



TO: ADHCC Members
FROM: Anne Hill, Executive Director
DATE: July 20, 2017
SUBJECT: **Heightened Scrutiny to begin for New York State ADHC Providers;
audioconference to be held Tues., July 25.**

The New York State Department of Health (DOH) recently issued a Dear Administrator Letter (DAL) informing ADHC providers on the heightened scrutiny process and initial plan to survey ten ADHC programs for compliance with the federal Home and Community-based Services (HCBS) Settings Rule. The on-site surveys, conducted by Public Consulting Group (PCG), is slated to begin the last week in July and conclude by early August. A second round, consisting of a larger number of programs, will be surveyed at a later date. The DAL can be found [here](#). The survey tool can be downloaded [here](#). ADHCC members who are first on the list for survey have been notified by ADHCC staff.

Background on Federal HCBS settings rule and heightened scrutiny

In January 2014, the Centers for Medicare and Medicaid Services (CMS) issued a final rule [42 CFR §441.301(c)(4)(5)], that established new standards for home and community-based settings. The new standards seek to distinguish HCBS settings from institutional settings by identifying settings that isolate or have the effect of isolating individuals from the community. States must be able to prove a setting is not institutional (a setting that isolates) and truly home and community-based in order to receive federal Medicaid dollars to fund the program. States have a five-year transition period—until March 2022—to be in compliance with the rule.

The rule applies to all home and community-based settings that operate under federal HCBS waivers including 1915(c) (Nursing Home Transition and Diversion waiver, Traumatic Brain Injury waiver and Care at Home waivers), 1915(i), 1915(k) and 1115 demonstration waivers (MLTC, MMC, MAP and FIDA plans). The rule also impacts individuals receiving Medicaid services under the Office of Family and Children Services, Office of People with Developmental Disabilities, New York State Office of Alcoholism and Substance Abuse Services, and Office of Mental Health.

As you know, ADHC is a benefit under all four 1115 waiver managed care products listed above. Thus, ADHC is a setting that is affected by the rule. **All ADHC programs in New York State must comply with the federal rule by 2022 for the State of New York to receive federal Medicaid funding for ADHC.**

The final rule identifies settings that are *presumed to have institutional qualities* and do not meet the rule's requirements for HCBS settings. These settings include those in a "publicly or privately-owned facility that provide inpatient treatment; on the grounds of, or immediately adjacent to, a public institution; or that have the effect of isolating individuals receiving Medicaid-funded HCBS from the broader community of individuals not receiving Medicaid-funded HCBS."

Heightened scrutiny is the process by which CMS reviews evidence presented by the State and other stakeholders to prove that the setting is home and community-based. To demonstrate that a setting is a home and community-based setting, the State must submit evidence that:

- The setting **does not** have the qualities of an institution, and
- The setting does have the qualities of a home and community-based setting.

CMS will review evidence generated by ADHC programs to ensure compliance. ADHC programs trigger the heightened scrutiny review because they are operated by nursing facilities and because most programs are located inside or on the campus of a nursing home/hospital. The overwhelming majority—78 percent—of ADHC programs are co-located with the nursing home; therefore, DOH and CMS will be reviewing **every ADHC program across the State to measure compliance**. Evidence collected to overcome the presumption of an institutional setting will come from various on-site and consumer surveys conducted by a third-party contractor, PCG.

If survey results show that ADHC programs do not fully comply with the new standards, New York State may propose new policies or amend ADHC regulations to come into compliance. Once this is completed, DOH will send all data (including new regulatory standards, if developed) to CMS. CMS will then decide, based on the data provided, whether or not each and every ADHC program complies with the federal rule.

Heightened scrutiny to begin this month for ten ADHC programs

A representative from DOH or PCG will contact the ADHC program in advance of the survey to announce the scheduled visit. DOH anticipates that the survey will take between one-three hours to complete. PCG will review registrant charts, care plans, activities calendars, etc. over the course of the survey. They will also tour the entire ADHC space, speak to registrants and staff, and may take pictures. The nursing home administrator and program director should be on-site to assist with the survey and answer additional questions.

Following the first round of surveys, DOH and PCG will collect the data and measure ADHC (as a whole) current level of compliance with the rule. ***It is important to note that to be in compliance with NYCRR Title 10 Part 425 regulations that govern adult day health care, may make you out of compliance with the federal HCBS settings rule.*** It is unclear the extent to which DOH will modify ADHC regulations or statute. To amend regulations takes a considerable amount of time and must include a formal public comment process. DOH communicated to ADHCC that PCG will develop a series of webinars and host in-person meetings to discuss remediation plans with stakeholders. Once regulations are modified to comply with the federal rule, PCG or another state contractor, will assess ADHC programs a final time for compliance. Because every ADHC program is operated by a skilled nursing facility, every ADHC program will undergo at least one on-site survey. The State has until 2022 to demonstrate compliance with the rule.

ADHCC to hold audioconference Tues., July 25 from 2-3:30.

ADHCC will review the contents of this memo and the survey tool during an audioconference scheduled from 2-3:30 p.m. on Tues., July 25.

To participate in the free, member-only audioconference, dial: 1-888-585-9008. The conference room number is 303-148-806. Registration is not required for the call. Please have a copy of the survey tool ready to review; no other handouts are necessary. The call will be recorded and posted on our website. Administrators are encouraged to participate in the call.

Conclusion

ADHCC has been very vocal and active in the State's transition to HCBS compliance. We have met with DOH numerous times and will continue to advocate for reasonable solutions that demonstrate compliance but also maintain the integrity of ADHC. ADHCC has put forth a strong advocacy effort in defense of ADHC and nursing home sponsorship with CMS and Members of Congress. We remain optimistic that ADHC programs will overturn the presumption of an institutional setting by 2022.

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