



ISSUE BRIEF

JUSTICE IN AGING

FIGHTING SENIOR POVERTY THROUGH LAW

The Home and Community-Based Services Settings Rule: A Guide for New Jersey Advocates

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WHAT IS THE HCBS SETTINGS RULE?

The Medicaid Home and Community-Based Services (HCBS) Settings Rule establishes minimum standards to ensure that Medicaid HCBS consumers live in settings that are truly non-institutional. The HCBS Settings Rule, hereafter referred to as the Rule, forces states to evaluate their policies and providers and engage in remediation strategies to differentiate settings delivering HCBS from institutional care. The Rule advances compliance with the Americans with Disabilities Act and the *Olmstead* decision, a United States Supreme Court case that determined that people with disabilities have the right to receive services in the most integrated setting possible.¹ The Rule establishes minimum criteria for HCBS settings, clarifies locations that do not qualify as HCBS, specifies person-centered planning requirements, and outlines protocols to evaluate whether settings presumed to have characteristics of an institution meet HCBS criteria. The Rule also establishes processes for states to evaluate and remedy their policies, procedures, and HCBS provider locations to comply with the Rule.

HOW DOES THE RULE IMPACT OLDER ADULTS?

The Rule supports the rights of older adults and people with disabilities of all ages to live and receive Medicaid services in integrated, community-based settings. It advances efforts to ensure that older adults living and receiving services in these settings have the same access to the community as other community-dwelling older adults not receiving HCBS. It also improves the quality of these services by protecting individual choice and promoting community integration across all Medicaid HCBS settings. The Rule applies to all settings where Medicaid HCBS are delivered, including locations where older adults live and receive services.²

WHAT IS THE TIMELINE FOR IMPLEMENTING THE RULE?

The final Rule was published on January 16th, 2014, and became effective on March 17th, 2014. However, the Centers for Medicare and Medicaid Services (CMS) has delayed requiring state compliance with the Rule multiple times. CMS allowed for a transition period through March 17th, 2023, during which states could continue receiving Medicaid reimbursement for HCBS settings while updating their policies and working with providers to comply with the Rule.³ On a case-by-case basis, CMS may also grant states time-limited and issue-specific extensions beyond the transition period to achieve compliance.⁴

WHICH HCBS SETTINGS ARE COVERED BY THE RULE?

The Rule applies to both residential and non-residential settings that provide HCBS and receive reimbursement through Medicaid. Residential settings include locations where individuals live and receive services, such as assisted living facilities and group homes. Non-residential settings include locations where HCBS services are delivered, such as adult day and employment programs.⁵

WHAT DOES THE RULE REQUIRE FOR SETTINGS?

The Rule requires that all HCBS settings:⁶

- Be integrated and support full access to the greater community;
- Be selected by the individual from among setting options, including settings not only for people with disabilities;
- Ensure an individual's rights of privacy, dignity, and respect, and freedom from coercion and restraint;
- Optimize autonomy and independence in making life choices; and
- Facilitate individual choice regarding services and supports and who provides them.

Some provider-owned or controlled settings, like assisted living facilities and group homes, are subject to additional conditions. This is because the provider is a single entity that controls both the individual's housing and services. To protect residents' rights, in these settings, the Rule further requires:⁷

- The unit or dwelling is a specific physical space that can be owned, rented or occupied under a legally enforceable agreement by the individual receiving services;
- 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;⁸
- Each individual has privacy in their unit, including lockable doors, choice of roommates, and the freedom to furnish and decorate;
- Individuals can control their schedules and activities, including access to food at any time;
- Individuals can have visitors at any time; and
- The setting is physically accessible to the individual.

The Rule allows for modifications of the provider-owned or controlled HCBS settings criteria outlined above, as long as these modifications support the needs of the individual and are documented in the person-centered service plan.

Issue Spotting: Eviction and Due Process Protections

Advocates have revealed implementation concerns related to various aspects of the Rule, including ensuring eviction and due process protections in particular provider settings. To demonstrate compliance with the Rule, New Jersey's Division of Developmental Disabilities created a sample residency agreement to fulfill the requirement that residents in a provider-owned or controlled setting can rent, own, or occupy a unit under a legally enforceable agreement.⁹ New Jersey's sample residency agreement, however, fails to provide residents with equivalent rights to the state's landlord-tenant law. This means that residents in settings using New Jersey's sample residency agreement are at risk of improper evictions with little or no notice. This is of particular concern for residents with traumatic brain injuries and developmental disabilities living in group homes and licensed apartments.

