



ADMINISTRATIVE DIRECTIVE

Transmittal:	23-ADM-05
To:	OPWDD Voluntary Providers
Issuing OPWDD Office:	Office of the Counsel
Date:	7/17/2023
Subject:	Occupancy Agreement Guidelines
Suggested Distribution:	<ul style="list-style-type: none"> • OPWDD State Operations Offices • OPWDD Regional Field Offices • OPWDD-certified Voluntary Residential Habilitation Providers • OPWDD-certified Family Care Providers • Provider Associations • OPWDD Division of Quality Improvement
Contact:	Counsel's Office (518) 474-7700
Attachments:	Template Occupancy Agreement for IRAs; Response to Public Comment

Related ADMs/INFs	Releases Cancelled	Regulatory Authority	MHL & Other Statutory Authority	Records Retention
22-ADM-03: Housing Subsidy Document		42 CFR § 441.301 14 NYCRR § 636- 2.4	MHL §§ 13.09(b) , 16.00	10 years (New York False Claims Act – State Finance Law §192)

Purpose:

The purpose of the Administrative Memorandum (ADM) is to set forth requirements and guidelines for occupancy agreements that are mandated under federal regulations for OPWDD-certified residential settings funded through OPWDD's Comprehensive Home and Community-Based Services ("HCBS") Waiver as authorized under [section 1915\(c\) of the federal Social Security Act](#). OPWDD is not requiring that providers utilize a specific document but has appended a template occupancy agreement to this ADM as a convenience for providers to use as a possible model for their own agreements. OPWDD is also including a document summarizing public comment and questions it received for this ADM as an attachment, which is now incorporated into this ADM.

Background:

On January 16, 2014, the Centers for Medicare and Medicaid Services (CMS) released a final rule that, in part, set standards for settings in which Medicaid-funded HCBS were rendered pursuant to Social Security Act section 1915(c) waivers. The regulation became effective March 17, 2014, but its compliance deadline for states has been extended until March 17, 2023.

In the final rule, CMS required that individuals enrolled in a 1915(c) HCBS waiver program who reside in provider-owned or controlled residential settings have a legally enforceable agreement with the provider. The final rule requires that "the individual has, at a minimum, the same responsibilities and protections from eviction that tenants have under the [applicable] landlord/tenant law . . ." For a setting that is not covered by landlord tenant laws, a written agreement is required that "provides protections that address eviction processes and appeals comparable to those provided under the jurisdiction's landlord tenant law."

See, [42 CFR § 441.301\(c\)\(4\)\(vi\)\(A\)](#). (This requirement was also entered into OPWDD regulations at [14 NYCRR § 636-2.4\(b\)\(1\)](#)). OPWDD refers to this required agreement as an "occupancy agreement."

In addition to this requirement, the Final Rule sets forth requirements for the individual's dwelling, which require that:

- (B) Each individual has privacy in their sleeping or living unit:
 - (1) Units have entrance doors lockable by the individual, with only appropriate staff having keys to doors.
 - (2) Individuals sharing units have a choice of roommates in that setting.
 - (3) Individuals have the freedom to furnish and decorate their sleeping or living units within the lease or other agreement.
- (C) Individuals have the freedom and support to control their own schedules and activities, and have access to food at any time.

- (D) Individuals are able to have visitors of their choosing at any time.
- (E) The setting is physically accessible to the individual.
- (F) Any modification of the additional conditions must be supported by a specific assessed need and justified in the person-centered service plan.

See [42 CFR § 441.301\(c\)\(4\)\(vi\)\(B\)](#) through (F).

The modifications of additional conditions described in subsection (F), above, must be supported by a specific assessed need, be justified, and 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). The documentation must demonstrate that the provider took appropriate steps prior to implementing such modifications including, at minimum, the following federal requirements:

- (1) Identify a specific and individualized assessed need.
- (2) Document the positive interventions and supports used prior to any modifications to the person-centered service plan.
- (3) Document less intrusive methods of meeting the need that have been tried but did not work.
- (4) Include a clear description of the condition that is directly proportionate to the specific assessed need.
- (5) Include regular collection and review of data to measure the ongoing effectiveness of the modification.
- (6) Include established time limits for periodic reviews to determine if the modification is still necessary or can be terminated.
- (7) Include the informed consent of the individual.
- (8) Include an assurance that interventions and supports will cause no harm to the individual.

See [42 CFR § 441.301\(c\)\(4\)\(vi\)\(F\)](#). Please note that this rights modification process 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 that may apply to a resident's rights.

