

OPWDD ASSESSMENT OF PUBLIC COMMENT

Occupancy Agreement ADM

Comment: OPWDD should mandate voluntary providers to use the proposed occupancy agreement template. And if OPWDD does not mandate voluntary providers follow the templates in the ADM then OPWDD must audit the content of the voluntary providers' occupancy agreement to ensure compliance with the HCBS settings rule.

Response: OPWDD does not require the use of any specific template. OPWDD's Division of Quality Improvement (DQI) will monitor provider compliance with this ADM and include review of agreement contents in its survey activities. Other divisions within OPWDD are also empowered to investigate complaints regarding occupancy agreements.

Violations of the Occupancy Agreement ADM will be subject to the same corrective measures that currently apply to providers. Furthermore, interested parties who are concerned with the contents of an occupancy agreement may bring specific examples to the attention of DQI.

Comment: Some commenters expressed appreciation that OPWDD provided template agreements but noted the challenge of using plain-English and easy to understand language and felt that the templates would still be viewed as confusing. Another commenter asked OPWDD to supply a plain language explanatory document.

Response: Occupancy agreements must meet the requirement of the federal regulation of being a legally enforceable agreement. As this comment notes, reducing the explanation of rights to simpler language can be difficult while maintaining adequate detail in an explanation of rights. The OPWDD templates went through several revisions with communications staff to reduce this to plain language. If providers can convey simpler language, they are welcome to do so in their own agreements. Furthermore, OPWDD has developed and will publish plain language explanatory documents to accompany the ADM and occupancy agreements, and this may be an option to use to communicate the purpose of the agreements with individuals and their circle of support.

Comment: We are pleased to see reference to the contact information for sources that could be of help to individuals, such as MHLS, DRNY, and where appropriate CAB. An appendix should be added that lists the actual contact information for these entities.

Response: The template agreement already contains contact information for the Mental Hygiene Legal Service and DRNY, and the ADM has been amended to highlight this.

Comment: The ADM should clarify the term included under the term "rent" as it is not a term regularly used in certified residential settings in the OPWDD world, due to the different sources of funds that may be used to cover an individual's room and board costs. The ADM, as well as the occupancy agreement template, should explain how the Room and Board expenses are covered.

Response: The ADM will clarify that the term "rent" is used for simplicity to describe room and board payments that the individual is obliged to pay a provider for a

residential opportunity. Although providers are welcome to add information to their own occupancy agreements or explanatory materials to describe rent obligations to their residents, OPWDD will not make further changes to the ADM or template agreement based on the other suggestions in this comment, to avoid overcomplicating the documents with discussion of regulatory matters that are adjacent to the occupancy agreement requirement.

Comment: One commenter argued that the recommendation in Section IV that providers “thoroughly counsel the individual as to the purpose of the occupancy agreement” and revisit the occupancy agreement in subsequent Life Plan meetings, when there is a failure to sign the occupancy agreement, could violate the Willowbrook Permanent Injunction.

Response: OPWDD disagrees that this process would violate the Willowbrook Permanent Injunction but has revised the language in this section of the ADM to clarify the intent of this passage, which was to instruct providers how they could satisfy the occupancy agreement requirement if an individual or representative did not sign the agreement. Because the federal regulations governing HCBS require a written agreement, good faith attempts to comply require that providers review the occupancy agreement with an individual and their circle of support on a regular basis.

Comment: OPWDD received questions regarding when occupancy agreements should be signed.

Response: The timing and frequency of signatures of an occupancy agreement is addressed in Section III(E) of the ADM.

Comment: OPWDD received several comments regarding the perception of the occupancy agreement by individuals and their families. One set of comments indicated approval that the draft ADM makes it clear that the occupancy agreement is intended to help people understand their rights and does not give service providers or OPWDD any additional powers or rights. One commenter observed that the proposed ADM and template, as currently drafted, are causing unnecessary concern for families and individuals receiving services; families are concerned that by signing the agreement OPWDD has the right to remove their loved one from their group home/IRA.

