




# OFFICE OF LONG-TERM LIVING BULLETIN

<b>ISSUE DATE</b> December 28, 2016	<b>EFFECTIVE DATE</b> December 28, 2016	<b>NUMBER</b> 59-16-14
<b>SUBJECT:</b> Home and Community-Based Settings Requirements		 Jennifer Burnett Deputy Secretary, Office of Long-Term Living

**PURPOSE:**

This bulletin provides guidance relating to the federal requirements for the settings in which home and community-based services (HCBS) are rendered. The settings in which HCBS are rendered must satisfy these requirements for applicable providers to receive payment for the HCBS.

**SCOPE:**

This bulletin applies to all HCBS providers that are enrolled in the Aging, Attendant Care, COMMCARE, Independence, and OBRA waivers.

**BACKGROUND:**

On January 16, 2014, the Centers for Medicare & Medicaid Services (CMS) published a final rule that established, among other things, acceptable qualities and characteristics of settings for Medicaid HCBS provided under 1915(c) waivers. 79 FR 2948 -3039 (January 16, 2014), codified at, 42 CFR 441.301(c)(4) – (c)(5). The settings must have these qualities and characteristics for a provider of services to receive payment, whether or not the provider owns or controls that setting.

CMS stated that these rules “establish a more outcome-oriented definition of [home and community-based] settings, rather than one based solely on a setting’s location, geography, or physical characteristics.” 79 FR at 3011. In summary, the setting must be integrated in the community; be selected by the individual; ensure privacy, dignity and respect; optimize autonomy and independence; and facilitate choice regarding services and providers. 42 CFR 301.441(c)(4)(i) - (c)(4)(v). In the event that a setting is otherwise appropriate, the final rule also establishes specific, additional conditions for provider-owned or provider-controlled residential settings. 42 CFR 301.441(c)(4)(vi). The final rule specifically excludes hospitals, nursing facilities, mental disease facilities, intermediate care facilities for individuals with intellectual disabilities, and other locations that have qualities of an institution. 42 CFR 441.301(c)(5).

CMS granted time to states and providers to implement the new requirements through a transition process. States and providers must be compliant by March 17, 2019. Information

about individual Office of Long-Term Living (OLTL) waiver transition plans may be found at <http://www.dhs.pa.gov/citizens/hcbswaiver/HCBSTransitionPlans/index.htm>.

## **REQUIREMENTS:**

All providers that are specified in the Scope section must provide HCBS in settings that satisfy the requirements set forth in the regulations established in the final rule, whether or not the provider owns or controls that setting. If the settings do not satisfy those requirements, then the provider may not bill for, and will not receive payment for, HCBS that are rendered to Medical Assistance recipients in those non-compliant settings.

Currently-enrolled providers must comply with these requirements no later than March 17, 2019. New providers that are enrolled after the effective date of this bulletin must comply with these requirements prior to being enrolled to provide OLTL waiver services.

**Note:** These requirements do not apply to provider administrative offices or the provision of temporary respite services in a nursing facility.

### **I. The Federal Regulatory Provisions.**

**A. Generally-Applicable Requirements.** The setting in which an HCBS is rendered must satisfy the generally-applicable requirements of 42 CFR 441.301(c)(4)(i) - (c)(4)(v):

*Home and community-based settings must have all of the following qualities, and such other qualities as the Secretary [of the federal Health and Human Services] determines to be appropriate, based on the needs of the individual as indicated in their person-centered service plan:*

*(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.*

**B. Additional Requirements for Provider-Owned or Controlled Residential Settings**. If the HCBS is provided in a provider-owned or controlled residential setting, then the setting must also satisfy the following requirements under 42 CFR 441.301(c)(4)(vi) in addition to those requirements under section I.A., above:

*In a provider-owned or controlled residential setting, in addition to the qualities at § 441.301(c)(4)(i) through (v), the following additional conditions must be met:*

*(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 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.*

*(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.*

*(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.*

*(F) Any modification of the additional conditions, under § 441.301(c)(4)(vi)(A) through (D), must be supported by a specific assessed need and justified in the person-centered service plan. The following requirements must be documented in the person-centered service plan:*

