

# Home and Community Based Settings Rule Heightened Scrutiny Evidentiary Package

On March 17, 2014, new federal Medicaid rules for Home and Community Based Services (HCBS) went into effect. The rules impact many parts of HCBS. One of the most important topics is the places where HCBS can be provided.

Because HCBS programs are offered as alternatives to nursing and intermediate care facility services, the new rules make sure that HCBS are provided in settings that are not institutional in nature. To follow this rule, states must make sure that HCBS settings are part of a larger community, people are able to have choices about their service settings, and that people are assured their rights to privacy, dignity and respect.

States must evaluate their HCBS programs to determine the level of compliance with the new rules. The setting indicated on this form has been identified as requiring to go through the heightened scrutiny process as part of the compliance process.

Additional information on Heightened Scrutiny can be found here: [HCBS Settings Rule: Heightened Scrutiny](#)

## Setting Information

<b>Site Name:</b>	Rise Inc	<b>Site ID:</b>	1174
<b>Site Address:</b>	141 N Vernal Ave, Vernal, UT		
<b>Website:</b>	<a href="https://riseservicesinc.org/">https://riseservicesinc.org/</a>		
<b># of Individuals Served at this location regardless of funding:</b>	13	<b># of Medicaid Individuals Served at this location:</b>	13
<b>Waiver(s) Served:</b>	<b>HCBS Provider Type:</b>		
<input checked="" type="checkbox"/> Acquired Brain injury <input type="checkbox"/> Aging Waiver <input checked="" type="checkbox"/> Community Supports <input checked="" type="checkbox"/> Community Transition <input type="checkbox"/> New Choices <i>Description of Waivers can be found here:</i> <a href="https://medicaid.utah.gov/ltc/">https://medicaid.utah.gov/ltc/</a>	<input checked="" type="checkbox"/> Day Support Services <input type="checkbox"/> Adult Day Care <input type="checkbox"/> Residential Facility <input type="checkbox"/> Supported Living <input type="checkbox"/> Employment Preparation Services		
<b>Heightened Scrutiny Prong:</b>			
<input type="checkbox"/> Prong 1: Setting is in a publicly or privately operated facility that provides inpatient institutional treatment  <input type="checkbox"/> Prong 2: Setting is in a building on the grounds of, or immediately adjacent to, a public institution  <input checked="" type="checkbox"/> Prong 3: From the initial assessment, the setting was found to have the effect of isolating individuals from the broader community. The following is the area that was identified: <ul style="list-style-type: none"> <li><input checked="" type="checkbox"/> A. Individuals have limited, if any, opportunities for interaction in and with the broader community and /or the setting is physically located separate and apart from the broader community and does not facilitate individual opportunity to access the broader community and participate in community services consistent with their person centered service plan</li> </ul>			

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	<input type="checkbox"/> B. The setting restricts individuals choice to receive services or to engage in activities outside of the setting <input type="checkbox"/> C. The setting has qualities that are institutional in nature. These can include: <ul style="list-style-type: none"> <li>• The setting has policies and practices which control the behaviors of individuals; are rigid in their schedules; have multiple restrictive practices in place</li> <li>• The setting does not ensure an individual’s rights of privacy, dignity, and respect</li> </ul>
<b>Onsite Visit(s) Conducted:</b>	9/25/19 Onsite, 1/10/23 (Virtual, Scheduled)
<b>Description of Setting:</b>	
The setting is a day service program located in Vernal, UT, near Utah Field House of Natural History State and Ashley Valley Community Park. Building is right next to a gas station, other community businesses and homes. Setting is in a small community.	
<b>Current Standing of Setting:</b>	
<input type="checkbox"/> Currently Compliant: the setting has overcome the qualities identified above <input checked="" type="checkbox"/> Approved Remediation Plan: the setting has an approved remediation plan demonstrating how it will come into compliance. The approved timeline for compliance is: 1/10/23	

## Evidence the Setting is Fully Compliant or Will Be Fully Compliant

<b>Prong 1: The setting is in a publicly or privately operated facility that provides inpatient institutional treatment; the setting overcomes this presumption of an institutional setting.</b>	
<b>Compliance:</b>	<input type="checkbox"/> Met <input type="checkbox"/> Remediation Plan demonstrating will be compliant <input checked="" type="checkbox"/> Not Applicable

