

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

Site Name:	NORTH EASTERN SERVICE, INC.	Site ID:	1025
Site Address:	83 North 400 East, Roosevelt, UT 84066		
Website:	Nesutah.com		
# of Individuals Served at this location regardless of funding:	25	# of Medicaid Individuals Served at this location:	25
Waiver(s) Served:		HCBS Provider Type:	
<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> https://medicaid.utah.gov/ltc/		<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	
Heightened Scrutiny Prong:			
<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"> <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 			

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	<p>community services consistent with their person centered service plan</p> <p><input type="checkbox"/> B. The setting restricts individuals choice to receive services or to engage in activities outside of the setting</p> <p><input checked="" type="checkbox"/> C. The setting has qualities that are institutional in nature. These can include:</p> <ul style="list-style-type: none"> • The setting has policies and practices which control the behaviors of individuals; are rigid in their schedules; have multiple restrictive practices in place • The setting does not ensure an individual’s rights of privacy, dignity, and respect
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Onsite Visit(s) Conducted:	Due to multiple North Eastern Services (NES) not being compliant and the noncompliance areas being similar at all of the settings, the State gave NES the opportunity to remediate organization level noncompliance areas as an organization prior to doing additional validation visits. This setting has a validation visit scheduled in January of 2023 to determine final compliance.
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Description of Setting:

The setting is a day support services program located in an area of Roosevelt that is located close to community resources such as banks, restaurants, theaters, and stores.

North Eastern Services chose to apply for and participate in the USU technical assistance program. They engaged with industry experts through USU to identify what areas they needed to focus on to come into compliance with the settings rule and established a transformation plan for their setting. As this was a very intensive and optional process, they did not go through the additional review onsite visit with the State in 2019.

Current Standing of Setting:

<p><input type="checkbox"/> Currently Compliant: the setting has overcome the qualities identified above</p> <p><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: The approved timeline for compliance is: 12/30/2022, Validation Visit will be completed in January 2023</p>
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Evidence the Setting is Fully Compliant or Will Be Fully Compliant

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.

Compliance:	<input type="checkbox"/> Met <input type="checkbox"/> Remediation Plan demonstrating will be compliant <input checked="" type="checkbox"/> Not Applicable
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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.

Compliance:	<input type="checkbox"/> Met <input type="checkbox"/> Remediation Plan demonstrating will be compliant <input checked="" type="checkbox"/> Not Applicable
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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.

Compliance:	<input type="checkbox"/> Met <input checked="" type="checkbox"/> Remediation Plan demonstrating will be compliant
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Summary:	<p>Transformation Plan Summary: North Eastern Services (NES) will eliminate usage of sub-minimum wage. Individuals involved in NES employment will receive no less than minimum wage for work completed. All residential and day support contracts adjusted to accommodate person centered ratios to result in more person centered services available. Day program will be more involved in the community and more person centered in regards to activities. NES will conduct pilot groups with the day service without walls model. NES will expand activity options by allowing clients to suggest multiple options that they are interested in. NES will reduce ratio size for community activities.</p> <p>Onsite Visit Summary (2021): Due to multiple North Eastern Services (NES) not being compliant and the noncompliance areas being similar at all of the settings, the State gave NES the opportunity to remediate organization level noncompliance areas as an organization prior to doing additional validation visits. The following concerns were identified at an organization level after several visits were done at multiple settings and the provider was asked to address these items at an organizational level: The settings need to do a better job at promoting community integration: Staff do not appear to have an understanding on how to promote community integration activities. Skill building is not a focus while in the community. Staff control individual's money when in the community.</p> <p>Remediation Plan Summary: North Eastern Services is currently working with staff to develop a better understanding on how to promote community integration activities. Individual skill building will be discussed and staff will be trained on looking for skill building during meetings and will be given ideas on how to promote community integration activities. NES is currently building a training and quiz to be completed by staff. Individuals will have the responsibility to bring their and manage their money for activities unless there is a human rights restriction in place.</p>
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Prong 3 B: The setting is selected by the individual from among setting options, including non-disability specific settings.	
Compliance:	<input checked="" type="checkbox"/> Met <input type="checkbox"/> Remediation Plan demonstrating will be compliant
Summary:	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.