Response: OPWDD understands this concern and continues to reiterate that the occupancy agreement is a federal requirement intended to benefit the individual by ensuring they have their rights under the governing laws in a written agreement with the provider. OPWDD also repeats in this ADM that the occupancy agreement does not increase the rights of the provider nor diminish the rights of the individual; the same rights and processes that always applied to certified residences under the OPWDD regulations prior to the occupancy agreement requirement still apply when the occupancy agreement is signed. The ADM also includes a section covering situations in which the individual refuses to sign, which should not be treated as a basis to discharge the individual from a residential opportunity.

Comment: One commenter stated that including electronic website links to the regulatory language is unnecessary and even counterproductive and argued that many individuals and families do not have internet access to be able to view those links.

Response: The regulatory references are intended to provide formal notification to the

individual of the rights that govern occupancy of a residence and their rights, and to supply information to support a legally enforceable agreement that complies with the HCBS final rule. For individuals who cannot access online copies of governing regulations, which are free for the public to access, OPWDD expects providers to assist if the individual requires assistance in viewing them.

Comment: One commenter recommended that OPWDD reconsider the requirement to issue a new agreement if a person moves to a different residence. The agreement should be with the residential provider, not the individual IRA. If the person were to move to a different residence outside the agency, then issuance of a new agreement would be warranted.

Response: OPWDD cannot accept this recommendation, as the federal rule requires that the specific unit be subject to the requirement of a legally enforceable agreement. Therefore, the agreement must be specific to the unit and cannot be a blanket agreement with the residential provider. The ADM does allow some flexibility for a new agreement to be signed after the individual completes the move to a new residence.

Comment: One commenter observed that CMS identified problematic provisions in occupancy agreements during recent field visits they conducted last summer and fall in New York State.

Response: The ADM did refer to CMS findings from recent site visits to HCBS providers, but these visits did not occur in New York. CMS has published its site visit reports on a publicly accessible website along with Statewide Transition Plans and other heightened scrutiny documents, located here: <https://www.medicaid.gov/medicaid/home-community-based-services/statewide-transition-plans/index.html>

Comment: Will the template be made available in other languages or in more accessible formats for those who are visually or hearing impaired?

Response: OPWDD is not requiring the use of the template that is provided. Therefore, it will not be translating the template into other languages. Providers must still meet their obligations as Medicaid providers to make language services available to those with Limited English Proficiency under Title VI of the Civil Rights Act and Section 504 of the Rehabilitation Act of 1973.

Comment: One commenter suggested a conflict existed between the draft Occupancy Agreement ADM and due process requirements under 633. Providers cannot discharge anyone without a safe place for them to go to.

Response: There is no conflict between the 633 regulations and the Occupancy Agreement ADM, or templates. First, federal regulations require that there be a written agreement that “provides protections that address eviction processes and appeals comparable to those provided under the jurisdiction’s landlord tenant law.” This ADM requires that the occupancy agreement contain references to the 633 regulations, and requires providers adhere to OPWDD regulations, including the 633.12 process, in dealing with residents. Further, the templates attached to the ADM contain explicit statements that OPWDD regulations, including 14 NYCRR § 633.12, still apply.

Comment: Some certified residences are subject to regulations issued by the U.S. Department of Housing and Urban Development, which require a lease agreement that conforms to those

regulations. One commenter proposed that OPWDD align the Occupancy Agreement ADM with HUD lease requirements or allow residents who already signed a HUD lease to avoid signing an additional occupancy agreement to avoid duplicative work.

Response: OPWDD has amended the ADM to count a valid HUD lease as meeting the requirement for an occupancy agreement in covered facilities. Providers are reminded that regardless of the type of agreement or lease the individual has, providers must observe all applicable regulations governing an individual and their place in a residence.