<b>Prong 2: The setting is in a building on the grounds of, or immediately adjacent to, a public institution; the setting overcomes this presumption of an institutional setting.</b>	
<b>Compliance:</b>	<input type="checkbox"/> Met <input type="checkbox"/> Remediation Plan demonstrating will be compliant <input checked="" type="checkbox"/> Not Applicable

<b>Prong 3 A: 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.</b>	
<b>Compliance:</b>	<input type="checkbox"/> Met <input checked="" type="checkbox"/> Remediation Plan demonstrating will be compliant

<b>Summary:</b>	<p><b>Onsite Visit Summary 9/25/19 (Onsite):</b></p> <p>The setting does not facilitate the opportunity to be integrated into the greater community to the same degree as individuals not receiving HCBS services. The setting will go out a whole group at times; this can be segregating for the individual served. Setting could do more to facilitate the process for individuals to pursue competitive integrated work as an option. The setting put a plan in place to provide and support participants in their personal choice, preferences, and interests. They will provide Community integrated employment, add more independence with choosing daily routines. Implement teaching skills to seek integrated</p>
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	<p>employment in the community. Will support people in their current day programs by helping to build more independence into their daily routine. The setting needs to address skill building and informed choice competitive integrated employment in the community moving forward. Plans to implement ongoing need to be validated through future visits.</p> <p><b>Remediation Plan Summary:</b></p> <p>Clients have a suggestion board that they write down the activities that they would like to do. On Friday the coordinator sits down with everyone and goes through the activities they have chosen. At that time if there are not enough ideas the coordinator and staff put out ideas that the clients select. The coordinator uses their activities and creates a schedule for the following week with activities. Each day when the client comes in they put their name by the activities that they would like to participate in for the day. Staffing is then determined by the group size of the activities the clients selected.</p> <p><b>Policy/Document Review:</b></p> <ul style="list-style-type: none"> <li>● Human rights</li> <li>● Staff training</li> <li>● Weekly/monthly schedule for clients</li> <li>● Planning activity board</li> </ul>
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<b>Prong 3 B: The setting is selected by the individual from among setting options, including non-disability specific settings.</b>	
<b>Compliance:</b>	<input checked="" type="checkbox"/> Met <input type="checkbox"/> Remediation Plan demonstrating will be compliant
<b>Summary:</b>	<p><b>Onsite Visit Summary 9/25/19 (Onsite):</b></p> <p>The setting does not restrict access to non-disability settings. The setting has an admission process that assesses individuals' needs and preferences and regularly reassesses to ensure services are provided in a person-centered manner.</p>

<b>Prong 3 C: The setting optimizes, but does not regiment individual initiative, autonomy, and independence in making life choices. The setting ensures an individual's rights of privacy, dignity, respect, and freedom from coercion and restraint. The setting ensures the individual has the freedom and support to control his/her own schedule and activities.</b>	
<b>Compliance:</b>	<input checked="" type="checkbox"/> Met <input type="checkbox"/> Remediation Plan demonstrating will be compliant
<b>Summary:</b>	<p><b>Onsite Visit Summary 9/25/19 (Onsite):</b></p> <p>It was unclear during the visit if individuals had choice in their work times and breaks. The provider's process on rights restrictions was unclear.</p> <p><b>Remediation Plan Summary:</b></p> <p>The provider will demonstrate compliance for informed consent prior to use of restraints and/or restrictive interventions, specify that restraints are a part of the care planning process, have been reviewed by the Human Rights Committee, and/or are addressed in a behavior support plan. The setting will document that they provide the individual with the opportunity to negotiate their work schedule, break/lunch times, and leave and medical benefits with the employer to the same extent as individuals in the community who do not receive Medicaid HCBS services.</p>

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<b>Overall, the setting enforces the Home and Community-Based Settings Regulation requirements.</b>	
<b>Compliance:</b>	<input type="checkbox"/> Met <input checked="" type="checkbox"/> Remediation Plan demonstrating will be compliant
<b>Summary:</b>	Site setting will work on involving clients more in their weekly activity scheduling and teach more skills and provide more opportunities for integrated employment options in the community. This location has a follow-up validation visit on Jan 10th, 2023.

