CMS is evaluating the level of interconnectedness between institutional and HCBS settings that are co-located to ensure there is not a significant overlap in administrative, operational or programming responsibilities. CMS is also requiring states to attest that staff for the institutional setting are completely separate and distinct from the HCBS setting, and that if there is an overlap in staff it is infrequent and all staff working at any time in

⁷ Centers for Medicare & Medicaid Services. (April 19, 2019). Letter from Ralph Lollar to Lori Coyner Re: Heightened Scrutiny Review of Horizon House RTF, New Roads RTF, Salmon Run RTF, Via Verda RTF., 6.

⁸ Centers for Medicare & Medicaid Services. (April 10, 2019). Letter from Ralph Lollar to Marie Matthews Re: Heightened Scrutiny Review of Boulder Meadows, 2.

⁹ Ibid., 3.

the HCBS setting have been properly trained on the provision of HCBS.

The separation of administrative functions or staff may also be relevant between different providers, even where none of them are funded as a Skilled Nursing Facility, Intermediate Care Facility, or Institution for Mental Diseases. For example, in CMS's correspondence with Ohio regarding Consumer Support Services' group homes, two 4-person group homes on the grounds of a publicly operated ICF/IDD in Clark County, CMS considered the fact that the home did not share management or staff with two other group homes within the same cul-de-sac and specifically noted that the two group homes operated by the same provider had recently modified their service model to add a home manager to each setting location rather than assigning them regionally. This counted as supporting evidence that the entities in question were able to overcome the institutional presumption. The service staff and programming separation also applies to supplemental programming not reimbursable as Medicaid-funded service provision, such as recreational programming and volunteer activities, because such programming still forms an important part of the larger service experience.¹⁰

This observation is further supported by the March 2019 guidance, which specifically highlights the decentralization of staff structures over "centralized insular staff models focused around a specific facility/site."¹¹ CMS is likely to consider decentralization whenever multiple group homes or other residential settings are clustered into a common location.

¹⁰ Centers for Medicare & Medicaid Services. (April 10, 2019). Letter from Ralph Lollar to Maureen Corcoran Re: Heightened Scrutiny Review of Consumer Support Services #1 & #2., 2, 5.

¹¹ Centers for Medicare & Medicaid Services. (March 22, 2019). SMD # 19-001 Re: Home and Community-Based Settings Regulation, Heightened Scrutiny., 6.

CMS also carefully evaluated whether The Lodge at New Dawn permitted residents to enter and exit the setting after hours other than via the adjoining skilled nursing facility. CMS noted that the state had "worked with the setting to ensure there are options for accessing the setting after hours, including providing examples of strategies adopted by other settings." CMS noted that the setting adopted a buzzer system that allowed residents immediate access to their living units through the assisted living entrance and maintained round-the-clock support for access to the assisted living setting. Nonetheless, CMS encouraged the state to consider additional remediation "to allow individuals continuous and immediate access to the assisted living" setting. This reflects the priority CMS places on maintaining entrance to and egress from the facility at any time.¹²

In response to a heightened scrutiny request regarding the Highland Manor of Fallon Residential Assisted Living Facility (ALF) in Fallon, NV, which shares a building with a private nursing home, CMS requested additional clarification about the building's locked and gated perimeter to demonstrate that ALF residents have continuous access to the greater community.¹³ This illustrates the many difficulties settings that share a building with an institutional provider must resolve to comply with the basic rights conferred by the HCBS settings rule and qualify as community-based settings.

Recommended Best Practices:

1. States should collect and submit information regarding the extent to which a setting on the grounds of or adjacent to a public institution, or located in a building providing inpatient institutional treatment, has separate

¹² Center for Medicare & Medicaid Services. (April 10, 2019). Letter from Ralph Lollar to Maureen Corcoran Re: Heightened Scrutiny Review of Villa Vista Royale, Monarch Meadows & The Lodge at New Dawn., 14.

¹³ Center for Medicare & Medicaid Services. (April 10, 2019). Letter from Ralph Lollar to Suzanne Bierman Re: Heightened Scrutiny Review of Highland Manor of Fallon., 3.

administrative functions and personnel from the institution.

