



The Medicaid HCBS Settings Rule: Heightened Scrutiny

What Is Heightened Scrutiny?

The Home and Community-Based (HCBS) Settings Rule requires all settings that receive Medicaid HCBS funding to provide access to the broader community, give people choice and control in their daily lives, and provide opportunities for competitive integrated employment. In order to receive Medicaid HCBS funding, all settings must meet the requirements of the Rule by March 17, 2022. Some settings, called “presumptively institutional settings,” may have institutional characteristics. If these settings wish to receive Medicaid HCBS funding, they must prove that they can overcome that presumption and actually meet all of the requirements of the Rule. This process is called “heightened scrutiny.”

Heightened scrutiny is how the federal government makes sure Medicaid HCBS funds only go to settings that are truly community-based, and not to institutional settings (which are funded under a different Medicaid program). The agency that oversees the Medicaid program is the Centers for Medicare and Medicaid Services (CMS). If a state reviews a setting that is presumptively institutional and believes it overcomes the presumption and actually meets each of the Rule’s requirements for a HCBS setting, the state can submit evidence to CMS. CMS then must decide if it agrees with the state. CMS and the state both have to agree that the setting passes heightened scrutiny before the setting can receive HCBS funding.

What Are Presumptively Institutional Settings?

CMS has said settings are presumptively institutional if ***any*** of the following apply to them:

- They are located in buildings that are also public or private institutions;
- They are on the same grounds as, or next to, public institutions; or
- They isolate people from the broader community. Settings that isolate have any one of the following characteristics:
 - Settings whose design or service model limits opportunities for interaction with the broader community;
 - Settings that limit people’s ability to choose to receive services or engage in activities outside of the setting; or
 - Settings that are physically separate from the broader community and do not facilitate access to it.
 - Rural settings are not automatically considered isolating. States should look at whether people in the setting have the same opportunities to engage in the community as people in the same area who are not receiving HCBS.
 - States may also identify additional characteristics they consider isolating, as long as those are clearly identified to stakeholders.

CMS previously provided examples of “settings that isolate,” including gated communities, farmsteads, and campuses. In more recent guidance, CMS removed these examples. While CMS has been clear that settings must be evaluated on a case-by-case basis, these types of settings very often have characteristics that meet the criteria for settings that isolate and must be closely examined as settings that are likely to be presumptively institutional.

How Will States Identify and Evaluate Presumptively Institutional Settings?

All presumptively institutional settings must be individually reviewed by the state to determine if they have institutional characteristics or if they meet each of the requirements set out in the HCBS Settings Rule.

If a state identifies a presumptively institutional setting, it can work with the setting to make changes so that it fully meets the Rule’s requirements. If a state is able to bring a setting into compliance before July 1, 2020, the state does not have to submit the setting to CMS for a heightened scrutiny review. The state must, however, identify these settings in their state’s transition plan (STP) and seek public comment. If public comments disagree with the state’s finding, CMS may require the setting to go through a full heightened scrutiny review. Any presumptively institutional setting that does not fully comply with the Rule by July 1, 2020 must go through a heightened scrutiny review.

After a state conducts heightened scrutiny reviews, it must make available for public comment a list of the settings it identified and reviewed and the findings from its reviews. States are required to publicly share the following information about the heightened scrutiny process:

- The process the state used to identify presumptively institutional settings.
- How the state will review those settings.
 - This includes how it will use public comment to inform its review, and how the state will determine if a setting is institutional or can fully meet each of the Rule’s requirements.
- A list of settings that the state believes cannot meet the requirements of the rule by the end of the transition period (March 17, 2022), and therefore cannot receive HCBS funding after the transition period.
- A list of settings that were flagged as presumptively institutional but have already made changes before July 1, 2020, so they now meet the Rule’s requirements.
 - Must also include a statement that information supporting the setting’s compliance is available on request.
- A list of settings identified as presumptively institutional that the state believes can overcome the presumption that they have institutional characteristics and meet all of the Rule’s requirements by the end of the transition period, but have not yet done so.
 - Must also include:
 - What presumptively institutional category setting falls into,
 - How the setting has or will overcome the institutional presumption,

- The state’s plan to ensure the setting complies with the rule by the end of the transition period, and
- How the state will oversee that plan.

In listing and describing specific settings, states will need to avoid disclosing any protected health information (PHI) about people living or receiving services in the settings while also ensuring the public has enough information to meaningfully comment.

How Will CMS Review Presumptively Institutional Settings?

After a state receives and considers public comment, it must submit a heightened scrutiny package to CMS. The package must contain evidence explaining why the state believes the setting has overcome the institutional presumption. CMS will randomly review a sample of settings from the state that have undergone heightened scrutiny. Examples of what CMS will review include:

- The breadth and scope of the interactions people in the setting have with the broader community, and their engagement with the community, including:
 - Community activities consistent with person-centered service plans,
 - Direct support professionals’ roles in facilitating community integration,
 - If schedules align with individuals’ preferences and integration, and
 - Individual access to services and activities in the broader community.
- How staff are trained and monitored, including in relation to person-centered planning and consistent with the state’s plan and the state’s Medicaid waiver or waivers.
- Proximity to public transportation and/or how transportation is facilitated.

CMS will also:

- Determine if, during its review, the state was thorough enough in onsite visits, interviews with people receiving supports, and reviews of person-centered plans.
- Examine remediation plans, and
- Examine summaries of public comments.

CMS may also review other information when necessary. According to CMS, the evidence submitted for review should focus on the organization’s policies and procedures that support community integration and support of individual person-centered service plans.

How Can I Get Involved?

Each state must give stakeholders the opportunity to comment on its process for identifying presumptively institutional settings, as well as on the results of the state’s review of those settings. Input from stakeholders who are familiar with those settings is critical to the decision the state and CMS make. Stakeholders should also comment if settings that they believe are presumptively institutional are not identified by the state. The HCBS Advocacy Coalition tracks when states are seeking public comment at www.hcbsadvocacy.org.

How Can I Learn More About the Settings Rule and Heightened Scrutiny?

To learn more, check out the following resources:

- The HCBS Advocacy Coalition, a coalition of more than 20 national disability and aging organizations working together for successful implementation of the HCBS Settings Rule, has an entire website with more information and resources: www.hcbsadvocacy.org
- The HCBS Advocacy Coalition has created or collaborated on several resources related to heightened scrutiny:
 - How to Advocate for Truly Integrated Settings: <https://bit.ly/2w6Cuvv>
 - Identifying, Evaluating, and Remediating “Settings That Isolate” in the Context of CMS Guidance on Heightened Scrutiny Requirements within the HCBS Settings Rule (by Community Living Policy Center): <http://materials.ndrn.org/HCBS/HCBS-Settings-Heightened-Scrutiny-CLPC-Document-Feb-2020.pdf>
- CMS also has helpful materials on heightened scrutiny, including:
 - Guidance on heightened scrutiny: <https://www.medicaid.gov/sites/default/files/Federal-Policy-Guidance/Downloads/smd19001.pdf>
 - Slides from webinar on heightened scrutiny <http://materials.ndrn.org/HCBS/CMS-Heightened-scrutiny-presentation-3-28-19.pdf>