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.	
Compliance:	<input type="checkbox"/> Met <input checked="" type="checkbox"/> Remediation Plan demonstrating will be compliant
Summary:	Transformation Plan Summary:

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NES will conduct pilot groups with the day service without walls model. NES will expand activity options by allowing clients to suggest multiple options that they are interested in. NES will reduce ratio size for community activities.

Onsite Visit Summary (2021):

Due to multiple North Eastern Services (NES) not being compliant and the noncompliance areas being similar at all of the settings, the State gave NES the opportunity to remediate organization level noncompliance areas as an organization prior to doing additional validation visits.

The following concerns were identified at an organization level after several visits were done at multiple settings and the provider was asked to address these items at an organizational level:

The settings must do a better job at individualized schedules: There is not a formal process for individuals to give input into the master calendar/schedule. Individual's are not given an option of alternative activities if they do not wish to participate in an activity. Individual's cannot move between groups based on preferred activities/staff/friends they want to participate with.

Staff control individual's money when in the community.

The settings must train their staff on communicating about and treating individuals served with dignity and respect: Functional labels and language were widely used across the settings by both staff and individuals served. Typically, individuals were described as "low functioning" or "high functioning."

The settings need to do a better job at not regimenting individual initiative, autonomy, and independence in making life choices: There were group restrictions for the entire setting in place (such as personal phones, food). There were reported restrictions where there was no way for others to circumvent the restrictions (such as sharps and food). Both staff and individuals served reported that either "all" or a lot of individuals had restrictions in place.

Remediation Plan Summary:

All individuals are encouraged to communicate their preference of activities with the Day Program Manager. With all individuals input, a Day Program calendar is then created and sent home with all individuals. It is the individual's choice to participate in any activities for the day. If an individual chooses not to participate in an activity for a specific day and is able to provide the Day Program manager with sufficient notice on a desired change to the calendar, accommodations can be made to the schedule, staffing, etc. All individuals are allowed to move between groups as they desire. Based on desires, client interests, local activities/events, and the time of year, the day program manager builds the schedule.

Staff will be trained on not using functional labels as a representation for the individuals we work with. We will look at our programs and how the different groups and teams are organized and not refer to the groups as "low functioning" or "high functioning". NES is building a training and quiz to be completed by all staff.

All individuals are encouraged to participate in learning opportunities. Material items not associated with the learning objective are most often distractions and are discouraged. Many individuals have behavior plans and rights restrictions in place for the safety of self and others surrounding them. Those individuals who do not have the direct restriction are able to possess items by keeping them in their personal belongings or request assistance from staff to obtain desired items. Staff will be trained on what restrictions are in place in each program so they can have a better understanding and help accommodate those without restrictions. NES is building a training and quiz to be completed by all staff.

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Overall, the setting enforces the Home and Community-Based Settings Regulation requirements.	
Compliance:	<input type="checkbox"/> Met <input checked="" type="checkbox"/> Remediation Plan demonstrating will be compliant
Summary:	Overall, the setting has a plan to remediate the institutional and segregating characteristics that were identified in their setting. A validation visit will be conducted to ensure their remediation plan has been implemented prior to final compliance being determined.