Additionally, New Jersey has failed to ensure protections for individuals when the cause of eviction stems from allegations associated with an individual's behavior, such as when a provider claims that it can no longer meet an individual's needs or that an individual is a danger to one's self or others. In these instances, the provider often uses the individual's underlying disability as an excuse to remove them instead of providing tailored services to address the alleged behavioral issues. Residents in these settings should have, at a minimum, equivalent eviction protections as tenants under New Jersey's landlord-tenant law. **Residents being evicted from HCBS settings should not leave, but rather stay in their homes while they secure legal counsel.**

WHICH SETTINGS DO NOT QUALIFY AS HCBS SETTINGS?

The Rule defines the settings that do not qualify as HCBS settings, including nursing facilities, institutions for mental diseases, intermediate care facilities for individuals with intellectual disabilities, hospitals, and other locations with qualities of an institutional setting.¹⁰

WHAT ARE STATEWIDE TRANSITION PLANS?

The Rule required states to develop a statewide transition plan (STP), describing how they intend to update their oversight systems, including licensure and certification standards, regulations, and policies, to incorporate the Rule's criteria into ongoing operations, as well as their process for assessing and bringing HCBS settings into compliance.¹¹ STPs expired on March 17th, 2023, the end of the regulation's transition period.

As part of their STPs, states were required to conduct a systemic assessment of their rules, regulations, and policies to ensure compliance with the Rule. New Jersey's Department of Human Services created a tool to crosswalk the NJ FamilyCare Comprehensive Demonstration waiver with the Rule's requirements.¹² Where compliance with a particular aspect of the Rule was not yet accomplished, the tool outlined the state's remediation strategy and accompanying timeline to achieve compliance.¹³

In addition to updating waiver policies and procedures to comply with the Rule, states must also assess each Medicaid HCBS setting to ensure compliance.¹⁴ New Jersey issued provider self-assessments in 2015 to understand baseline compliance and a second survey in 2021 to reassess providers' ongoing remediation activities. The 2021 updated assessment found 87% of NJ HCBS settings to be fully compliant with the Rule, 11% of settings able to achieve compliance with modifications before the March 2023 deadline, and 2% of settings to be presumptively institutional.¹⁵

Program Spotlight: New Jersey’s Assisted Living Program

New Jersey has a unique long-term care delivery model called the Assisted Living Program (ALP). ALPs use a portable model to provide residents in specific low-income senior housing buildings with services similar to an assisted living residence. ALP providers enter into an agreement with building managers to provide staff on-site for 12-16 hours per day, seven days a week.¹⁶ The ALP model offers an assisted living level of care to populations, specifically low-income older adults of color, LGBTQ+ older adults, and people with dementia, for whom these services would otherwise be financially prohibitive.

Under New Jersey’s approved STP, ALPs are not subjected to the additional criteria required of provider-owned or controlled settings. This is because ALP services are provided in privately rented apartment units within senior housing, and the Rule presumes private homes to be compliant. Additionally, because residents are not obligated to use the ALP provider for their Medicaid HCBS services, the ALP model also promotes resident choice, a key component of the Rule. ALPs are still required to meet the Rule’s baseline HCBS criteria and are included in the state’s quality assurance framework and ongoing monitoring activities.¹⁷

STPs must also describe the remediation strategies, and accompanying timelines, the state will use to address compliance issues observed during the provider assessment process.¹⁸ New Jersey required providers to submit corrective action plans outlining their remediation strategies and accompanying timelines to meet the criteria for compliance.¹⁹ New Jersey pledged technical assistance and training to support site-specific remediation activities for providers determined capable of coming into compliance.²⁰

TABLE 1
Results of 2021 New Jersey Assessment of HCBS Provider Settings

Setting Type	Total	Fully Compliant	Could come into compliance with modifications	Cannot comply with the HCBS requirements	Presumed institutional and submitted for heightened scrutiny
Residential HCBS Settings	2820	2426	333	3	58
Non-Residential HCBS Settings	333	297	31	0	5

Finally, STPs must describe how states will communicate and offer alternatives to individuals living in and receiving services from settings deemed unable to comply with the Rule by March 17th, 2023.²¹ In instances where transitions must occur, states are required to provide individuals with the opportunity, information, and supports necessary to make an informed choice among options for continued service provision, including an alternative setting that aligns or will align by the end of the transition period, with the regulation.²² States must also ensure no disruption to individuals’ services during the transition period.²³

As noted in Table 1, New Jersey determined three residential settings as unable to come into compliance with the Rule and removed them from the Medicaid provider networks. Despite this determination, New Jersey estimated that no HCBS enrollees would need to transition to alternative settings, as none were living in the three noncompliant assisted living residences.²⁴

WHAT IS HEIGHTENED SCRUTINY?