Discussion

I. Settings Subject to the Requirement

The regulation identifies that the settings subject to the occupancy agreement requirement are "provider-owned or controlled residential setting[s]". Residential settings that hold OPWDD operating certificates and whose agencies are certified to deliver residential habilitation services in these residences are subject to this requirement (i.e., Individualized Residential Alternatives ("IRAs"), Family Care Homes,

and Certified Community Residences). Furthermore, CMS has noted that provider “control” can include:

- Scenarios in which a provider has influence over whether any individual is accepted for residency.
- Scenarios in which the landlord has influence over which service providers the individual in the setting uses.

See [Themes Identified During CMS’ Heightened Scrutiny Site Visits, Centers for Medicare and Medicaid Services, November 16, 2022.](#)

Providers should review relationships with landlords and property owners under which they deliver services to determine whether an occupancy agreement is required for individuals residing in those settings.

Other non-certified and non-provider owned or controlled rental arrangements are likely subject to landlord-tenant laws and are outside the scope of this ADM. OPWDD does not consider certified settings to be subject to landlord-tenant laws as the individual is protected by processes in 14 NYCRR § 633.12, but providers should consult with their own legal counsel on whether these laws may apply to a particular residential setting and create additional rights for individuals or obligations for the provider.

(A) Duplicative Agreements Not Required

There are some situations in which providers may already be required to have enforceable leases with individuals. In the following situations, providers are not required to have an additional occupancy agreement:

- For providers that operate certified residences that are subject to written lease requirements enforced by the U.S. Department of Housing and Urban Development (HUD), a separate Occupancy Agreement is not required. Providers that have existing HUD leases with individuals should still follow those requirements and are still required to provide the same protections and due process to residents under the 14 NYCRR § 633.12 regulations.
- OPWDD’s Housing Subsidy program requires a written lease that conforms to the guidelines in the Housing Subsidy ADM (22-ADM-03). Providers serving individuals participating in that program should follow the Housing Subsidy ADM for guidance on the written lease for those residential opportunities, and do not need a separate Occupancy Agreement.
- Opportunities covered by OPWDD’s Funding Opportunity for Independent Living Letters of Support (FOFILLS) are also subject to the lease requirements in the Housing Subsidy ADM and should follow that document for guidance.

II. Content of Occupancy Agreement

Recognizing that the occupancy agreement requirement may apply to a diverse spectrum of residential settings, OPWDD is not requiring providers to use a particular template for an occupancy agreement. Although OPWDD has developed its own occupancy agreements for use in its State-Operated IRAs and Family Care Homes and made those documents publicly available (see attachments), providers are not required to use those forms; the documents were made public so that providers could decide whether to use them as models for their own forms.

Providers must, however, ensure that the agreements they use are drafted using plain, understandable, person-centered language and comply with applicable state and federal regulations on HCBS settings ([14 NYCRR § 636-2.4\(b\)\(1\)](#); [42 CFR § 441.301\(c\)\(4\)\(vi\)\(A\)](#)). Agreements must also avoid including Prohibited Terms that are discussed below in Section III. Providers should also consult their own legal counsel to ensure that their occupancy agreements are consistent with any applicable local landlord/tenant laws.

Although there is no required format for an occupancy agreement, OPWDD is requiring that the occupancy agreement meet certain standards to allow providers flexibility while maintaining requirements to be person-centered and to ensure the individual's rights. The following areas should be documented in any occupancy agreement:

- (A) The Individual's Rent Obligations
 - For simplicity, this ADM uses the term "rent" to describe room and board payments that the individual is obliged to pay a residential service provider for a residential opportunity.
 - The terms of the individual's rent obligations should be explained in clear, person-centered language.
 - Providers should ensure that an individual's rent obligations and timing of rent payments are clearly set forth in the occupancy agreement. For example, occupancy agreements should include language that informs the resident that any changes in income, whether an increase or decrease, affects the rent owed for an IRA.
 - (1) Additional policies regarding rent terms:
 - Arrears in rent: Changes in a person's income can change the amount of rent that is due and, depending on the timing of the recalculation of rent, an arrears of rent can be immediately created. Providers should not treat this situation as automatically triggering a breach of the Agreement and should work cooperatively with individuals who have an arrears in rent to create repayment plans

that do not interfere with Life Plan goals or employment opportunities.

- In all situations involving underpayment or nonpayment of rent amounts, Providers should work with and counsel the individual to ensure the correct amount of rent is paid.
- Because variations in an individual's income can regularly result in a change in rent, a new Agreement does not need to be signed every time there is a change in income. However, the individual must be given written notice of the new amount of rent owed and how it was calculated. The provider should maintain copies of these notifications in the same manner it maintains the signed occupancy agreement.