## Input from Individuals Served and Staff

<b>Individuals Served Summary:</b>	<p><b>Summary of interviews (2019):</b></p> <ul style="list-style-type: none"> <li>• Individuals enjoy participating in activities and using transportation in the community.</li> <li>• Some Days they go outside when they don't have work.</li> <li>• They can spend their own money if it is under \$50.</li> <li>• An individual has their own truck and staff drive them places.</li> </ul>
<b>Staff Summary:</b>	<p><b>Summary of interviews (2019):</b></p> <ul style="list-style-type: none"> <li>• Receives annual and as needed training. Can improve on involving individuals in their weekly planning for activities.</li> <li>• A staff member said they don't really understand the Settings rule.</li> <li>• Staff said individuals never have activities that they participate in.</li> </ul>

<b>Ongoing Remediation Activities</b>	
Current Standing: <input type="checkbox"/> Currently Compliant <input checked="" type="checkbox"/> Approved Remediation Plan	
<b>Continued Remediation Activities</b>	The provider has identified areas for remediation and the state will conduct additional validation visit to ensure settings compliance.
<b>Ongoing Monitoring Activities</b>	<p>The State will use the following tools to ensure settings continue compliance with the Settings Rule criteria:</p> <ul style="list-style-type: none"> <li>• Conducting individual served experience surveys</li> <li>• Addressing settings compliance during the annual person centered service planning process</li> <li>• Ongoing provider training and certification</li> <li>• Monitoring through critical incident reporting</li> <li>• Case Management/Support Coordinator visit monitoring</li> <li>• HCBS Waiver Reviews/Audits</li> </ul>

## Summary of Stakeholder Workgroup Comments Received and State Response:

<b>Stakeholder Workgroup Review: January 3, 2023 - January 18, 2023</b>	
<b><i>General Comments Received</i></b>	
<b>Comment:</b>	The materials provided by the State in the newly-released evidentiary packets ("batch 5") raise concerns about whether the identified settings currently demonstrate the qualities of HCBS. In most instances, the state has only completed a virtual review instead of an in-person visit. In our experience as the P&A, it is difficult to accurately

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assess characteristics of an institution as well as to communicate effectively with waiver participants without an in-person visit.

**Response:**

The State has a comprehensive virtual validation visit process in place to determine HCBS Settings Rule compliance. If at any time the State determines that the virtual process is not sufficient for a specific setting, then the State will make the determination that an in-person visit is required at that time. Once a setting has completed its remediation and the State has validated its compliance with the HCBS settings rule, it moves to the ongoing monitoring process.

**Comment:**

In many instances, the packages state that the setting is compliant based on a remediation plan and indicate that a validation visit will be completed in the future. Many of the reviews state that individuals are not getting into the community to the degree they would wish and that there are still institution-like restrictions on individuals in the settings. It is difficult for stakeholders to provide feedback on whether a setting has the characteristics of an HCBS setting if it is still in the process of remediating. The remediation plans seem to lack the detail necessary to assist a setting with becoming compliant and the short time frame until the final compliance deadline leads us to believe that these sites will not remediate in time.

**Response:**

Settings must demonstrate compliance or demonstrate a plan along with the State's oversight to ensure completion of actions to certify they will become compliant prior to March 17, 2023 before the State submits them through the heightened scrutiny process.

**Comment:**

The reviews in many instances lack the detail necessary to determine whether a setting is institutional/segregating. For example, there are reviews of 14c certificate holders that do not indicate whether the setting will pay subminimum wage moving forward. Reviews indicate that individuals access the community, but in many instances don't specify how large the groups are, what types of activities they engage in and the frequency with which activities occur. Some reviews mention work groups/work enclaves, but do not specify what type of work individuals engage in, where people work and how large the work groups are. The reviews frequently say that the setting does not restrict access to the community, that community amenities are within "miles" and that there is access to public transportation, but often do not specify how the facility supports individuals to access these amenities/public transportation.

**Response:**

While the State agrees that certain criteria can create concerns with compliance, several elements described do not determine on their own whether a setting meets or fails requirements. Individual settings are reviewed and assessed on their merit. For example, payment of sub-minimum wage work or group sizes in and of themselves are not including or excluding criteria. The state determines compliance based on factors such as person centered planning, individual choice and autonomy, individualized schedules, and individuals self-reporting they are accessing the community at the level that they desire.

**Comment:**

We are very concerned about how the state has handled non-residential settings, particularly large day programs and sheltered workshops. These reviews do not demonstrate that the state has ensured that these particularly

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problematic settings have remediated sufficient to comply with the settings rule as well as title II of the ADA and Olmstead. Again, many final reviews have not been completed in person, and most frequently the state is submitting sites that have submitted a remediation plan but have not been validated as remediated.