Input from Individuals Served and Staff

Individuals Served Summary:	Individuals will be interviewed in January, 2023
Staff Summary:	Staff will be interviewed in January, 2023

Ongoing Remediation Activities	
Current Standing: <input type="checkbox"/> Currently Compliant <input checked="" type="checkbox"/> Approved Remediation Plan	
Continued Remediation Activities	The setting is finalizing its remediation activities in prong 3A and 3C. The State will conduct a validation visit to ensure they are compliant in the areas indicated.
Ongoing Monitoring Activities	<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"> ● Conducting individual served experience surveys ● Addressing settings compliance during the annual person centered service planning process ● Ongoing provider training and certification ● Monitoring through critical incident reporting ● Case Management/Support Coordinator visit monitoring ● HCBS Waiver Reviews/Audits

Summary of Stakeholder Workgroup Comments Received and State Response:

Public Comment Period: December 12, 2022 to January 13, 2023
Setting Specific Comments:
<p>Comment:</p> <p>The Disability Law Center (DLC) appreciates the opportunity to provide comments on the HCBS Settings Rule Heightened Scrutiny process as both a member of the settings stakeholder committee and through the public comment process. 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 engage in a sufficient assessment process or provide adequate support to bring settings into compliance with the rule prior to the February 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</p>

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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.

General Comments Received:

Comment:

The materials provided by the State in the newly-released evidentiary packets raise concerns about whether the identified settings currently demonstrate the qualities of HCBS. In most instances, the state has only completed a final desk review and/or virtual review instead of an in-person visit. We believe that this is insufficient to confirm that a setting does not isolate individuals or have the indices of an institution.

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. The state needs to give the results of final validations to the work group and other stakeholders before it can submit the setting to CMS for heightened scrutiny.

Response:

Settings must demonstrate compliance or demonstrate a plan along with the State's oversight to ensure completion of action's 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

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“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 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 action’s 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.

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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.

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: December 12, 2022 to January 13, 2023

Setting Specific Comments:

Comment:

One commenter stated North Eastern Services, Inc site 1025 is a day support services program located at 83 North 400 East, Roosevelt, UT 84066. It provides services to 25 individuals. 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.

Response:

Settings must demonstrate compliance or demonstrate a plan along with the State's oversight to ensure completion of action's to certify they will become compliant prior to March 17, 2023 before the State submits them through the heightened scrutiny process. A validation visit was conducted in January (1/17/2023) to ensure that the remediation plan was implemented and the setting was not compliant in all the areas indicated. We asked for additional remediation items to be submitted by March 17th, 2023 and have been working with the provider to ensure that timeline. 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

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sufficient for a specific setting, then the State will make the determination that an in-person visit is required at that time. This setting was approved under [Utah's Corrective Action Plan \(CAP\)](#) approved by Centers for Medicare & Medicaid Services (CMS) to allow more time to come into compliance. The State worked with NES closely to provide technical assistance to come into compliance and an in-person validation visit was conducted in May 2023. The setting was determined to be compliant at that time.

Comment:

The same commenter had additional feedback that this setting was not evaluated individually because the state found that NES settings had similar areas of non-compliance across its settings. The state identifies lack of community integration, lack of individual choice and restrictive policies as being present in all settings. It is difficult to assess what is happening at the Roosevelt site as the state did not complete an assessment. It is unclear how it is meaningful to submit an evidentiary report to CMS or how stakeholders could possibly provide feedback about the site. Given the short amount of time before the compliance deadline and the widespread nature of noncompliance, it is unlikely that this setting will remediate within the required timeline.

Response:

Settings must demonstrate compliance or demonstrate a plan along with the State's oversight to ensure completion of action's to certify they will become compliant prior to March 17, 2023 before the State submits them through the heightened scrutiny process. This setting was approved under [Utah's Corrective Action Plan \(CAP\)](#) approved by Centers for Medicare & Medicaid Services (CMS) to allow more time to come into compliance. The State worked with NES closely to provide technical assistance to come into compliance and an in-person validation visit was conducted in May 2023. The setting was determined to be compliant at that time.

General Comments Received:

Comment:

The Disability Law Center (DLC) appreciates the opportunity to provide comments on the HCBS Settings Rule Heightened Scrutiny process as both a member of the settings stakeholder committee and through the public comment process. 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 engage in a sufficient assessment process or provide adequate support to bring settings into compliance with the rule prior to the February 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.

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Summary of Stakeholder Workgroup Recommendation:

Stakeholder Workgroup Review:
Only one member of the Stakeholder Workgroup Responded. Their specific 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.