Comment: One commenter asked whether information that agencies convey annually, such as annual notice of rights, annual notice of liability, annual notice of benefits, must be in one lease document or may the provider use separate attachments?

Response: The ADM sets forth the required contents of an occupancy agreement and includes a template agreement that providers may use. Information outside of those requirements does not have to be included in the same document and may instead be separately distributed to the individual.

Comment: Some commenters suggested that the occupancy agreement include a clause that gives a provider a right of entry and inspection that allows the landlord to enter for repairs and may do so at times without notice.

Response: There is no clause in the ADM or the occupancy agreement template that forbids the provider from entering a living space to address emergencies that impact the health and safety of residents, or necessary repairs to ameliorate damage or hazards. Providers should note that the HCBS final rule also requires that settings ensure “an individual’s rights of privacy, dignity and respect” and, accordingly, unannounced entry into a living unit should be limited to the minimum necessary to ensure resident safety.

Comment: More clarity is needed on what constitutes provider-owned and provider-controlled settings.

Response: All certified IRAs, Certified Residences (CRs), and Family Care Homes are subject to the requirement of an occupancy agreement. For other settings, the ADM described qualities of a residence that could lead it to be deemed provider-owned or provider-controlled, which was based on published reports regarding CMS site visits. OPWDD will amend the ADM if CMS provides further guidance on this issue. Providers should consult with their own legal counsel if they have questions whether their non-certified setting is subject to the requirement.

Comment: One commenter suggested that language should be added to discuss the procedure for addressing conflicts with roommates and suggested a process where individuals could discuss options with a residential manager or the Care Manager.

Response: No change will be made to the ADM or template. Providers are free to implement mediation procedures to address grievances if those processes are consistent with OPWDD regulations regarding resident objections.

Comment: Some commenters proposed that the occupancy agreement contain language that describes the items that the provider is responsible for in the residence (e.g., nursing care, bed linens, towels) and language on what is not provided by an agency (e.g., designer clothing, magazine subscriptions, alcohol, tobacco, cannabis products).

Response: No change to the ADM or template agreement will be made. The obligations of the agency in this regard are the subject of OPWDD regulations and are not required to be addressed in an occupancy agreement.

Comment: One commenter suggested additional language regarding visitors and recognition of safety precautions, as some residents may invite individuals who are unknown into residences.

Response: No change to the ADM or template agreement will be made. The ability to have visitors at any time is something that is required by the federal regulations. Providers that wish to restrict visitors must follow the rights modification process set forth in federal regulations.

Comment: Some commenters asked about the ADM's impact on the OPWDD Housing Subsidy Program and the Funding Opportunity for Independent Living Letters of Support ("FOFILLS") process.

Response: As described in the ADM, housing subsidies, including those that were through the traditional funding stream (formerly known as Individual Supports and Services/ISS) or through a Self-Direction plan are governed by a separate Housing Subsidy ADM (#2022-03) with its own requirements for leases, and providers involved in those programs should follow the requirements of that ADM. The FOFILLS process is not impacted by the Occupancy Agreement ADM; applicable units in projects that are developed in the FOFILLS process would also be subject to the requirements of the Housing Subsidy ADM.

Comment: In the Background section, it is not clear what the phrase "modification of additional conditions" in the HCBS Final Rule refers to.

Response: The "additional conditions" are the qualities that must be present in HCBS residences under [42 CFR § 441.301\(c\)\(4\)\(vi\)\(B\)](#) through (E), e.g., access to food, visitors of choosing, etc. "Modifications" refers to any change in these rights, which must go through the rights modification process described in the regulation.

Comment: One commenter suggested that the description of the federal HCBS regulations in the Background section of the ADM may create confusion as it is redundant and potentially confusing because of overlap with OPWDD Regulations at 14 NYCRR 633.16.