**Response:**

Settings must demonstrate compliance or demonstrate a plan along with the State's oversight to ensure completion of actions to certify they will become compliant prior to March 17, 2023 before the State submits them through the heightened scrutiny process. The State has a comprehensive virtual validation visit process in place to determine HCBS Settings Rule compliance. If at any time the State determines that the virtual process is not sufficient for a specific setting, then the State will make the determination that an in-person visit is required at that time. Once a setting has completed its remediation and the State has validated its compliance with the HCBS settings rule, it moves to the ongoing monitoring process. While the State does acknowledge that activities for remediation extended into March 2023, it does not believe strategies deviated from its Statewide Transition Plan, or that inappropriate methods were used in validating compliance. The State also acknowledges that Settings compliance is not a one time activity and the usage of ongoing monitoring will aid to reinforce core tenants of the Rule as well as the development and dissemination of best practices. The State encourages the submission of providers who are believed to be non-compliant with requirements of the Settings Rule, including the elements/criteria which are not sufficiently meeting expectations.

**Comment:**

Reviews indicate that individuals are still being segregated by "level of functioning" and even by whether an individual resides in an ICF or an HCBS setting.

**Response:**

The State agrees that settings identified as having this concern are institution and segregating in nature. The purpose of the heightened scrutiny process was to identify settings that were institutional and segregating in nature and go through the process of showing how they overcame those qualities. Settings submitting for heightened scrutiny were required to remediate through training of staff, provide evidence of compliance, and demonstrate compliance through validation that they were compliant in these areas of concern.

**Comment:**

Reviews do not indicate that the EPR codes which contemplate meaningful, individualized, time-limited pre-vocational programs are being implemented in Workshops. Reviews do not indicate that individuals are spending at least 20% of their time in the community engaging in activities chosen by the individual. Reviews do not (for the most part) indicate whether or not the provider is continuing to pay subminimum wage. Reviews do not consider what type of work individuals engage in the setting and whether or not that work is chosen by the individual. Frequently, specificity as to how many individuals are working in a group is not given. Frequently, information about how settings are supporting individuals to gain competitive, integrated employment as guaranteed by the settings rule is not given.

**Response:**

As with all settings, the State's review was for the purpose of determining whether the tenants of the Settings Rule had been met, regardless of which specific services were delivered at the location. The State has separate compliance monitoring for the appropriate authorization of Employment Preparation Services and the delivery of those services by providers.

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**Comment:**

Frequently, reviews indicate that there are still restrictive practices in the settings indicating an institution-like environment.

**Response:**

The State agrees that many reviews indicated settings still had restrictive practices in place indicating an institution-like environment as they had not yet gone through their final validation process at the time they went out for heightened scrutiny. The State has spent considerable time with settings and providers providing technical assistance beyond what was documented in their remediation plans to remediate their institutional and segregating characteristics to come into compliance with the rule.

## Summary of Public Comments Received and State Response:

**Public Comment Period:** January 2, 2023 to February 3, 2023

### **Setting Specific Comments:**

**Comment:**

One commenter stated Rise site 1174, is a day support services program located at 141 N Vernal Ave, Vernal, UT. It provides services to 13 waiver participants. The materials provided by the State in the evidentiary packet do not demonstrate that the identified setting currently demonstrates the qualities of HCBS. For stakeholders to provide effective feedback, the state needs to present stakeholders with final validations of compliance with the rule rather than un-validated remediation plans. Not doing so does not provide appropriate notice to community partners of the steps the state has taken to ensure that settings are fully in compliance with the settings rule.

**Response:**

Settings must demonstrate compliance or demonstrate a plan along with the State's oversight to ensure completion of actions to certify they will become compliant prior to March 17, 2023 before the State submits them through the heightened scrutiny process. As indicated on the heightened scrutiny package, and as the commenter said, a validation visit was conducted in January (1/10/23) to ensure that the remediation plan was implemented and the setting was compliant in the areas indicated. The setting was determined compliant after the validation visit.

**Comment:**

The same commenter had additional feedback stating We have concerns that the planned assessment of the setting after the public comment deadline will not be completed in person. In our experience as the P&A, it is difficult to accurately assess characteristics of an institution as well as to communicate effectively with waiver participants without an in-person visit.