(B) Individual's Rights under the Occupancy Agreement

- Occupancy agreements should include references to applicable regulations applying to an individual's rights while living in a residence, and to an individual's right to object to a provider's delivery of services or a provider's actions with regard to the individual's occupancy in a residence. These regulations are, at minimum, [42 CFR § 441.301\(c\)\(4\)](#) and [14 NYCRR §§ 633-12](#) and [636-2.4](#).
- The occupancy agreement should include an affirmative statement that the individual, by signing the Agreement, is not waiving any applicable rights under state, federal, or local laws. Providers should consult with their own legal counsel regarding compliance with local laws that may apply to any specific residence.
- A statement and/or complementary materials shared at the signing of the agreement that provides contact information for legal assistance a person may qualify for, including from Disability Rights New York and the Mental Hygiene Legal Service. The template occupancy agreement attached to this ADM includes the following contact information:

If I have any questions about this Agreement, free legal advice may be available from the Mental Hygiene Legal Service (<http://www.courts.state.ny.us/ad3/mhls/index.html> (518) 451-8710); or Disability Rights New York (<http://www.drny.org> (518) 432-7861 or (800) 993-8982).

(C) Responsibilities of the Provider

- The occupancy agreement should contain the following statements that address the following issues:
 - That the provider will follow all applicable laws and regulations in the operation of the residence and in providing services, including

all requirements under the Home and Community-Based Services regulations.

- That the residence will meet all applicable state and local codes including health, safety and building codes and OPWDD requirements.
- That the provider will give the individual a copy of the Residence's written policies, responsibilities, and procedures that govern the individual's stay in the residence, which will also be made available to the individual upon future/additional request(s).
 - Providers should note that the ability to request extends to all representatives of the individual, e.g., the legal guardian, actively involved family members, attorneys from the Mental Hygiene Legal Service, the Consumer Advisory Board for the Willowbrook Class, etc.
- That if the individual's rent changes, the individual will be given notice of the change and will receive assistance so that the correct amount of rent is paid.

(D) Ending the Occupancy Agreement

- The occupancy agreement must describe the process that is triggered in situations when the individual decides to leave the residence or must leave the residence.
 - The Agreement should note that when an individual decides to leave a residence, the occupancy agreement will end, and the individual understands that they will have to move and will work with their Care Manager to plan the move with staff at the residence they are leaving. The Agreement should also state that the provider will continue to maintain services at the Residence until the individual moves out.
 - The occupancy agreement must also describe the process that is followed when the provider decides to end the occupancy agreement or initiates a transfer of the individual to another residence, including:
 - examples of the situations that may cause a provider to terminate the Agreement and ask an individual to find another place to live or to move (e.g., "including because the health, welfare, or safety of me or others is in jeopardy, or I violate any material (significant) term(s) of this Agreement"). These reasons must not include the violation of any prohibited terms listed in Section III of this ADM.

- A statement that if an individual is asked to move out entirely (discharged) or to transfer to another residence, the procedures in [14 NYCRR § 633.12](#) (“633.12”) apply and that the person may formally object. The Agreement should also state that if the individual formally objects to being moved or discharged through the procedures in 633.12, other than in cases of emergency moves or time limited services, and the objection is still under review, the individual can only be moved or discharged with the OPWDD Commissioner’s approval. The Agreement should also state that, during the period in which an objection is pending, every reasonable effort will be made to maintain the individual’s services at their Residence.
 - The Agreement should inform the individual that the provider will cooperate with the individual and the Care Manager to develop a safe discharge plan when the individual leaves the residence. Providers should interpret the term “individual” as including all representatives of the individual (e.g., the legal guardian, actively involved family members, attorneys from the Mental Hygiene Legal Service, the Consumer Advisory Board for the Willowbrook Class, etc.) if the individual would like their assistance. In addition, when the provider initiates the discharge or transfer, the provider has the responsibility to assist the individual in finding a new residential opportunity.
- (E) Term of the Agreement
 - The occupancy agreement should state that the Agreement remains in effect as long as the individual resides at the location, and that the individual must enter into a new Agreement if they move to a different residence.
 - OPWDD does not require the individual to sign a new Agreement before such a move is completed, but the individual should sign a new Agreement as soon as possible after the move.
- (F) Appropriate Signatures
 - The occupancy agreement must have a signature space for the provider, the individual, and the individual’s representative.

III. Prohibited Terms

Occupancy agreements may not contain policies or support practices that are inconsistent with individual rights under current laws and regulations, or conflict with HCBS standards. If providers choose to include in the occupancy agreement, by reference or otherwise, general residence policies and conditions that are unrelated to

individual safety or support issues governed by HCBS regulations, then those terms must not be more restrictive than terms that are customary in a lease between a landlord and tenant. In addition, the occupancy agreement is not the place to include individual-specific structures, strategies, or limitations. Individuals who require specific supports or limitations may have those addressed in the person-centered plan through applicable procedures.