Response: Clarifying language has been added to the ADM to address this potential confusion. While the HCBS rule specifically refers to a rights modification process for the residential rights enumerated in that rule, providers must also follow other regulations, such as the Person-Centered Behavioral Intervention regulations at 633.16, if applicable to the modification.

Comment: OPWDD received several comments on the ADM's requirement that no legal rights are waived by the signing of an occupancy agreement. Some commenters applauded this requirement. One commenter questioned why the ADM says that the occupancy agreement should not contain any statement that an individual waives the ability to raise the potential applicability of landlord-tenant laws if OPWDD considers certified settings to be outside the jurisdiction of those laws.

Response: OPWDD believes that its certified settings are not subject to landlord-tenant

laws, but there may be a situation in which a court finds that a particular landlord-tenant law applies to a certified residence. While OPWDD will continue to maintain that its certified residences are exempt from these laws, and providers are free to argue the same in any legal proceeding, occupancy agreements should not require residents to preemptively waive the potential application of these laws.

Comment: In the second to last bullet on page 8 which reads, “[p]rovisions that permit termination of the Occupancy Agreement ... if an individual’s needs increase ...,” the footnote refers to CMS site visit observations that some providers tried to discharge people without looking to provide additional supports. Would this issue be addressed in Regulation 633.12?

Response: Any situation in which a provider attempts to involuntarily discharge a resident would need to adhere to the procedures in 14 NYCRR § 633.12, which would also cover a situation in which a provider attempted to discharge an individual without exploring whether additional supports were able to be provided so that the person could stay in their residence.

Comment: Commenters raised questions about the ADM’s description procedures when individuals could not sign the occupancy agreement or refused to sign the agreement, and what documentation was required.

Response: The ADM has been clarified to explain what providers should do when an individual does not have capacity to sign the agreement, or when the individual and an authorized representative refuse to sign an occupancy agreement. OPWDD did not wish to be overly proscriptive in dictating how the provider documented the refusal to sign, given the differences in processes and systems between providers, but providers and Care Managers should ensure that attempts and refusals to sign are documented in a way that demonstrates a good faith attempt to comply with the HCBS final rule requirements.

Comment: One commenter suggested that the ADM address what would happen if a person’s SSA/SNAP revenue streams are interrupted by a loss of Medicaid eligibility or benefits.

Response: No change will be made in the ADM or occupancy agreement template. Situations which trigger a loss of Medicaid and ancillary benefits, as well as a provider’s response to those situations, are outside the scope of this ADM.

Comment: In Section III of the ADM, entitled “Prohibited Terms,” OPWDD states that it “considers certified settings to be outside of the jurisdiction of state and local landlord tenant laws.” One commenter opined that this was confusing and requested clarity.

Response: In response to this comment, OPWDD has amended that phrase to read as follows:

OPWDD considers certified settings to be outside the scope of state and local landlord tenant laws and, therefore, are not subject to those laws. Regardless, the procedures in 14 NYCRR § 633.12 provide the necessary protections from eviction required by the federal rule.

Providers should note that the ADM still prohibits occupancy agreements from specifically requiring the individual waive the application of landlord tenant law.

Comment: Several commenters asked for clarification of the role of the Care Manager in the occupancy agreement process.

Response: The ultimate responsibility to comply with the occupancy agreement requirement rests with the residential provider, who is responsible for initiating the process for the individual to review and sign an occupancy agreement. The Care Managers will be expected to assist the individual with an occupancy agreement in the same manner they normally would assist with any decision related to the individual's services. Care Managers are specifically mentioned in the ADM with respect to assisting an individual who needs to change residences and developing a safe discharge plan. OPWDD is also considering providing additional instructions to Care Managers regarding the occupancy agreement in separate guidance and policy manuals.

Comment: One commenter asked about where and how rights modifications needed to be documented, and whether that needed to occur in the Life Plan document.

