

MEMORANDUM

To: All DDS Providers
From: Doreet Goldhaber, DDS Director of Licensure and Certification
Re: Guidance on Residential Agreements and the Centers for Medicare and Medicaid Services Home and Community Based Services Waiver “Community Rule,” *Revises and replaces May 5, 2016 Guidance Memorandum*
Date: July 11, 2016

I. The Community Rule

Pursuant to 42 U.S.C. 441.301(c)(4)(vi) (“the Community Rule”), when residential services are provided pursuant to a home and community-based waiver, the following applies:

In a provider-owned or controlled residential setting, in addition to the above qualities at paragraphs (c)(4)(i) through (v) of this section, the following additional conditions must be met:

(A) The unit or dwelling is a specific physical place that can be owned, rented or occupied under a legally enforceable agreement by the individual receiving services, and the individual has, at a minimum, the same responsibilities and protections from eviction that tenants have under the landlord tenant law of the State, county, city or other designated entity. For settings in which landlord tenant laws do not apply, the State must ensure that a lease, residency agreement or other form of written agreement will be in place for each participant and that the document provides protections that address eviction processes and appeals comparable to those provided under the jurisdiction's landlord tenant law.

The guidance in this memorandum is intended to generally assist DDS Providers in complying with the Community Rule; **however, this guidance is not a substitute for Providers consulting legal counsel to interpret the Community Rule and its application to their individual facts and circumstances.**

II. Application of the Community Rule’s Provisions

Q: Does the Provider own or control a residential setting?

A: Providers should consult with legal counsel to make this determination. Typically, if the provider directly owns or leases a property that constitutes the residential setting, such as a single-family home or duplex, the answer is “yes.” If the Provider, not the individual, holds a lease on an apartment on behalf of an individual, this may also be considered a residential setting under the “control” of the provider, since the provider may determine whether and when to initiate or determine the lease. More difficult questions arise if the Provider is a placement agency which contracts with another Provider to provide services in the waiver participant’s home or in the home of another. If an individual holds a lease in his or her name for the property, or in the name of his or her guardian, the Provider may not “own” or “control” the setting.

Q: Is “[t]he unit or dwelling [] a specific physical place that can be owned, rented or occupied under a legally enforceable agreement by the individual receiving services”?

A: Providers should consult with legal counsel to make this determination. In some cases, an individual may occupy a bedroom and share common space with other occupants of the house, and, in general, a portion of a home may be, “*owned, rented or occupied under a legally enforceable agreement by the individual receiving services.*” However, there may be instances where the unit, or portion of the unit, cannot be, “owned, rented or occupied under a legally enforceable agreement by the individual receiving services,” because the physical space is already subject to an agreement that does not permit the individual to become the sub-lessee under the existing agreement to occupy the premises. For example, the individual may reside in public or subsidized housing which is already subject to a lease or long term management agreement between a public housing agency and the Provider, and the lease or management agreement does not permit a sublease or subrogation to the individual.

Q: If the unit is owned or controlled by the Provider, and the space may be owned, rented or occupied by the individual, what form of “legally enforceable agreement” is required under the Community Rule?

A: Under Massachusetts law, the terms of a tenancy may vary according to what the landlord and tenant agree to. See <http://www.mass.gov/ago/consumer-resources/consumer-information/home-and-housing/landlord-and-tenant-law/>. The requirement under the Community Rule is that the Provider must ensure that, “*the individual has, at a minimum, the same responsibilities and protections from eviction that*

tenants have under the landlord tenant law of the State, county, city or other designated entity.”

In drafting a “legally enforceable agreement” compliant with these provisions, Providers should refer to sources of Massachusetts landlord tenant law, and to counsel with expertise in landlord tenant law. *See* G.L. c. 239 and c. 186, § 11. Providers should be aware that different residential settings, such as assisted living or publicly subsidized housing, may have particular requirements of any agreement to occupy the property or unit.

Q: Where Does Landlord Tenant Law Not Apply?

A: The Community Rule also acknowledges that an individual may be receiving services in an environment where “landlord tenant law does not apply.” If a Provider determines that landlord-tenant law does not apply, it must ensure that, *“a lease, residency agreement or other form of written agreement will be in place for each participant and that the document provides protections that address eviction processes and appeals comparable to those provided under the jurisdiction's landlord tenant law.”* If the Provider determines that landlord tenant law does not apply, the Provider may develop a “residency agreement” or “other form of agreement” that, *“provides protections that address eviction processes and appeals comparable to those provided under the jurisdiction's landlord tenant law.”* If the individual has an intellectual disability and the setting is a DDS “facility,” as defined in G.L. c. 123B, § 2, the agreement should, at a minimum, incorporate reference to the individual’s rights under G.L. c. 123B, § 3.

Q: What is the effect of the Transfer Statute?

A: If an individual with an intellectual disability receives services in a “facility” as defined in G.L. c. 123B, § 2, and DDS proposes to transfer the individual to another “facility,” the Transfer Statute provides an opportunity to challenge the transfer through the division of law administrative law appeals, and provides a stay of the transfer pending appeal, unless the emergency conditions are met. *See* G.L. c. 123B, §3, 115 CMR 6.63.