2. When evaluating whether multiple clustered buildings dedicated to residential service provision overcome the institutional presumption, one factor (among many) states should consider is whether there is any operational interconnectedness between the service and staff arrangements within each building and, where appropriate, for each individual receiving service within each building.

C. Evaluating the Right of Residents to Control Their Own Schedule and Have Access to the Broader Community

CMS has required states to take action to verify “that the variation and frequency of engagement in community activities of individuals' choosing (including group and individual outing options in the broader community) are consistent with the preferences and desires outlined in each individual's person-centered plan as identified through a review of the person-centered service plan, setting activity records/notes and/or direct on-site observation.”¹⁴ HCBS Settings must support full access of individuals receiving Medicaid HCBS to the greater community, including ensuring that individuals in provider owned and controlled residential settings “have the freedom and support to control their own schedules and activities.”

Ensuring that a setting and provider respects this freedom requires a state to carefully examine the individual schedules of those receiving services to ascertain whether or not they have the opportunity to control their own schedule. In the event that individuals receiving services are only able to choose between multiple congregate activities and cannot opt to select other

individualized non-congregate activities consistent with their own interests, concern should be raised that a setting is a Setting that Isolates and may require additional remediation if it is to receive HCBS funding.

It is also necessary for states to evaluate whether the staffing patterns used within a setting actually allow this right to be operationalized. For example, in the event that a setting nominally allows an individual to opt-out of a congregate activity but fails to maintain a staffing pattern that will support them in an individual alternative, it does not meaningfully allow those receiving services to control their own schedule. If a setting maintains a staffing pattern that effectively requires individuals' to participate in congregate activities in order to allow the provider to maintain a sufficient staffing pattern to provide adequate support or ensure health and safety, the setting is not in compliance with this requirement. States may wish to carefully review the amount of time individuals within a possible Setting that Isolates spend in congregate as opposed to individualized activities and ensure that both are selected by the individual(s) and consistent with personal preferences.

For example, in New Hampshire's heightened scrutiny request for the Easter Seals Group Home in Concord, the state reviewed a year's worth of monthly progress notes for each person receiving services within the setting, later verifying them through interviews with the service recipient and their support staff and on-site observations of the setting. During the on-site observation, “a conversation was observed between a resident and a staff person. The resident said they changed their mind since their conversation at breakfast and didn't want to go shopping, they wanted to go out for coffee instead. The staff suggested doing both

¹⁴ Center for Medicare & Medicaid Services. (April 10, 2019). Letter from Ralph Lollar to Deborah Fournier Re: Heightened Scrutiny Review of Easter Seals Group Home., 5; Center for Medicare & Medicaid Services. (April 10, 2019). Letter from Ralph Lollar to Maureen Corcoran Re: Heightened Scrutiny Review of Villa Vista Royale, Monarch

Meadows & The Lodge at New Dawn., 10; Centers for Medicare & Medicaid Services. (April 19, 2019). Letter from Ralph Lollar to Lori Coyner Re: Heightened Scrutiny Review of Horizon House RTF, New Roads RTF, Salmon Run RTF, Via Verda RTF., 5, 11-12, 16, 22-23.

activities. The resident said they just wanted to go for coffee. Staff supported their decision.”¹⁵ This provides a very vivid example of the kind of interaction that states should look for as evidence that a setting may constitute HCBS. In contrast, had the staff person insisted that the resident maintain their previously planned schedule, this would constitute evidence that the setting in question may not be HCBS and would either require further remediation or the withdrawal of HCBS funding. Similarly, had the setting not maintained adequate staffing patterns to allow the resident to opt out of a previously scheduled trip (for example, because other residents were scheduled to join that trip and the group home lacked staffing to support individuals not participating), it would also constitute evidence that the setting in question might not be HCBS.

