



**TO:** ADHCC Members  
**FROM:** Anne Hill, Executive Director  
**DATE:** April 19, 2019  
**SUBJECT:** **DOH issues DAL on HCBS Settings Rule compliance for ADHC programs;  
Person-centered care planning trainings scheduled**

The New York State Department of Health (DOH) recently issued a Dear Administrator Letter (DAL) reminding ADHC providers of the HCBS Settings Rule requirements, timeline for compliance, and announcement of a self-assessment tool to be completed by each ADHC program. Attached to the DAL are several FAQs that seek to clarify what standards apply to ADHC, the actions providers can take to align with requirements, future funding and resources for compliance. Please read the DAL and FAQ below and contact ADHCC with any questions.

In response to member demand for additional person-centered care plan training, ADHCC is offering a half-day intensive seminar on Wed., June 5 from 1-5pm at The New Jewish Home, Bronx. The seminar will be very similar to the pre-conference training held April 3<sup>rd</sup> in Saratoga. The seminar will be taught by Gail Weinstein, LNHA, LeadingAge NY ProCare consultant. The training will cover the new PCSP requirements under the HCBS Setting Rule and how those regulations are applied in an ADHC environment. Person-centered care planning is mandatory for all registrants and will be critical to overturn the presumption that ADHC is an institutional setting. Registration and a complete seminar description will be available shortly.

DOH is also planning a series of provider and stakeholder training sessions on person-centered thinking, planning and practice. The dates and locations for these trainings are to be determined. ADHCC strongly encourages members to register for both ADHCC and DOH-sponsored trainings.

### **Background on Federal HCBS settings rule**

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." Approximately 70 percent of ADHC programs in New York State are located inside the nursing home or hospital setting.

Every HCBS setting must have the following qualities in order to comply with the rule:

1. 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.
2. 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.
3. Ensures an individual's rights of privacy, dignity and respect, and freedom from coercion and restraint.
4. 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.
5. Facilitates individual choice regarding service and supports, and who provides them.

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.

DOH is in the process of determining how heightened scrutiny will be conducted across agencies and different provider types. Every ADHC program located inside the nursing home and every county or city-sponsored ADHC program must go through heightened scrutiny. We are unsure if ADHC programs located on a campus of a private nursing home or off-site locations will undergo heightened scrutiny.

**DOH to begin collection of evidence for heightened scrutiny through ADHC provider self-assessments**

To ensure compliance with the HCBS Final Rule, DOH will issue a self-assessment tool to be completed **by each ADHC program**. According to the DAL, the assessment effort will target the following criteria:

Category 1: Physical characteristics of Setting

Category 2: Policies, procedures and staff competencies

Category 3: Legal/financial rights and protections

ADHCC has reached out to DOH on multiple occasions to seek clarification on the timeline and request a copy of the self-assessment in advance of the survey period. At the time of this memo, we are unsure when the self-assessment period will begin and what questions will be included in the survey. It's our understanding that all ADHC programs, despite location, must complete the provider self-assessment.

### **Frequently Asked Questions raises concerns over current ADHC regulations in conflict with the Rule and cost of compliance.**

While some of the HCBS Rule standards are relatively easy to meet, there are several "actions" DOH is encouraging providers to take that are costly, or in some cases, in direct conflict with ADHC regulations. ADHCC has sent several questions to DOH and requested a meeting to address the disconnect between the FAQs and ADHC regulations.

One area of concern is Q2 #6: *Train staff, registrants, families, on creating an environment where individuals have a right to come and go at any time. This includes making appropriate modifications of these rights within the Registrant Care Plan if someone is unable to manage this right.*

Since 2014, ADHCC has discussed the "5-hour rule" mandate in formal correspondence and in-person meetings on several occasions with DOH. Several questions still remain regarding billing for a visit less than five hours for a person who chooses to leave program early. ADHCC is seeking clarification on DOH and OMIG expectations on the "5-hour rule" in light of the FAQ.

Other areas of concern are the costs associated with social transportation, access to activities and modification of physical environment (see FAQ 7, 8, 10, 12). ADHCC will continue to push back against unfunded mandates that would put considerable financial strain on providers. ADHCC brought up the costs of community integration and physical modifications with DOH during our last meeting on March 25, 2019. ADHCC members who attended the annual conference also shared concerns about costs during the DOH HCBS Settings Rule update session.