Particular settings are presumed to have the qualities of an institution, and therefore do not meet the criteria for Medicaid HCBS. There are three categories of presumptively institutional settings:

- A Category 1 setting is located in a building that is also a facility providing inpatient institutional care;
- A Category 2 setting is on the grounds of, or immediately adjacent to an institution; and
- A Category 3 setting has the effect of isolating individuals receiving Medicaid HCBS from the broader community.²⁵

States may submit evidence to CMS, via a process known as heightened scrutiny review, to demonstrate that a setting presumed to be institutional, either meets or can meet, via a remediation strategy, the criteria for Medicaid HCBS.²⁶ The heightened scrutiny process is a key component of STPs; however, states can submit a setting for heightened scrutiny review to CMS at any time.

As Table 1 shows, New Jersey submitted 63 locations to CMS for heightened scrutiny review, with the majority characterized as Category 1 and 3 settings.²⁷ As of March 2023, CMS is still reviewing New Jersey's heightened scrutiny submissions. After CMS reviews the settings, states will implement CMS feedback via the remediation strategy outlined in their STPs.

Issue Spotting: Equity Implications of the Heightened Scrutiny Review Process

Potential equity implications exist for New Jersey residents living in or receiving services from settings that CMS may determine, through the heightened scrutiny review process, as non-compliant. In such instances, New Jersey must provide the resident with an alternative setting that complies with the Rule.

Compliance with the Rule may be especially challenging for settings with limited resources. Although understanding of the demographic characteristics of HCBS recipients is limited, data on nursing facility residents indicates that Black and Latino older adults are more likely to reside in locations with fewer resources.²⁸ Therefore, lower-resourced HCBS settings with a potentially greater risk of non-compliance may also have higher numbers of residents from marginalized communities, implicating both access to and quality of these residents' HCBS. New Jersey should work with the advocacy community to tailor solutions to ensure that residents in non-compliant settings retain their HCBS and that quality is not compromised.

WHAT IS THE CURRENT IMPLEMENTATION STATUS OF THE RULE IN NEW JERSEY?

New Jersey requested a Corrective Action Plan (CAP) through July 31, 2023, to provide time for CMS to review the state's heightened scrutiny findings and for the state to respond accordingly.²⁹ CAPs authorize states with time-limited and issue-specific extensions beyond the transition period, during which states can receive reimbursement for HCBS as they work to fully comply with the Rule. CMS is actively reviewing CAPs as of March 2023; any CAPs approved after the end of the transition period will be retroactively approved back to March 17, 2023.³⁰ CMS has not specified a maximum amount of time for which CAPs will be authorized.³¹

HOW DOES THE RULE IMPACT THE PERSON-CENTERED PLANNING PROCESS?

The person-centered planning process is where an individual, along with their identified supports and care team, develops a service plan that reflects their preferences and goals. The Rule's person-centered planning requirements became effective on March 17, 2014.³²

The Rule requires that the individual leads the person-centered planning process, receives the information needed to make informed care decisions, and is able to update their plan. It also requires the process to occur timely, be accessible, and reflect the cultural considerations and communication needs of the individual, including plain language and language supports for people with limited English proficiency. The individual's person-centered care plan must indicate that the setting where the individual lives was their choice; reflect the individual's strengths and preferences, and identify goals and desired outcomes; identify services and supports, both paid and unpaid, that will assist the individual in achieving their goals; include risk factors along with measures to reduce risk; prevent the use of unnecessary or inappropriate services; identify the entity responsible for monitoring the plan; and indicate that the individual agrees to the written service plan. At a minimum, the individual and their care team must review and make any necessary revisions to the plan every twelve months, when the individual's circumstances or needs change significantly, or at the individual's request.

HOW WILL STATES MAINTAIN ONGOING COMPLIANCE WITH THE RULE?

