



August 9, 2024

New York State Department of Health
875 Central Avenue
Albany, NY 12206
Sent via email to acfHCBS@health.ny.gov

Re: ACF Heightened Scrutiny Packages

To Whom It May Concern:

We are writing on behalf of LeadingAge New York and our not-for-profit adult care facility (ACF) and assisted living members to provide comments on the Home and Community-Based Services (HCBS) Settings Rule Heightened Scrutiny Evidence Packets for ACFs, published on July 17, 2024. LeadingAge New York appreciates the opportunity to comment on the Heightened Scrutiny Packets and recognizes the significant efforts by the Department of Health (DOH) and the ACFs themselves in the process. The packets are the result of the submission and review of a great deal of documentation, site visits, and interviews to help illustrate the nature of services provided in these settings.

LeadingAge New York supports the goals of the federal rule, which include ensuring that those who receive Medicaid-covered HCBS have full access to the benefits of community living and are able to receive services in the most integrated setting. We support the rule's objectives to optimize autonomy, independence, and choice. And we support the overall conclusion reflected in the Heightened Scrutiny Packets; all of the ACFs in LeadingAge New York's membership that were subjected to Heightened Scrutiny demonstrated that they offer their residents abundant opportunities to engage in the broader community, individual autonomy and privacy, and an array of enjoyable and rewarding activities that enrich their lives and improve their wellbeing. As such, we believe that our members should and will be successful in overcoming DOH's presumption that they have qualities of an institution.

Our primary concern is that the State has applied the HCBS Settings Rule and the associated Heightened Scrutiny review in an overly broad fashion, and some settings should not have been subject to the presumption and Heightened Scrutiny in the first place.

While we understand that we are, at this juncture, coming to the end of the Heightened Scrutiny process, we think it important to identify these issues for the purposes of arriving at a proper conclusion regarding the current review, and for clarity moving forward. As such, we urge DOH and the Centers for Medicare and Medicaid Services (CMS) to amend the documentation to accurately reflect those settings that are subject to Heightened Scrutiny. This is important not only for the purposes of reviewing the Heightened Scrutiny Packets before us, but also for future development of long-term services and supports. We fear that this overreaching may have a chilling effect on the willingness of aging services organizations to offer ACF/assisted living, to serve Medicaid beneficiaries, and/or to offer continuums of care that include nursing facility services. As the comments from consumers in the Heightened Scrutiny Packets demonstrate, these are desirable models that offer opportunities for healthy aging and social engagement. State and national policies should be promoting, rather than inhibiting, the growth of these living arrangements.

The following comments are specific to the Heightened Scrutiny Packets of ACFs in our membership. However, our comments are likely to be equally applicable to other ACFs that were subject to Heightened Scrutiny.

In reviewing the HCBS Settings Rule Heightened Scrutiny Evidence Packets for ACFs, the State has exceeded the intended scope of the rule or misapplied it in the following ways:

- It has misinterpreted the second prong of the Heightened Scrutiny analysis (adjacent to a “public institution”) by applying it to any ACF located near a nursing home.
- It has applied the Heightened Scrutiny standard to ACFs that do not receive any Medicaid funding.

Prong 2 of the Heightened Scrutiny Analysis Is Not Intended to Apply to Settings Located Adjacent to Nursing Homes

DOH inappropriately applied the second prong of the Heightened Scrutiny review to any ACF that is located *adjacent to or on the same campus* as a nursing home. Prong 2 is explicitly targeted at “Settings that are in a building located on the grounds of, or immediately adjacent to, a public institution.”¹ None of the facilities in LeadingAge New York’s membership that were subject to Prong 2 are on the grounds of or adjacent to a “public institution.”

Nursing homes are not included in the regulatory definition of “public institution.” CMS stated in the preamble to the [HCBS Settings Rule](#)² that it would define a public institution as set forth in [Medicaid regulations](#) – “an institution that is the responsibility of a governmental unit or over which a governmental unit exercises administrative control,” which “does not include . . . [a] [medical institution](#) as defined in this section.” A nursing home is a “medical institution,” *not* a public institution, under Medicaid regulations and under the [New York State Medicaid Plan](#).³ Therefore, ACFs should not have been presumed to have institutional qualities solely based on a location adjacent to, or on the grounds of, a nursing home. Moreover, none of the ACFs subjected to Heightened Scrutiny under Prong 2 are adjacent to a government-controlled institution.

The below ACFs are a part of organizations in LeadingAge New York’s membership that were erroneously subjected to Heightened Scrutiny under Prong 2 because they were “on the same campus” as a nursing home:

- Bethany Village
- Cedarbrook Village
- Dosberg Manor
- Eger Harbor House

¹ Letter to State Medicaid Directors, SMD # 19-001, Mar. 22, 2019; 42 C.F.R. 441.301(5)(c)(v).

² Medicaid Program; State Plan Home and Community-Based Services, 5-Year Period for Waivers, Provider Payment Reassignment, and Home and Community-Based Setting Requirements for Community First Choice and Home and Community-Based Services (HCBS) Waivers, 79 Fed. Reg. 2948, 2972, Jan. 16, 2014.

³ See e.g., NYS Medicaid Plan, at pp. 713 (Attachment 4.19-C), 1108 (Attachment 3.1-C)

- Gurwin Jewish Fay J. Lindner Residences
- Hilltop Manor West
- Lutheran Home of Central New York
- Presbyterian Resident Community
- St. Louise Manor

Additionally, Brookdale Hospital Medical Center ALP was included because it is across the street from Brookdale Hospital Medical Center.

None of these settings should have been subjected to Heightened Scrutiny under Prong 2 and should be removed from the list of settings subject to Heightened Scrutiny.