### **Conclusion**

#### **Q3. Are ADHCPs going to be defunded due to the HCBS Rule or Heightened Scrutiny?**

*New York is committed to working with ADHCPs to preserve the important services they offer. The Department of Health will commence State monitoring activities to verify implementation of changes required by the HCBS Final Rule beginning as early as January 1, 2020. There will be*

*specific action steps recommended through the assessment process that will be communicated with each ADHC program.*

ADHCC is pleased DOH continues to publicly state their commitment to preserve ADHC. Members should be aware that there will be several changes over the next few years to ADHC regulations and operations to comply with the Rule. Some changes will be easier to implement than others. ADHCC encourages members to read and save all communications coming from the association and take advantage of regional meetings, web and in-person trainings and conferences offered. Please visit our website, [www.adhcc.org](http://www.adhcc.org) for updates and announcements.

ADHCC will continue to engage with CMS, Members of Congress, State Legislature and Governor's office, for reasonable solutions that demonstrate compliance but also maintain the integrity of ADHC. Together with state and national partners, ADHCC has put forth a strong advocacy effort in defense of ADHC and nursing home sponsorship. We remain optimistic that ADHC programs will overturn the presumption of an institutional setting by 2022.

Contact: Anne Hill, [ahill@leadingageny.org](mailto:ahill@leadingageny.org), 518-867-8836.



## Department of Health

**ANDREW M. CUOMO**  
Governor

**HOWARD A. ZUCKER, M.D., J.D.**  
Commissioner

**SALLY DRESLIN, M.S., R.N.**  
Executive Deputy Commissioner

April 8, 2019

Re: DAL NH 19-02  
Adult Day Health Care Program Home  
and Community Based Settings Rule  
and Compliance Notice

Dear Nursing Home/Adult Day Health Care Administrator:

Effective March 17, 2014, the federal Department of Health and Human Services (HHS) promulgated the Home and Community Based Settings (HCBS) Final Rule. The HCBS Final Rule establishes requirements for the qualities of settings where individuals live and/or receive Medicaid-reimbursable HCBS provided under sections 1915(c), 1915(i), 1915(k), 1915(b)(3), and 1115 of the Social Security Act.

As the Adult Day Healthcare Program (ADHCP) is a non-residential setting as described above, the New York State Department of Health (the Department) must ensure the ADHCP meets the established requirements set forth in the Final Rule and is in full compliance by March 31, 2022. All ADHCPs must be considered “home and community-based” as defined under Federal regulations 42 CFR 441.301 and 441.710 to continue receiving federal funding.

The HCBS requirements establish an outcome-oriented definition focusing on the nature and quality of individuals’ experiences. The rule further maximizes opportunities for individuals to have access to the benefits of community living and the opportunity to receive services in the most integrated setting by:

- Ensuring full implementation of person-centered care and care planning;
- Ensuring an individual’s rights of privacy, dignity, respect and freedom from coercion and restraint;
- Optimizing individual initiative, autonomy and independence in making life choices;
- Facilitating individual choice regarding services and supports, and who provides them; and
- Supporting integration in and access to the greater community.

To ensure compliance with the HCBS Final Rule, the Department will be providing a self-assessment tool to be completed by each ADHCP. The self-assessment effort will target the following criteria for each ADHCP:

### Category 1: Physical Characteristics of Setting

- The setting is not located on, near or adjacent to an institutional setting
- The setting is not isolating from the community and does not have the effect of isolating people from the community

Category 2: Policies, Procedures, and Staff Competencies

- Setting policies/procedures and practices promote rights and integration
- Staff competencies, training and interactions

Category 3: Legal/Financial Rights and Protection

- Setting provides registrants with comparable legal and financial right as the general public

Responses to this self-assessment will assist the Department in measuring the ADHCP's overall compliance with the HCBS Final Rule, as well as assist in the development of ongoing education, policy guidance and updated regulations that comply with the HCBS Final Rule.

Further information regarding the HCBS Rule may be found at:

[http://www.health.ny.gov/health\\_care/medicaid/redesign/home\\_community\\_based\\_settings.htm](http://www.health.ny.gov/health_care/medicaid/redesign/home_community_based_settings.htm)

The Department is committed to working with your program to ensure compliance with the HCBS Final Rule. The Department is sponsoring free provider trainings on person-centered thinking, planning, and practice. These trainings are strongly recommended to demonstrate movement towards regulatory compliance. More information on trainings can be found by emailing [NYDOHPCPTraining@pcqus.com](mailto:NYDOHPCPTraining@pcqus.com).

