

Home and Community-Based Settings Regulation

Heightened Scrutiny

The much-awaited guidance from the Centers for Medicare and Medicaid Services (CMS) on **Heightened Scrutiny** was issued on March 22, 2019 (SMD#19-001). The guidance “is designed to ensure that implementation decisions balance the need for robust stakeholder engagement with administrative feasibility.”

The guidance, in the form of FAQs, addresses the process for Heightened Scrutiny and provides clarification on two additional issues: the questions of assessing individual’s private residences to determine compliance with the Settings rule, and of whether an individual must live in a compliant setting when receiving Medicaid funded non-residential HCBS.

Perhaps the most significant aspect of the guidance was the inclusion of a **July 1, 2020 end date** for states to submit settings identified for Heightened Scrutiny to CMS, if those settings have successfully remediated the identified issues. Settings that are still implementing remediation on **July 1, 2020** must submit to CMS with the assurance that they will achieve full compliance with the settings criteria by **March 17, 2022**. On July 14, 2020 CMS revised the extension date to be **March 17, 2023**.

The first 11 FAQs are directed at clarifying the Heightened Scrutiny requirements. The topics covered include:

1. Settings that have the qualities of an institution
2. Characteristics of settings that isolate
3. Information specific to rural settings
4. Settings that isolate that are remediated and achieve compliance
5. Promising practices for remediation of settings
6. HIPAA privacy concerns when seeking public input on settings identified as remediated from the institutional presumption
7. HIPAA and PHI implications when notice on a state’s decision regarding a setting overcoming the institutional presumption of isolation is provided to stakeholders
8. Information a state must provide during the public comment process on settings identified as Heightened Scrutiny
9. How CMS will review Heightened Scrutiny settings

identified by states as overcoming the presumption

10. The information a state is required to submit to CMS for Heightened Scrutiny review
11. The process CMS will use to monitor identified Heightened Scrutiny settings to ensure compliance with the regulation by March 17, 2023

Question 12 addresses CMS’s expectations for the review of private residences and reiterates that privately owned or rented homes and apartments where a person receiving HCBS funded services lives with family members, friends, or roommates are presumed to be in compliance with the Settings Rule. The clarification provided is that “states are not responsible for confirming this presumption for purposes of ensuring compliance with the regulation.” Further, the response clarifies that when a person receiving HCBS funded services lives in a private residence owned by an unrelated caregiver who is paid to provide HCBS services for the person, those settings are considered to be provider-owned or controlled and must be assessed.

Question 13 addresses the question of whether a person receiving HCBS funded non-residential services must reside in a residential setting that is in compliance with the HCBS Settings Rule. CMS states that the state is not responsible for ensuring compliance with the Settings Rule in the residential setting. However, the guidance also clarifies that the state may decide to require the setting to meet the criteria even if the person is not receiving HCBS funded services in that setting.

The clarifications within this guidance will be helpful to states as they endeavor to implement their Statewide Transition Plans by completing setting assessments, identifying and remediating Heightened Scrutiny settings, and submitting Heightened Scrutiny packages to CMS.

Questions about Heightened Scrutiny or the Settings Rule?

PCG’s team is here to help! Please feel free to contact Cathy Anderson at caanderson@pcgus.com with your questions or to learn more about how PCG can help you achieve compliance by 2023.