The Heightened Scrutiny Standard of the HCBS Settings Rule Was Erroneously Applied to ACFs that Do Not Receive Any Medicaid Funding

The HCBS Settings Rule is intended to ensure that Medicaid-funded HCBS promote community integration and individual autonomy. It was never intended to create federal regulatory standards for providers that are funded exclusively with non-Medicaid or private dollars. This is evident from the rule's location in Part 441 of the CMS regulations which pertain to services funded under Medical Assistance Programs. This intent is further clear from the potential outcome of a finding that a setting cannot overcome the presumption that it is institutional – such a finding results in a denial of Medicaid funding for HCBS. (See SMD #19-001, March 22, 2019, at Question 8.) A provider that does not receive any Medicaid funding would not experience any penalty as a result of being deemed “institutional” in character.

The following ACFs within LeadingAge New York's membership were required to demonstrate compliance with the HCBS Settings Rule and subjected to Heightened Scrutiny even though they do not receive any Medicaid funding:

- Gurwin Jewish Fay J. Lindner Residences
- Woodland Pond

Neither of these providers is a Medicaid assisted living provider. They do not receive Medicaid funds for HCBS provided to residents in the ACF/assisted living settings. Both Heightened Scrutiny Packets erroneously make reference to use of the Uniform Assessment System for New York (UAS-NY), an assessment tool for the Medicaid assisted living program (ALP), which does not apply to the assisted living residence (ALR) model – the licensure that both the Gurwin and Woodland Pond assisted living settings hold.

Additionally, the evidence packets suggest that both settings are only partially compliant with *42 CFR 441.301(c)(4)(vi)(F)*, and that “Remediation is in progress to procure an independent assessor/case management agency to determine the individual's need for HCBS and develop a person-centered service plan. This is to ensure conflict-free case management.” Again, this relates to an issue the State is working to remedy regarding services provided in a Medicaid ALP and does not apply to Gurwin or Woodland Pond's ALR.

It should also be noted that both of the above ALRs are part of Continuing Care Retirement Communities (CCRCs). In New York, people seek out CCRCs and use their own resources to live in a setting that allows them to remain in the same community, even if their needs increase over time. In New York, consumers with resources have chosen options that have a nursing home on the same campus, or in the same building, as an assisted living setting because it makes transitions easier if needing rehabilitative services or long term care. It should be noted that Independent Living (IL) is also a critical component of CCRCs. The IL units are typically on the same campus or in the same building as the other levels of care. Our members have vibrant communities where people from each level of care can interact. Residents also are engaged in the broader communities in which the CCRC is located.

Further, in a CMS-issued document, [Guidance on Settings that Have the Effect of Isolating Individuals Receiving HCBS From the Broader Community](#), it states:

“In CMS’ experience, most Continuing Care Retirement Communities (CCRCs), which are designed to allow aging couples with different levels of need to remain together or close by, do not raise the same concerns around isolation as the examples above, particularly since CCRCs typically include residents who live independently in addition to those who receive HCBS.”

For these reasons, we believe that Gurwin Jewish Fay J. Lindner Residences should be removed from the list of entities subject to Heightened Scrutiny.

Other Issues

The below settings were subject to Heightened Scrutiny under Prong 1; a setting is subject to Heightened Scrutiny if it is located in the same building as a publicly or privately operated facility that provides inpatient institutional treatment.

- Hulquist Place was subject to Heightened Scrutiny under this prong for being co-located with Lutheran Retirement Home, a skilled nursing facility. Unfortunately, that skilled nursing facility has closed. As such, Hultquist Place should be removed from Heightened Scrutiny, as it no longer triggers any of the Heightened Scrutiny criteria.
- Maplewood Assisted Living was subject to Heightened Scrutiny for being co-located with United Helpers Canton Nursing Home. Unfortunately, the Maplewood ALP has closed and can be removed from the list.

An Overbroad Interpretation of the Rule Jeopardizes the Future Development of Services for Older Adults

As noted above, we urge the correction of the issues identified above, not just for the ACFs on this list, but also to protect the future availability of services and supports for older adults in the state.

This concern was highlighted by CMS’s guidance, [HCBS Final Regulations Questions and Answers Regarding Home and Community-Based Settings](#), and subsequent 2019 follow-up guidance, [Heightened Scrutiny Review of Newly Constructed Presumptively Institutional Settings](#). The 2019 guidance modified the 2016 guidance to recognize that settings were being constructed that triggered Heightened Scrutiny and provide a pathway for the State and CMS to review the settings. Both guidance documents have discouraged the

development of new settings by imposing complex requirements and processes, and creating uncertainty about the viability of project.

Thus, the overbroad application of those standards as reflected in the Heightened Scrutiny Packets will hinder the development of needed services in New York, such as settings in which HCBS are on the same campus as or near a nursing home or hospital or CCRC. LeadingAge New York has highlighted repeatedly that consumers prefer and seek out services that enable them to age in place, support couples with different needs, and facilitate access to other health care providers and services. An overly broad application of the rule could also discourage providers from serving people who rely on Medicaid.

Conclusion

LeadingAge New York appreciates the opportunity to comment on the Heightened Scrutiny Packets. We urge the State to modify the packets as outlined above and its future approach to Heightened Scrutiny, in order to remain consistent with the parameters of the rule. Overbroad application can hinder access to services and settings that are not only needed, but preferred and sought after by older adults.

Sincerely,

A handwritten signature in cursive script that reads "Diane Darbyshire". The signature is written in black ink on a white background.

Diane Darbyshire, LCSW
Vice President of Advocacy and Public Policy