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The Federal Home- and Community-Based Settings Rule: Ensuring Maine's Full Compliance to Protect the Future of Home- and Community-Based Services (HCBS)

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What is the federal HCBS Settings Rule?

In January 2014, the federal Centers for Medicare & Medicaid Services (CMS) released a new rule regarding Home and Community-Based Services (HCBS) which took effect March 17, 2014. The rule requires that people who receive home and community-based services and supports *funded through Medicaid* (known as MaineCare in Maine) must receive those services and supports in settings (places) that meet specific standards. The standards are designed to ensure the settings are truly home and community-based. This means that individuals receiving services in these settings have full access to the greater community and can enjoy all of the benefits of community living. The rule came into effect after a five-year federal rulemaking process with multiple public comment periods during which over 2,000 comments were submitted from across the country, including comments from individuals with disabilities and their families. The overall goal is to ensure all HCBS programs provide a setting and experience that is very distinct from what an institution [e.g. a hospital, nursing facility or intermediate care facility for people with intellectual disabilities (ICF-IID)] offers.

Who is affected by the HCBS Settings Rule?

This rule applies to people who receive services from the following waivers which are outlined in the [MaineCare Benefits Manual](#):

Section 18, Waiver Services for Adults with Brain Injury

Section 19, Waiver Services for the Elderly and Adults with Disabilities

Section 20, Waiver Services for Adults with Other Related Conditions

Section 21, Waiver Services for Members with Intellectual Disabilities or Autistic Disorder

Section 29, Waiver Support Services for Members with Intellectual Disabilities or Autistic Disorder

What is Maine's plan for complying with the HCBS Settings Rule?

All states must create a *Statewide Transition Plan* that outlines the process by which the state will ensure all settings where Medicaid-funded Home and Community-Based Services are being delivered fully meet the standards of the HCBS Settings rule. States are required to submit an *Initial Statewide Transition Plan* to CMS for review and approval, followed by the final plan. States are required to fully implement the final plan and bring all settings into compliance by March 17, 2022.

There is no opportunity for an extension beyond March 17, 2022. CMS will no longer provide Medicaid funding for any home and community-based service delivered in a setting that is not in full compliance by March 17, 2022.

What is at stake if Maine does not bring its HCBS system into compliance with the HCBS Settings Rule by March 17, 2022?

Medicaid programs are funded through a partnership between the state and federal governments. Federal funding makes up nearly two-thirds (63.8%) of the total funds used to operate the Home and Community-Based Services programs in Maine. This means that in state fiscal year 2019 for every \$1 in funding, the federal government provided almost \$0.64 while the state funded \$0.36. Maine receives approximately \$333,021,477 in federal funds to operate its HCBS programs, which serve over 6,500 individuals across the state.

All HCBS settings must meet full compliance with the HCBS Settings Rule by March 2022 to allow for continued funding. The HCBS Settings rule requires that members shall not experience a disruption in services as a result of settings that do not meet full compliance. In the event that some HCBS settings are deemed not to be in compliance with the HCBS Settings rule requirements, the state will lose the federal funding for each setting. This means that reimbursement rates for HCBS would need to be reduced by almost two-thirds (a 63.8% rate reduction) for non-compliant settings. Maine cannot afford this option. Therefore, Maine – like all states – must come into full compliance with the HCBS Settings Rule by March 2022.

Are other states recognizing their obligation to comply with the HCBS Settings Rule?

Yes. To date, 46 states have submitted an *Initial Statewide Transition Plan* and had these initial plans approved. To date, 18 states have submitted a final *Statewide Transition Plan* and had these plans approved. Some states have already completed their transition to compliance by fully implementing their approved *Statewide Transition Plans*.

What about Maine's Statewide Transition Plan?

Maine must develop an *Initial Statewide Transition Plan* that describes the clear path that we will take to ensure our HCBS programs and settings are in full compliance by the March 2022 deadline. The plan must include a description of how we will engage with stakeholders, including how we will educate people receiving services, their family members, advocates, service providers, and partner systems (e.g. mental health, vocational rehabilitation) about the HCBS Settings Rule requirements, our transition plan, and our progress toward implementation.

The *Initial Statewide Transition Plan* will inform CMS about how Maine plans to ensure services are delivered in accordance with the HCBS Settings Rule. If Maine determines that policy changes (such as how people are supported to create their person-centered service plans, licensing requirements, and other MaineCare Benefits Manual changes) are needed to ensure full compliance with the HCBS Settings Rule, then the *Initial Statewide Transition Plan* must outline the steps Maine is taking to change specific policies.

Who is leading the state’s compliance effort?

The state has an Executive Steering Committee comprised of state officials, and a Stakeholder Advisory Committee made up of community members to ensure that Maine is on the right track toward implementing the settings rule standards and ensuring the system of supports and services is fully compliant by the deadline.

The State has also contracted with a national team of experts at Economic Systems (EconSys), which contracts with subject matter experts to assist the state in meeting federal requirements to be fully compliant with the settings rule by March 17, 2022.

What does the HCBS Settings Rule require?

The rule supports the original intent of Home and Community-Based Services when they were first established by the U.S. Congress as an alternative to Medicaid-funded institutions. The HCBS Settings Rule requires that people receiving HCBS:

- Enjoy the same access to the broader community as people who do not receive HCBS or live in an institution.
- Engage in community life with other members of the broader community in ways that reflect individual preferences and goals.
- Seek employment and work in competitive integrated settings.
- Control personal resources.
- Have assured rights of privacy, dignity, and respect and do not experience coercion or restraint.
- Have the best possible opportunities to exercise individual initiative, autonomy, and independence in making life choices including, but not limited to, choices about daily activities and schedules and about with whom to spend time.
- Be given choice regarding services and supports, and who provides each of these services and supports.
- Have the opportunity, as part of person-centered planning, to choose the setting where they receive each service/support based on individual preferences and needs. This includes the opportunity to choose a setting that is not specifically established for people with disabilities. If the setting selected is residential, selection is also based on an individual’s available resources. The setting options offered, from which the person selects their setting of choice, must be identified and documented in their person-centered plan.