After CAP's expire, language in states' approved HCBS waivers and state plans will dictate how states will ensure compliance with the Rule. States articulated their processes for ongoing compliance monitoring in their STPs, including how case management, beneficiary feedback, and licensure and certification standards will be used to identify and remediate instances of provider noncompliance.³³

ADVOCACY TIP

Input is Needed to Ensure Ongoing Compliance with the Rule

Input from older adults, people with disabilities, and their advocates is critical to ensuring ongoing compliance and implementation of the Rule. Because the Rule itself does not require states to explicitly track or address inequities outside of the person-centered planning process, it is especially important that people from marginalized communities provide feedback on the Rule's impact on access to and quality of services. Advocates should provide feedback to their state, CMS, the U.S. Department of Health and Human Services Administration for Community Living, and advocacy groups like the HCBS Advocacy Coalition via email at hcbsadvocacy@gmail.com, to ensure that the protections and quality improvements outlined in this rule are actualized. New Jersey advocates should submit written feedback by email to DMAHS.HCBS-Settings-Rule@dhs.nj.gov or Statewide Transition Plan, NJ Department of Human Services, P.O. Box 700, Trenton, NJ 08625-0700. Advocates can also elevate concerns to the federal CMS Division of Long-Term Services and Supports by email at HCBS@cms.hhs.gov.

HCBS SETTINGS RULE REFERENCE GUIDE

CMS Materials

- [Home & Community Based Services Final Regulation](#)
- [Home & Community Based Services Training Series](#)
- [Statewide Transition Plans Approval Process](#)

HCBS Advocacy Coalition

- [HCBS Advocacy Coalition Settings Rule Toolkit](#)

Justice in Aging

- [Toolkit to Help Advocates Push for Strong HCBS Rules](#)

ENDNOTES

- 1 *Olmstead v. L.C.*, 527 U.S. 581 (1999).
- 2 CMS, “Fact Sheet: Summary of Key Provisions of the Home and Community-Based Services (HCBS) Settings Final Rule,” (2014), available at <https://www.medicaid.gov/sites/default/files/2019-12/hcbs-setting-fact-sheet.pdf>.
- 3 CMS, “HCBS Settings Rule Implementation: A National Conversation about Statewide Transition Plans,” available at <https://www.medicaid.gov/medicaid/home-community-based-services/downloads/hcbs-rule-stp-conversation.pdf>.
- 4 CMS, “HCBS Settings Rule Implementation – Moving Forward Toward March 2023 & Beyond,” available at <https://www.medicaid.gov/resources-for-states/downloads/covid19allstatecall05242022.pdf>.
- 5 CMS, “Fact Sheet: Summary of Key Provisions of the HCBS Settings Final Rule,” (2014), available at <https://www.medicaid.gov/sites/default/files/2019-12/hcbs-setting-fact-sheet.pdf>; This Rule specifically impacts services provided under sections 1915(c), 1915(i), 1915(k), 1915(b)(3) and 1115 of the Social Security Act.
- 6 42 C.F.R. § 441.301(c)(4), 441.710(a)(1), 441.530(a)(1).
- 7 42 C.F.R. § 441.530(a)(1)(vi), 441.710(a)(1)(vi).
- 8 Note that 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 HCBS participant, and that the document provides protections that address eviction processes and appeals comparable to those provided under the jurisdiction’s landlord tenant law.
- 9 NJ DHS DDD, “Sample Residency Agreement,” available at <https://nj.gov/humanservices/ddd/documents/housing-conversion-webinar-slides.pdf>.
- 10 42 C.F.R. § 441.301(c)(5), 441.710(a)(2), 441.530(a)(2)
- 11 CMS, “Moving Forward Toward March 2023 & Beyond,” available at <https://www.medicaid.gov/resources-for-states/downloads/covid19allstatecall05242022.pdf>; New Jersey’s STP went through a public comment process and, after feedback from CMS, received final approval on January 20, 2023.
- 12 New Jersey’s state plan benefits include home health care, Medical Day Care (Adult Day Health Services) and the Personal Care Assistant (PCA) Services benefit. Medicaid long-term care services and supports beyond state plan benefits are provided via the state’s 1115 waiver, called the NJ FamilyCare Comprehensive Demonstration. New Jersey uses this demonstration authority to provide HCBS through a managed care delivery model for older adults and people whose disabilities meet the clinical and financial eligibility criteria for the program. NJ DHS, “NJ FamilyCare Comprehensive Demonstration Renewal Proposal,” available at <https://www.state.nj.us/humanservices/dmahs/home/NJ%20FamilyCare%20Comprehensive%20Demonstration%20Renewal%20Final%202022.28.pdf>.
- 13 NJ DHS, “Statewide Transition Plan: Appendix B Companion Documents for Compliance Demonstration with Home and Community-Based (HCBS) Settings Requirements,” available at https://www.state.nj.us/humanservices/dmahs/info/STP_Crosswalk.pdf; New Jersey Department of Human Services, “Systemic Assessment – Crosswalk Appendix A,” January 2022, available at https://www.state.nj.us/humanservices/dmahs/info/STP_Crosswalk.pdf.

www.state.nj.us/humanservices/dmahs/info/STP_crosswalk_plan.pdf.