It is important that states evaluate the lived experiences of those receiving services with respect to these requirements, not just the providers’ policies. For example, in Ohio’s on-site observational review of Villa Vista Royale, an assisted living facility co-located with a nursing facility, “state reviewers observed individuals setting their own schedules (observed during Ohio’s onsite observational review—individuals were leaving on their own or with family and friends). Additionally, during Ohio’s onsite observational review individuals confirmed they set their own schedules and participate in activities with the setting, as they choose.”¹⁶ Ohio also reviewed statements from local businesses in evaluating the extent of integration with the broader community of the setting.¹⁷

To offer another example, in Nevada’s review of Highland Manor ALF in Fallon, the state noted that a resident “was on her way to the dining

room to eat, despite the fact, it appeared lunch was over. Her roommate was sitting in their living room and crocheting, [and] also indicated that they eat whenever they want to and they come and go as they please.”¹⁸ This is consistent with other parts of the provider-owned and controlled residential settings, such as the right to have access to food at any time (a topic that CMS has sought assurances from states on in multiple heightened scrutiny reviews), and also speaks to the ability of the setting to avoid a regimented schedule, such as specific meal and sleep times.

The ability to control personal resources, another requirement of the broader Settings Rule, may also be relevant in evaluating the extent to which individuals receiving service have autonomy and access to the broader community. For example, in Oregon’s heightened scrutiny request for several residential treatment homes, the state noted that individuals receiving services had “access to personal resources, including unrestricted use of their individual mobile phones.”

Recommendations:

1. States should evaluate presumptively institutional settings to ascertain the extent to which individuals are both permitted to set their own schedules *and* the extent to which they actually do set their schedules. This includes evaluating whether individuals are allowed to make modifications on an ongoing basis without prior notice, ensuring that individuals have the ability to change their mind about their schedule. It should also include a review ensuring that individuals can participate in

¹⁵ Center for Medicare & Medicaid Services. (April 10, 2019). Letter from Ralph Lollar to Deborah Fournier Re: Heightened Scrutiny Review of Easter Seals Group Home., 5.

¹⁶ Center for Medicare & Medicaid Services. (April 10, 2019). Letter from Ralph Lollar to Maureen Corcoran Re: Heightened Scrutiny Review of Villa Vista Royale, Monarch Meadows & The Lodge at New Dawn., 5.

¹⁷ Centers for Medicare & Medicaid Services. (April 10, 2019). Letter from Ralph Lollar to Maureen Corcoran Re: Heightened Scrutiny Review of Consumer Support Services #1 & #2., 5.

¹⁸ Center for Medicare & Medicaid Services. (April 10, 2019). Letter from Ralph Lollar to Suzanne Bierman Re: Heightened Scrutiny Review of Highland Manor of Fallon., 4.

individual activities, not just congregate ones.

2. In addition to on-site observations, states should consider incorporating interviews with broader community stakeholders, reviews of provider policies and practices, reviews of individual schedules, and interviews with those receiving services in the evaluation of these requirements.
3. To ensure that these rights are operationalizable, states should evaluate and monitor the staffing patterns of such settings to ensure that individuals are able to participate in individualized activities and opt out of congregate ones without losing access to adequate support.

D. Evaluating Community Integration within a Setting

The extent to which individuals without disabilities are present within a setting informs whether or not a presumptively institutional setting can pass heightened scrutiny. However, “reverse integration” - where individuals not receiving HCBS are intentionally invited into a facility-based setting to participate with individuals receiving HCBS - is not alone sufficient to comply with the community integration criteria of the Settings Rule.¹⁹

CMS’s correspondence with pilot states reinforces this standard repeatedly. For example, CMS did not consider sufficient Montana’s attestation that Boulder Meadows Assisted Living Facility met the community integration requirements by encouraging family and friends to participate in activities offered within the Assisted Living Facility.²⁰ In contrast, CMS

approved North Dakota’s heightened scrutiny request for Villa De Remer Apartments, a complex on the grounds of a publicly-operated ICF/IID, in part because the buildings had been converted into apartment buildings owned by private landlords and rented by the general public, “ensuring that the grounds are no longer used only by individuals with intellectual and developmental disabilities.”²¹

Recommendation:

- States must ensure that settings under consideration for submission for heightened scrutiny offer interactions with people without disabilities in the broader community, not solely or primarily in the setting itself. In addition, states should ensure that such interactions with people without disabilities go beyond family members and service-provision personnel. States should look at a variety of types of evidence to evaluate this, such as on-site observational reviews, consumer and family interviews, review of provider policies and practices and analysis of individual schedules, among other avenues.