The following terms should not appear in an occupancy agreement:

- Waivers of individual rights under applicable laws, regulations, or rules
 - The occupancy agreement must not contain a waiver of any legal rights available to an individual, such as those guaranteed by OPWDD or CMS regulations. Rights modifications or restrictions are also inappropriate terms in these agreements and must separately follow applicable regulatory processes (see below).
 - 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. However, the occupancy agreement should not contain any statement that an individual waives the ability to raise the potential applicability of state or local landlord tenant laws in any court or administrative proceeding.
- Restrictions or prohibitions on visitors
 - Under the HCBS regulations, individuals are permitted to have visitors at any time. There should be no restrictions or limits on visitors, or pre-approval of guests, described in the occupancy agreement. If a rights modification is needed, then the provider must follow the regulatory process to impose one and appropriately document the modification in the person's person-centered plans, defined as the Life Plan (LP) and associated plans such as the Staff Action Plans (SAPs) and/or other planning/service-related document(s) (e.g., Behavior Support Plan, Plan of Nursing Services, or other applicable person-centered plans, as needed).
- Provisions that permit termination of the occupancy agreement and removal from their Residence if an individual's needs increase even if there were resources available to provide additional support to allow the individual to remain.¹
- Requirements that the individual works or participates in a provider's HCBS or other programs.

¹ CMS observed in recent field work that some agreements contained terms that provided for an eviction based on a change in acuity, without an attempt to provide available additional supports to the person.

- The occupancy agreement must not include any requirements that the individual maintains employment or works for the provider or at a provider-operated worksite.²
- Similarly, the occupancy agreement must not include terms requiring the individual's participation in a provider's HCBS or other programs.³
- Occupancy agreements also must not include provisions that require an individual to vacate their rooms or residence during specified periods of time.⁴
- Inclusion of rights modifications, or individual-specific structures or limitations.
 - An individual's behavior plan or other rights modifications should not be detailed or referenced in the occupancy agreement.⁵ They should be addressed in the individual's Life Plan and other person-centered plans as appropriate. Improper agreement terms include:
 - Removal of locks or locking mechanisms on bedroom or bathroom doors.
 - Restricted access to the community (locked building entrance doors with no keys or other accommodations afforded to the individual).
 - Behavioral support plans requiring individuals to earn activities that are their right or using the loss of activities and rights as a negative consequence.
 - Restrictions on visitors and access to food.

IV. Failure to Sign Occupancy Agreement

Providers may not treat a failure or inability to sign an occupancy agreement as a basis to terminate an individual's services, initiate or propose a discharge or relocation, or to ask an individual to move out of a residence. The provider must not threaten or attempt to coerce individuals into signing an occupancy agreement.

² CMS site visits have revealed that some occupancy agreements inappropriately contained requirements for the individual to work on the provider's worksite, or to pay the provider for lack of attendance at a worksite.

³ CMS rulemaking has highlighted that participation in a service or support cannot be a condition of living in a unit. In the final rule (<https://www.federalregister.gov/d/2014-00487/p-191>) CMS noted that "it is a basic tenet of the Medicaid program that individuals cannot be compelled to receive any Medicaid service," and other regulatory requirements applying to the person-centered planning process and protecting individuals from coercion and restraint also operate as a "right to refuse" provision.

⁴ CMS also observed the use of these terms, which operated as proxies for a requirement that an individual work or participate in a provider's programs.

⁵ CMS survey uncovered a variety of rights restrictions that were improper for not following the required regulatory procedures or improperly included in occupancy agreements.

If the person is unable to sign due to incapacity to provide informed consent, or the person (including the person's authorized representative) has refused to sign after the provider has explained the purpose of the occupancy agreement and that it does not impact the individual's pre-existing rights, providers must then appropriately document the individual's refusal or inability to sign. The provider must reintroduce the occupancy agreement at each of the individual's next regularly scheduled Life Plan meetings to document good faith attempts to comply with regulatory requirements to obtain a signed agreement. OPWDD will accept documentation of good faith attempts to obtain a signed compliant agreement through this process as satisfying the Occupancy Agreement requirement.

A representative of the provider must still sign the occupancy agreement on behalf of the provider, and the provider must still ensure the setting adheres to all applicable OPWDD and federal laws, rules and regulations governing an individual's rights.

Service Documentation

Providers are not required to submit signed occupancy agreements to OPWDD and should not submit originals or copies to OPWDD, unless specifically requested to do so.

Records Retention

Providers should maintain documentation for a period of ten (10) years. This period is tied to the statute of limitations under the [New York False Claims Act](#).