- 14 CMS, “Moving Forward Toward March 2023 & Beyond,” available at <https://www.medicaid.gov/resources-for-states/downloads/covid19allstatecall05242022.pdf>.
- 15 NJ Department of Human Services, “Statewide Transition Plan Addendum #3,” January 2023, available at https://www.state.nj.us/humanservices/dmahs/info/STP_Addendum_1-11-23.pdf.
- 16 Colleen Diskin & Capital Impact Partners, “New Jersey Assisted Living Program Provider Coalition,” available at https://www.capitalimpact.org/wp-content/uploads/2022/02/New_Jersey_Assisted_Living_Program_ALP_Primer_10-2021.pdf
- 17 NJ DHS, “Statewide Transition Plan Addendum #3,” https://www.state.nj.us/humanservices/dmahs/info/STP_Addendum_1-11-23.pdf.
- 18 CMS, “A National Conversation about Statewide Transition Plans,” available at <https://www.medicaid.gov/medicaid/home-community-based-services/downloads/hcbs-rule-stp-conversation.pdf>.
- 19 NJ DHS DDD, “HCBS Statewide Transition Plan,” available at <https://www.nj.gov/humanservices/ddd/providers/federalrequirements/hcbsplan/>.
- 20 NJ DHS, “Statewide Transition Plan Addendum #3,” https://www.state.nj.us/humanservices/dmahs/info/STP_Addendum_1-11-23.pdf
- 21 CMS, “A National Conversation about Statewide Transition Plans,” available at <https://www.medicaid.gov/medicaid/home-community-based-services/downloads/hcbs-rule-stp-conversation.pdf>.
- 22 U.S. Department of Health and Human Services, “Statewide transition plan toolkit for alignment with the home and community-based services (HCBS) final regulation’s setting requirements,” available at <https://www.medicaid.gov/medicaid/home-community-based-services/home-community-based-services-training-series/index.html>.
- 23 CMS, “A National Conversation about Statewide Transition Plans,” available at <https://www.medicaid.gov/medicaid/home-community-based-services/downloads/hcbs-rule-stp-conversation.pdf>.
- 24 NJ DHS, “Statewide Transition Plan Addendum #3,” January 2023, available at https://www.state.nj.us/humanservices/dmahs/info/STP_Addendum_1-11-23.pdf.
- 25 CMS, “Re: Home and Community-Based Settings Regulation – Heightened Scrutiny,” available at <https://www.medicaid.gov/federal-policy-guidance/downloads/smd19001.pdf>; To evaluate characteristics of isolation, CMS considers whether: the way services are provided limits the older adult’s opportunities for interaction with the broader community, the setting restricts the older adult’s choice to receive services or engage in activities outside of the setting, or the setting is physically separate or apart from the broader community and does not facilitate access to, and participation in, community services, consistent with their person-centered plan.
- 26 *Id.*
- 27 NJ DHS, “Statewide Transition Plan Addendum #3,” January 2023, available at https://www.state.nj.us/humanservices/dmahs/info/STP_Addendum_1-11-23.pdf.
- 28 Li et al., “Deficiencies In Care At Nursing Homes And Racial/Ethnic Disparities Across Homes Fell, 2006-11,” available at <https://www.healthaffairs.org/doi/10.1377/hlthaff.2015.0094>.
- 29 NJ DHS, “Home and Community-Based Services Corrective Action Plan Request,” available at https://www.state.nj.us/humanservices/dmahs/info/STP_CAP_request.pdf.
- 30 CMS, “Medicaid Home and Community-Based Services Settings Regulation: Fitting the Pieces Together,” February 2023.
- 31 CMS, “Moving Forward Toward March 2023 & Beyond,” available at <https://www.medicaid.gov/resources-for-states/downloads/covid19allstatecall05242022.pdf>; CMS, “Statewide Transition Plans Approval Process,” available at <https://www.medicaid.gov/medicaid/home-community-based-services/statewide-transition-plans/index.html>.
- 32 42 C.F.R. § 441.301(c)(1-3), 441.725; CMS, “Questions and Answers – 1915(i) State Plan Home and Community-Based Services, 5-Year Period for Waivers, Provider Payment Reassignment, Settings Requirements for Community First Choice, and 1915(c) Home and Community-Based Services Waivers – CMS 2249-F and 2296-F,” available at <https://www.medicaid.gov/sites/default/files/2019-12/final-q-and-a.pdf>.
- 33 CMS, “Medicaid Home and Community-Based Services Settings Regulation: Fitting the Pieces Together,” February 2023.