E. Documentation of Individuals’ Opportunity to Select Their Setting From Among Setting Options, Including Non-Disability Specific Settings

CMS seems specifically concerned that states are not providing sufficient documentation that individuals receive an opportunity to select their setting from among a variety of setting options, including non-disability specific settings, as required by the Rule. This requirement is relevant both in evaluating a particular setting or provider and in evaluating the state’s larger systemic compliance with the rule.²²

¹⁹ Centers for Medicare & Medicaid Services. (August 14, 2018). Letter from Ralph Lollar to Marie Matthews.

²⁰ Centers for Medicare & Medicaid Services. (April 10, 2019). Letter from Ralph Lollar to Marie Matthews Re: Heightened Scrutiny Review of Boulder Meadows., 2.

²¹ Centers for Medicare & Medicaid Services. (April 16, 2019). Letter from Ralph Lollar to Maggie Anderson Re: Heightened Scrutiny Review of Villa De Remer Apartments., 3.

²² Centers for Medicare & Medicaid Services. (April 10, 2019). Letter from Ralph Lollar to Maureen Corcoran Re: Heightened Scrutiny Review of Consumer Support Services #1 & #2., 3; Centers for

Recommendation:

- States should require documentation in person-centered plans of specific setting options presented to the individual, including non-disability specific settings, for each type of service received. This should be documented *prior to* an individual being referred to a specific provider to assure there were no conflicts in the case management process. This requirement is advisable across the board, given that the right to select a setting from among a variety of options (including non-disability specific settings) is applicable to all individuals receiving Medicaid HCBS. However, it is especially crucial when an individual has selected a provider-owned or controlled residential setting or a congregate residential, day, or employment service setting. There is a longstanding history of individuals with disabilities being channeled to such settings without the opportunity to select a non-disability specific setting.

F. Opportunities for Competitive Integrated Settings

For settings submitted for heightened scrutiny designed to serve working-age adults (and for some designed to serve older adults²³), CMS will likely also specifically evaluate the extent to which interested individuals receiving services in the setting have opportunities to work in competitive integrated settings, as reflected in CMS's evaluation of New Hampshire's heightened scrutiny request for an Easter Seals Group Home in Concord.²⁴ This component of the settings rule is important even for providers

that do not provide employment services, due to the significant data showing that a person's residential and day setting is associated with their likelihood of accessing competitive integrated employment.²⁵

Recommendation:

- States should evaluate whether individuals receiving services in presumptively institutional settings have access to competitive integrated employment opportunities. To accomplish this, states should rely on both close review of person-centered plans and direct interviews with residents of/people receiving services in the setting to determine whether competitive integrated employment opportunities are being discussed with them as an option, and if they desire such an option, to what extent the setting is supporting the realization of this goal.

G. Evaluating a Setting's Ability to Facilitate Individual Choice Regarding Services and Who Provides Them

In order to be considered community-based, a setting must facilitate "individual choice regarding services and supports, and who provides them." This means in part that an individual had a choice in selecting their both their residential and non-residential service providers.²⁶ In correspondence with the State of New Hampshire, CMS specifically indicates that states must, "through ongoing monitoring, ensure that individuals maintain the right to choose their providers and ensure that the selection of a non-residential service provider is

Medicare & Medicaid Services. (April 16, 2019). Letter from Ralph Lollar to Maggie Anderson Re: Heightened Scrutiny Review of Villa De Remer Apartments., 4.

²³ Center for Medicare & Medicaid Services. (April 10, 2019). Letter from Ralph Lollar to Maureen Corcoran Re: Heightened Scrutiny Review of Villa Vista Royale, Monarch Meadows & The Lodge at New Dawn., 6.