Response: The draft ADM's guidance on this issue—that “[t]he modifications of additional conditions [e.g., visitors at any time, free access to food, etc.] . . . must be appropriately documented in the correct sections of the resident's person-centered plan or supporting documents (e.g., Life Plan, behavioral support plan, staff action plan, functional behavioral assessment)” and not in an occupancy agreement — will not change. While OPWDD recognizes that providers may use different electronic health records (EHRs) for Life Plans and other supporting plans and assessments, providers should fully document the process supporting any rights modification so they may demonstrate compliance with the regulatory elements.

Please also note that the process required for rights modifications relating to the HCBS settings rule is not intended to replace other processes related to behavioral modifications that may apply in certain situations, such as Person-Centered Behavioral Intervention regulations at 14 NYCRR 633.16. Providers must ensure that they comply with all regulations pertaining to resident rights, regardless of whether they are specifically called out in the ADM. OPWDD has added a note to the ADM to highlight this issue.

Comment: OPWDD received several comments and questions regarding the effective date of these guidelines and suggestions to delay any statements of deficiency resulting from non-compliance. Commenters noted that some providers had already executed occupancy agreements with individuals and that a change of this nature will require all occupancy agreements to be reviewed, revised, and reissued. These commenters suggested that OPWDD DQI should only enforce the new content requirements as rent updates occur (but no later than 6 months after issuance of the ADM).

Response: OPWDD appreciates that some providers have already drafted occupancy agreements for the individuals they serve. OPWDD is not requiring providers to use a particular agreement or format of occupancy agreement. Providers must independently determine whether any existing agreements they have entered with an individual is consistent with governing laws, regulations, and the ADM.

The ADM is effective upon the date of final issuance. Not all providers will be out of compliance with these requirements. Providers that have signed occupancy agreements that are out of compliance with the federal rule, or this ADM, should commence corrective measures as soon as possible, prepare a written plan describing its process, and document progress. DQI will consider these actions in evaluating provider compliance with this requirement.

Comment: Additional clarification is needed on the Section III (a)(1) statement that “[p]roviders should work cooperatively with individuals who have an arrears in rent to create repayment plans that do not interfere with Life Plan goals” The commenter questioned whether the statement prohibited the provider from requiring the individual to pay back the provider first out of funds that were not protected by personal allowance laws and regulations.

Response: No change will be made to the ADM. This language appears in a section that discusses arrears that have been created by situations other than the individual’s refusal to pay the rent due, such as an income change that causes a retroactive rent increase. The purpose of this language is to ensure that the provider maintains a person-centered approach to its residents and that should extend to dealing with these situations.

Comment: The language in Section II (c) requiring “that the provider will give the individual a copy of the Residence’s written policies, responsibilities, and procedures, which will also be made available to the individual upon future/additional request(s)” sets up an unclear and difficult to meet standard. A narrower set of policies and procedures pertaining to grievance procedures and due process rights would be more appropriate rather than things like staff attendance or medication administration procedures.

Response: The individual has a right to have all documents that govern their stay in the residence at the time they receive an occupancy agreement to sign, so the individual may be informed of their obligations and rights living in the residence. The ADM has been amended to clarify this. Regardless of what is required under this ADM, an individual also has the right to a copy of any document that directly applies to a service this individual receives from the residential provider. Providers that have difficulty supplying such documents upon request should review their internal procedures to ensure that individuals have access.

Comment: Language in the ADM that states, “if the individual’s rent changes, the individual will be given notice of the change and will receive assistance to ensure the correct amount of rent is paid,” should be clarified to require the representative payee to provide this assistance as it is the responsibility of the representative payee to ensure the correct amount is paid. The provider is not always the representative payee.

Response: OPWDD agrees that the representative payee is responsible for paying the individual’s rent. However, this language is intended to require the residential provider to assist and help ensure that the correct rent is paid. This both benefits the residential provider and demonstrates person-centered service provision.

Comment: Will the occupancy agreement template satisfy concerns from Willowbrook parties?