For general questions, please contact the Department at [ADHCP.HCBS@health.ny.gov](mailto:ADHCP.HCBS@health.ny.gov).

Please see attached Adult Day Health Care Program FAQ's.

Sincerely,

Sheila McGarvey  
Director  
Division of Nursing Homes & ICF/IID  
Surveillance  
Center for Health Care Provider Services  
and Oversight

Attachment

**FAQ – Frequently Asked Questions  
Adult Day Health Care Program (ADHCP) and  
Home and Community-Based Services (HCBS) Final Rule Compliance**

**Q1. What are the HCBS Rule standards that apply to ADHCPs?**

1. ADHCPs must be integrated in and support full access to the broader community to the extent that the registrant desires. This includes, engaging in community life, controlling personal resources, and receiving services in the community to the same degree of access as individuals not receiving Medicaid HCBS. It also includes, where appropriate, providing education and information about opportunities that are available to seek employment or volunteer and/or work in competitive integrated settings.
2. The ADHCP must be selected by the individual receiving HCBS from setting options, including non-disability specific settings. These options are identified and documented in the person-centered service plan (Registrant Care Plan) and are based on the individual's needs and preferences.
3. ADHCPs must ensure registrants' rights of privacy, dignity, respect, and freedom from coercion and restraint.
4. ADHCPs must make opportunities for individuals to take initiative and enjoy independence in making life choices, including but not limited to, their daily activities, physical environment, and with whom to interact.
5. ADHCPs must facilitate registrants having a choice regarding services and supports, and who provides them.
6. ADHCPs must provide registrants with access to visitors and snacks of preference at all times.

**Q2. What actions can an ADHCP take to align with these requirements?**

1. Train staff at all levels in person-centered planning, thinking, and practice, including how to incorporate these practices in person-centered service planning.
  - a. Training should include techniques used to facilitate and support individuals' participation in unscheduled/scheduled community activities in the same manner as people not receiving HCBS in the community as they choose.
  - b. Provide opportunities for registrants to be involved in meal planning and preparation, if they desire.
2. Educate registrants, families and/or natural supports on the rights of the individuals served, including how to support individuals in making informed choices. Discuss any risks involved in making those choices and safeguards that may be put in place to support individuals to make such choices.
3. Ensure person-centered planning occurs at least annually for individuals served to assess their strengths, interests, preferences, and goals, making sure their activities and services reflect this process. Programs should allow the registrants to lead the process as much as possible.

4. Reorganize or reconfigure staffing resources and/or patterns to support individual choices.
5. Update/revise policies and procedures applicable to the setting, such as removal of “blanket restrictions” that apply to all individuals served in the setting, relying instead on an individualized person-centered planning process for any needed individual restrictions.
6. Train staff, registrants, families, on creating an environment where individuals have a right to come and go at any time. This includes making appropriate modifications of these rights within the Registrant Care Plan if someone is unable to manage this right.
7. Increase access to activities and options that are of interest to, or the preference of, individuals supported, directly soliciting the feedback of individuals served on activities in the process.
8. Reallocate/revise/increase transportation resources to ensure individual transportation needs are met to ensure access to the community at times and dates of their choosing.
9. Develop and implement strategies to help foster natural and volunteer supports for individuals to access meaningful community activities that promote community inclusion and independence.
10. Modify the physical environment, if needed, to include a locking mechanism such as a key pad entry system that allows more independent registrants to come and go freely, and/or remove locks, barriers, or obstructions that restrict movement within the setting.
11. Increase access to assistive technology.
12. Allocate additional program space to promote freedom of movement within the setting, privacy, comfort, and individualized activity opportunities.

**Q3. Are ADHCPs going to be defunded due to the HCBS Rule or Heightened Scrutiny?**

New York is committed to working with ADHCPs to preserve the important services they offer. The Department of Health will commence State monitoring activities to verify implementation of changes required by the HCBS Final Rule beginning as early as January 1, 2020. There will be specific action steps recommended through the assessment process that will be communicated with each ADHC program.

**Q4. Are there any resources to help ADHCPs come into compliance with the Rule?**

Yes. Beginning in 2019 DOH is sponsoring free provider and stakeholder training sessions on person-centered thinking, planning, and practice. These sessions are strongly recommended in order to demonstrate movement towards regulatory compliance. More information on training can be found by emailing NYDOHPCPTraining@pcgus.com.