²⁴ Center for Medicare & Medicaid Services. (April 10, 2019). Letter from Ralph Lollar to Deborah

Fournier Re: Heightened Scrutiny Review of Easter Seals Group Home., 3-4.

²⁵ Crane, Samantha. (September 2014). Defining Community: Implementing the new Medicaid Home and Community-Based Services Rule. Autistic Self Advocacy Network., 13-14.

²⁶ Center for Medicare & Medicaid Services. (April 10, 2019). Letter from Ralph Lollar to Deborah Fournier Re: Heightened Scrutiny Review of Easter Seals Group Home., 4.

not contingent upon selection of an individual's residential service provider."²⁷

Such monitoring strategies may include: close review of person-centered plans; direct interviews with residents of the setting; required notification of service-recipients of their right to select a non-residential service provider separate from their residential service provider; and through data collection across the broad scope of HCBS settings to ascertain the prevalence of individuals accessing nonresidential services from a different provider from their residential service-provider.

Recommendations:

1. States should monitor individuals' opportunity to select non-residential service providers from among various options by conducting close review of person-centered plans, direct interviews with residents of the setting, notification of service-recipients of their right to select a non-residential service provider separate from their residential service-provider, and data collection.
2. Where states observe through ongoing data collection and monitoring that all or most of the individuals in a residential setting also rely on the same provider for non-residential services, the state should initiate an evaluation process to scrutinize that provider to ascertain if undue pressure is being applied to influence an individual with a disability's choice of provider.
3. Because the Settings Rule applies not only to providers but also to states, states should also evaluate other factors

that may reduce access to a choice of providers, including inadequate provider networks either in general or for specific populations, and target remedies, such as reimbursement rates, accordingly. CMS has been scrutinizing such factors as part of their review of state transition plans.

H. Compliance with the Individualized Process for the Use of Restrictive Interventions and Modifications to the Provider-Owned and Controlled Residential Settings Conditions

In multiple heightened scrutiny packages,²⁸ CMS sought assurances that "the use of restrictive interventions and modifications to conditions in provider-owned and controlled residential settings" comply with the Settings Rule.²⁹ As a best practice, states should carefully monitor modifications to the provider-owned and controlled residential settings criteria and audit providers to ensure that compliance with this criteria and the modification process takes place and is reflected within the experience of individuals receiving service.

Recommendation:

- States should establish a uniform process for approving modifications to the provider-owned and controlled residential setting requirements involving state technical assistance on less restrictive alternatives, submission of modifications to a statewide review process and periodic auditing of person-centered plans that incorporate modifications to these requirements and accompanying interviews with and

²⁷ Ibid.

²⁸ Center for Medicare & Medicaid Services. (April 10, 2019). Letter from Ralph Lollar to Deborah Fournier Re: Heightened Scrutiny Review of Easter Seals Group Home., 4-5; Center for Medicare & Medicaid Services. (April 10, 2019). Letter from Ralph Lollar to Maureen Corcoran Re: Heightened Scrutiny Review of Villa Vista Royale, Monarch Meadows & The Lodge at New Dawn., 6, 10;

Centers for Medicare & Medicaid Services. (April 19, 2019). Letter from Ralph Lollar to Lori Coyner Re: Heightened Scrutiny Review of Horizon House RTF, New Roads RTF, Salmon Run RTF, Via Verda RTF., 11, 16, 22.

²⁹ Centers for Medicare & Medicaid Services. (April 16, 2019). Letter from Ralph Lollar to Maggie Anderson Re: Heightened Scrutiny Review of Villa De Remer Apartments., 4.

observations of individuals receiving services to assess provider compliance.

I. Evaluating the Right to Visitors at Any Time and Privacy in One's Own Unit

States must document that individuals within a residential setting have the right to visitors at any time even when a facility is locked or outside typical "visiting hours."³⁰ For example, in correspondence with Ohio regarding The Lodge at New Dawn, a residential assisted living facility in Canton attached to a nursing home, CMS sought and received documentation showing that individuals "have access to visitors at all times, including during hours of 10:00 p.m. - 6:00 a.m. when the facility is locked."³¹ This is an important protection, reflecting the right of people with disabilities to invite visitors into their homes at any time, including allowing visitors to stay overnight. Residents may keep their own hours or wish to invite sexual partners or significant others to stay the night.