Response: OPWDD sought and considered feedback from advocates, including the Willowbrook CAB, in the development of OPWDD’s own occupancy agreements and the Occupancy Agreement ADM. OPWDD recognizes that there are times when an individual

will refuse to sign an agreement, regardless of whether they are in the Willowbrook class or not, and the ADM includes a procedure for providers to follow in those situations to demonstrate good faith compliance with the occupancy agreement requirement.

Comment: Does an occupancy agreement need to be re-executed annually?

Response: An occupancy agreement does not need to be executed on an annual basis. Please note that the template agreement includes a statement that “[t]his Agreement remains in effect as long as I reside at this Residence.”

Comment: Is there a break down on how to calculate the rent for the individual?

Response: Each person’s rent must be calculated individually, as that is a function of calculating how much personal allowance a person is due, as set forth under governing laws and regulations (see N.Y. Social Services Law § 131-o; 14 NYCRR § 633.15). In general, personal allowance amounts are based on an individual’s income, statutory personal allowance levels, and any relevant exemptions.

Comment: Are we required to provide copies of residential policies and procedures upon signing the agreement or just upon request?

Response: Residential policies should be made available to the individual prior to signing the agreement and upon any future request.

Comment: Some commenters requested guidance on appropriate termination notices if a provider wished to end an individual's stay at a residence, and that those notices could contain opportunities for mediation of grievances or resident violations.

Response: Any discharge or relocation of an individual from an OPWDD-certified or operated residential setting is governed by 14 NYCRR § 633.12 and the Community Placement Procedures handbook. Providers must follow those procedures if they seek to move an individual out of a residence. That regulatory process also involves opportunities for mediation of disputes and grievances.

Comment: The ADM is overbroad, exceeds the scope of the regulatory authority the ADM is intended to address, and the proposed draft extends far beyond what is required by state and federal law.

Response: This ADM and its directives are within the scope of OPWDD’s regulatory authority. Furthermore, this ADM is necessary for the OPWDD system to comply with federal rules, and its directives were directly informed by violations found by CMS in other states.

Comment: Please define who is required to sign an occupancy agreement.

Response: A finalized occupancy agreement must be signed by the individual and a representative of the residential provider. If applicable, an authorized representative may sign on behalf of the individual. The ADM has a section on procedures for when an individual and representative cannot sign or refuse to sign an occupancy agreement.

Comment: Some commenters suggested the rent room and board calculation under subparts (A) and (B) may be beyond the knowledge of most individuals asked to sign these agreements. Another commenter suggested there is also a possible conflict with MHL § 43.03 but did not provide further detail.

Response: OPWDD included explanation of rent in the Occupancy Agreement ADM requirements to create a legally enforceable document, as required under the federal regulation. The absence of rent information would not comply with this directive. The Occupancy Agreement ADM and its directives do not conflict with New York Mental Hygiene Law section 43.03.

Comment: Several commenters submitted joint suggestions to make minor language changes in the draft occupancy agreement template in the sections discussing ending an occupancy agreement and residential opportunity, because they believed the language did not conform to the ADM.

Response: The template occupancy agreements included with the Occupancy Agreement ADM are sufficient and will not be changed, but OPWDD agrees with the commenters that the directives in the Occupancy Agreement ADM govern the interpretation and effect of the language in those templates.

Comment: One commenter urged OPWDD to encourage providers to at least submit any provisions which they might have concerns about to OPWDD for review before they are inserted into an agreement.

Response: Providers should consult their own legal counsel regarding the propriety of clauses they may wish to have in an occupancy agreement.

OPWDD also received comments that did not address the Occupancy Agreement ADM, but made other observations about HCBS services, OPWDD's over-regulation and micro-management of providers, and the adequacy of OPWDD's website in describing rules and regulations. Because these comments were outside the scope of the ADM, OPWDD will not respond to them here. All out-of-scope comments were brought to the attention of program staff in the relevant areas for consideration.