**Response:**

The State has a comprehensive virtual validation visit process in place to determine HCBS Settings Rule compliance. If at any time the State determines that the virtual process is not sufficient for a specific setting, then the State will make the determination that an in-person visit is required at that time. Once a setting has completed its remediation and the State has validated its compliance with the HCBS settings rule, it moves to the ongoing monitoring process.

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**Comment:**

The same commenter had additional feedback stating the evidentiary package lacks specificity regarding compliance with the rule. While the state did assess community integration and found that individuals were not doing activities in the community of their choice and with the frequency they desire (Staff state that consumers “never have activities that they participate in”), the state doesn’t evaluate what activities individuals are participating in at the setting and whether that is the choice of the individuals.

**Response:**

As indicated on the heightened scrutiny package, and as the commenter said, a validation visit was conducted in January (1/10/23) to ensure that the remediation plan was implemented and the setting was compliant in the areas indicated. The setting was determined compliant after the validation visit. The process is the same for both community and setting based activities. There is a formal process for individuals to give input into their activity calendar. Staff ask and give options of activities. Individuals are asked what they want to do. There is a morning focus group (daily) that can take up to 45 minutes depending on how interested individuals are. Individuals reported they give the recommendations on where they want to go with staff and what activities they participate in.

**Comment:**

The same commenter had additional feedback stating the remediation plan presented lacks specificity regarding both community integration and integrated employment, and does not consider how people spend their days in the setting itself. Parts missing from the remediation plan seem to be as follows: how frequently will individuals be going into the community and for what activities, how large will the groups be (small enough to facilitate community integration), what types of activities are happening in the day program itself and what changes need to be made to facilitate consumer choice? The remediation plan states that they will provide more opportunities for community integrated options in the community without any detail about how they plan to do so.

**Response:**

As indicated on the heightened scrutiny package, and as the commenter said, a validation visit was conducted in January (1/10/23) to ensure that the remediation plan was implemented and the setting was compliant in the areas indicated. The setting was determined compliant after the validation visit. Individuals reported they were able to go out into the community as often as they wanted. Staff shared that when they were out in the community, they encouraged individuals to interact with community members and integrate to their full ability. There is a formal process for individuals to give input into their activity calendar. Staff ask and give options of activities. Individuals are asked what they want to do. There is a morning focus group (daily) that can take up to 45 minutes depending on how interested individuals are. Individuals reported they give the recommendations on where they want to go with staff and what activities they participate in. During the validation visit it was found that individuals are accessing the community in small groups (2-4 people) the majority of the time. There were times the setting would go out in larger groups (up to 12 individuals). The State provided technical assistance to the setting and determined them compliant in this area after a desk review of their revised practices.

**General Comments Received:**

**Comment:**

As the Protection and Advocacy agency for people with disabilities for the State of Utah, the Disability Law Center (“DLC”) is uniquely suited to provide assistance and input during this process. Based on our own observations as the P&A as well as our evaluation of the state’s assessments of settings, the state did not



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engage in a sufficient assessment process or provide adequate support to bring settings into compliance with the rule prior to the March 17, 2023 deadline. We are concerned that HCBS waiver dollars will continue to be spent on segregated, institutional settings despite the state's obligations under the HCBS settings rule, Title II of the ADA and Olmstead. This heightened scrutiny evidentiary package demonstrates these ongoing concerns as detailed below.

**Response:**

While the State does acknowledge that activities for remediation extended into March 2023, it does not believe strategies deviated from its Statewide Transition Plan, or that inappropriate methods were used in validating compliance. The State also acknowledges that Settings compliance is not a one time activity and the usage of ongoing monitoring will aid to reinforce core tenants of the Rule as well as the development and dissemination of best practices. The State encourages the submission of providers who are believed to be non-compliant with requirements of the Settings Rule, including the elements/criteria which are not sufficiently meeting expectations.

## Summary of Stakeholder Workgroup Recommendation:

**Stakeholder Workgroup Review:** January 3, 2023 - January 18, 2023

We only got a response from one workgroup member. Their comments are noted above.

## Utah's Recommendation

**Recommendation: Compliant**

**At the time the heightened scrutiny packet was submitted for public comment, the State had not completed the final validation visit. The State has since completed the final validation visit and determined the setting has overcome the effect of isolating individuals from the broader community and is in compliance with the HCBS Settings Rule.**