States must also ensure compliance with the requirement that individuals have privacy in their own unit and that units have lockable doors to which only appropriate staff have keys. For example, in CMS's review of Nevada's heightened scrutiny request for the Highland Manor ALF in Fallon, CMS required the state to "provide remediation to ensure individuals' units have lockable doors."³² It is important to note that CMS has indicated that this must be the default and not only made available upon request. CMS did not accept as sufficient statements by residents that they were okay without a locked door or a statement to future tenants and relatives that bedroom doors were not lockable.³³

³⁰ Some states have chosen to implement this requirement in non-residential settings as well.

³¹ Center for Medicare & Medicaid Services. (April 10, 2019). Letter from Ralph Lollar to Maureen Corcoran Re: Heightened Scrutiny Review of Villa Vista Royale, Monarch Meadows & The Lodge at New Dawn., 12.

Recommendations:

1. States should provide and enforce clear guidance that providers must ensure that residents have the opportunity to have visitors at any time, including overnight visitors.
2. For settings co-located with an institutional provider, states should look closely at specific issues pertaining to how HCBS participants experience their setting and what interactions they have with the institutional setting, as well as what if any constraints are built into the HCBS setting that are common in institutional settings (for existing, visiting hours, entrance/exit constraints, rules regarding curfews, access to outside spaces, etc.).
3. States must also ensure compliance with the requirement that individuals have privacy in their own unit and that units have lockable doors to which only appropriate staff have keys. It is important to note that CMS has indicated that this must be the default and not only made available upon request.

J. Evaluating Access to Public Transportation

CMS has interpreted the requirement that HCBS settings be integrated in and support full access of individuals receiving Medicaid HCBS to the greater community, coupled with the requirement that individuals in provider owned and controlled residential settings "have the freedom and support to control their own schedules and activities", to mean that

³² Center for Medicare & Medicaid Services. (April 10, 2019). Letter from Ralph Lollar to Suzanne Bierman Re: Heightened Scrutiny Review of Highland Manor of Fallon., 3.

³³ Ibid., 5.

individuals must be supported to have access to transportation, including public transportation if available. In evaluating a setting’s compliance with these criteria, CMS has repeatedly asked states for information regarding the availability of transportation options to help individuals access activities of their preference in the broader community. For example, in reviewing two group home settings submitted by Ohio, CMS asked whether “public transportation options were offered to all individuals, and clarification (by the state) that all individuals either declined public transportation options or have modifications outlining why public transportation is not a suitable option.”³⁴

This must also be evaluated on an ongoing basis as part of state ongoing monitoring responsibilities. Evaluation must focus on the individuals’ lived experience, as well as observational data of what the provider does to share information on public transportation and facilitate access to transportation options (including how staff respond to requests to handle transportation). Settings should not rely exclusively on family support in order to provide transportation, and must instead offer those receiving services access to individualized transportation supports.

Recommendations:

1. States should require documentation within the person-centered plan that individuals were offered public transportation options for compliance with the Setting Rule. This must also be evaluated on an ongoing basis as part of state ongoing monitoring responsibilities. Evaluation must focus on the individuals’ lived experience, as well as observational data of what the

provider does to share information on public transportation and facilitate access to transportation options (including how staff respond to requests to handle transportation).

2. States should also specifically evaluate settings considered presumptively institutional to ascertain their capacity to support residents in accessing transportation into the broader community. Settings that cannot accomplish this may not be able to rebut a presumptive institutional nature. This should include access to public transportation and other options beyond family support, if desired by the individual.

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³⁴ Centers for Medicare & Medicaid Services. (April 10, 2019). Letter from Ralph Lollar to Maureen

Corcoran Re: Heightened Scrutiny Review of Consumer Support Services #1 & #2., 4, 7.