*(1) Identify a specific and individualized assessed need.*

*(2) Document the positive interventions and supports used prior to any modifications to the person-centered service plan.*

*(3) Document less intrusive methods of meeting the need that have been tried but did not work.*

*(4) Include a clear description of the condition that is directly proportionate to the specific assessed need.*

*(5) Include regular collection and review of data to measure the ongoing effectiveness of the modification.*

*(6) Include established time limits for periodic reviews to determine if the modification is still necessary or can be terminated.*

*(7) Include the informed consent of the individual.*

*(8) Include an assurance that interventions and supports will cause no harm to the individual.*

**C. Specifically-Excluded Settings.** The settings listed in 42 CFR 441.301(c)(5) specifically exclude the following settings as acceptable HCBS settings:

*(i) A nursing facility;*

*(ii) An institution for mental diseases;*

*(iii) An intermediate care facility for individuals with intellectual disabilities;*

*(iv) A hospital; or*

*(v) Any other locations that have qualities of an institutional setting as determined by the Secretary.*

## **II. Interpretive Guidance.**

Providers have an independent obligation to understand and to comply with the forgoing HCBS settings regulations. To assist providers with compliance, OLTL provides the following interpretive guidance to announce the position OLTL will take to enforce the provisions in future proceedings. The guidance is not exhaustive or exclusive, and it does not address every element of regulatory compliance. To the extent that an element of the regulations is not addressed in the guidance, the regulatory element is still applicable.

A. CMS sought to preserve participant choice in the final rule. Consequently, if an HCBS is provided in the participant's private home, then OLTL will presume that the participant's private home has the qualities and characteristics of an acceptable HCBS setting for that particular service, subject to OLTL's verification of domicile and ownership. "Private home" means the premises are owned or leased by the participant or by the participant's parent, immediate blood relative or legal guardian. OLTL may rebut this presumption if it concludes that there is unnecessary isolation or that the setting has attributes or characteristics that impede implementation of the person-centered Individual Service Plan (ISP).

B. All settings must be integrated in and support full access to the greater community, including, opportunities to engage in community life. Therefore, participants must

have opportunities to engage in community activities of the participant's choice. This requirement applies even at times the participant is receiving day program services.

C. All settings must be integrated in and support full access to the greater community, including opportunities to control personal resources. Therefore, participants must have an opportunity to have a checking or savings account or other means to control their funds. If any person or party other than the participant controls the participant's funds, the controlling party shall provide an accounting of the participant's funds upon request by the participant. This includes all available periodic account statements.

D. All settings must be free from restraint and must optimize, and cannot regiment, individual initiative, autonomy, and independence in making life choices, including but not limited to, daily activities, physical environment, and with whom to interact. Therefore, the participant must have:

- The freedom to move about inside and outside of the setting as opposed to one restricted room or area within the setting;
- The opportunity to have visitors at times of the participant's choosing;
- Participants must have the opportunity to choose their daily activities and not be restricted to a certain schedule; and
- Access to all common areas (gates, locked doors, fences or other barriers that prevent the participant's entrance to or exit from certain areas of the setting are prohibited).

For further interpretive guidance on this issue, see page 6, Specific Procedures, I.

**Modifications under 42 CFR 441.301(c)(4)(vi)(F)** for specific procedures related to ISPs.

E. All settings must facilitate the participant's choice regarding services and supports, and who provides them. Therefore, the setting cannot have structural characteristics or other attributes that would prohibit communication with participant's service coordinator, that would expose health-related information other than to individuals providing the HCBS, or that would impede implementation of the participant's ISP.

F. All settings must ensure an individual's right of privacy, dignity and respect and freedom from coercion and restraint, and all settings must optimize, but not regiment, individual initiative, autonomy, and independence in making life choices. To ensure that these generally-applicable requirements exist in provider-owned or provider-controlled settings, providers must do the following in those settings:

- Providers must give the opportunity to participants to make an anonymous complaint through a process that is documented in the provider's policies.
- Providers must post participant rights in an area to which all participants have access.
- The provider's staff must use appropriate and effective communication with participants based on age, disability, cognition, and cultural background, as evidenced in a policy and staff training.

G. Provider-owned or provider-controlled settings must allow participants to have access to food at any time. This includes providing the participant the opportunity to leave the setting to eat meals.

H. Provider-owned or provider-controlled settings must be physically accessible to participants. Providers may utilize barriers when they have documentation that it is necessary to comply with Occupational Safety and Health Administration regulations, building codes, and other pertinent safety laws, regulations and requirements.

## **SPECIFIC PROCEDURES.**

I. **Modifications under 42 CFR 441.301(c)(4)(vi)(F).** The federal regulations allow for modification of the additional requirements that apply specifically to provider-owned or provider-controlled settings, but under certain conditions that must be documented in the participant's ISP. 42 CFR 441.301(c)(4)(vi)(F). To ensure compliance with those requirements, the provider must communicate any necessary modifications or adjustments to the participant's Service Coordinator for inclusion in the person-centered ISP. Additionally, the participant must sign the person-centered ISP (MA546) as an indication of consent.

## **II. Determining Locations that Have Qualities of an Institutional Setting and Heightened Scrutiny under 42 CFR 441.301(c)(5).**

1. **Presumption.** The federal regulations provide that any setting that is located in a building that is also a publicly or privately operated facility that provides inpatient institutional treatment, or in a building on the grounds of, or immediately adjacent to, a public institution, or any other setting that has the effect of isolating individuals receiving Medicaid HCBS from the broader community of individuals not receiving Medicaid HCBS will be presumed to be a setting that has the qualities of an institution. 42 CFR 441.301(c)(5).
2. **Overcoming the Presumption through Heightened Scrutiny.** The presumption may be overcome if the federal Secretary of Health and Human Services determines through heightened scrutiny, based on information presented by the State or other parties, that the setting does not have the qualities of an institution and that the setting does have the qualities of home and community-based settings. 42 CFR 441.301(c)(5). Providers of services in settings that are not home and community-based as described above, and who believe the setting does not have the qualities of an institution, may submit information to OLTL to be considered for the heightened scrutiny process through CMS. Further guidance on heightened scrutiny will be issued separately. OLTL anticipates a heightened scrutiny bulletin to be published in the Spring of 2017.

### **III. Monitoring, Documentation And Enforcement.**

OLTL will annually monitor compliance with the federal HCBS settings requirements. OLTL intends to start monitoring HCBS settings in January 2017.

To monitor compliance, OLTL will review the following information:

1. Participant Review Tool completed by the participant's Service Coordinator in accordance with the Participant Reviews bulletin located at <http://www.dhs.pa.gov/publications/bulletinsearch/bulletinsearchresults/index.htm?po=OLTL>;
2. Provider documentation;
3. The participant's person-centered ISP; and
4. Information from onsite assessments by OLTL's Quality Management Efficiency Teams or by the Pennsylvania Department of Aging Adult Day Center Licensing staff.

OLTL may request the provider who renders services in the setting to submit additional documentation that supports the provider's compliance with the final rule.

If OLTL finds noncompliance with the setting, then OLTL will issue a Statement of Finding to the person or provider responsible for the setting. The responsible person or provider must submit a Corrective Action Plan (CAP), which must include specific corrective action and proposed deadlines for implementation of corrective actions. The proposed deadline cannot be later than March 17, 2019 if OLTL finds the noncompliance in an existing setting before March 17, 2019. The CAP must be approved by OLTL to be acceptable. If the CAP is acceptable to OLTL, then the responsible person or provider must implement the corrective action within the proposed deadlines.

Any participant, family member, Service Coordinator, or advocacy group may submit information on settings they feel are not compliant with the federal requirements set forth in 42 CFR 441.301, or the requirements outlined in this bulletin to RA-PWHCBSFinalRule@pa.gov.

This bulletin rescinds any other OLTL policy documents or parts of policy documents that are inconsistent with this bulletin's contents.

**COMMENTS AND QUESTIONS REGARDING THIS BULLETIN SHOULD BE DIRECTED TO:**

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