The rule includes additional standards that apply to residential settings owned or controlled by the provider of residential services. In Maine, these settings include: Group Homes, Family-

Centered Homes, and Shared Living if the provider is not a related family member(s) of the individual(s) living in the Shared Living setting.¹

The additional standards require that:

- Individuals have the freedom to control and choose their daily schedule and activities, including support as needed to participate in the activities they choose;
- Individuals have access to food at any time;
- Individuals have the ability for visitors at any time;
- Each individual has a legally enforceable lease or residency agreement that offers the same protections that any tenant in the state or locality would typically have, including protections related to eviction and appeals processes;
- There are lockable entrance door(s) to an individual's living unit (and bedroom if they share a living unit with unrelated individuals), and only the individual and appropriate staff have keys to door(s);
- Each individual has the option for a private bedroom/living unit, taking account the person's needs, preferences, and available resources;
- Individuals have a choice of housemate/roommate if sharing a living unit or a bedroom;
- Individuals may furnish and decorate their living unit and bedroom as they choose; and
- The setting is physically accessible to the individual.

Can states set higher standards for home and community-based settings?

The federal HCBS Settings Rule sets the minimum requirements all states must follow. The state may set higher standards, but these must be included in the *Statewide Transition Plan*, which must be posted for public comment before it can be submitted to CMS. The Maine Executive Steering Committee, established to implement the HCBS Settings Rule, has begun considering when and why the state may want to set a higher standard than the federal rule requires. Thus far, the Executive Steering Committee has decided to include only the following higher standards in the *Initial Statewide Transition Plan*:

“Maine plans to require all provider owned and/or controlled settings in Maine’s HCBS programs, not just residential settings, to comply with some of the additional federal

¹ Per CMS guidance, **all** Shared Living settings, including those where the provider is not a related family member(s) of the individual(s) living in the Shared Living setting, must meet the **general** requirements of the rule that apply to all Medicaid HCBS-funded settings. These are listed on page 3 of this FAQ document.

requirements for provider owned or controlled residential settings to ensure individuals have: (1) freedom and support to control their daily schedule and activities; (2) access to food at any time; (3) an ability to have visitors at any time; and (4) a right to receive services in a setting that is physically accessible. Maine’s plan will ensure consistency for all individuals with regard to these important expectations.

For non-residential settings, offering access to food at any time will mean that providers in these settings may not restrict what or when HCBS participants eat or drink, and may not prohibit individuals from bringing their own food, snacks, and drinks. For non-residential settings, the ability to have visitors at any time will mean that these providers may not have policies that prevent HCBS participants from having visitors while they are at the setting, subject to any sign in/out policies that apply to visitors who are not there to see a particular HCBS participant and that are in place for safety reasons.”

Are any HCBS settings exempt from complying with the HCBS Settings Rule?

A very limited number of settings are already presumed to be compliant and therefore do not have to be evaluated for compliance during the transition period. These settings are:

- Individual-supported employment settings (places where individuals – not small groups of two or more – are supported to work in competitive integrated employment);
- Typical integrated community settings, not owned or controlled by a provider of HCBS services, where an individual – not a small group of two or more – is receiving HCBS. Examples include but certainly are not limited to: businesses open to the public; community centers; libraries; gyms; religious places of worship; and outdoor spaces like a park;
- An individual’s own home or family home, not owned or controlled by a provider of HCBS services.

CMS guidance states: *“Individual, privately-owned homes (privately-owned or rented homes and apartments in which the individual receiving Medicaid-funded HCBS lives independently or with family members, friends, or roommates) are presumed to be in compliance with the regulatory criteria of a home and community-based setting. States are not responsible for confirming this presumption for purposes of ensuring compliance with the regulation. States should, however, include private residences as part of their overall quality assurance framework when implementing monitoring processes for ongoing compliance with the federal HCBS requirements.”* This means the state is not required to assess and validate privately-owned homes and family homes during the transition period, except Shared Living settings as described above. Maine will ask all Shared Living providers to conduct the self-assessment, but will not apply the provider-owned or controlled setting requirements to Shared Living where a relative is providing the service. The state is expected to complete ongoing monitoring of HCBS participants’ experiences in these settings to ensure their experiences are consistent with the general requirements for all HCBS settings. More information about this process will be communicated in both the *Statewide Transition Plan* and by the state in the future.

Are Shared Living and Family-Centered Home providers required to follow and meet the HCBS Rule?

As discussed above, all Shared Living and Family-Centered HCBS settings are required to meet the general requirements expected of all settings as outlined in the HCBS Settings Rule. With regard to the additional requirements for provider-owned or -controlled settings, CMS guidance states: “*settings where the beneficiary lives in a private residence owned by an unrelated caregiver (who is paid for providing HCBS services to the individual), are considered provider-owned or -controlled settings and should be evaluated as such.*” Therefore:

- Shared Living providers are required to follow and meet the provider-owned or -controlled requirements for residential providers outlined within the HCBS Settings Rule, unless the provider is a related family member(s) of the individual(s) living in the Shared Living setting.
- Family-Centered Home providers are also required to follow and meet the provider-owned or controlled requirements of the HCBS Settings Rule, unless the provider is a related family member(s) of the individual(s) living in the Family-Centered setting and the setting is the individual’s own private home.

How will Maine’s transition to compliance with the HCBS Settings Rule affect individuals receiving HCBS?

- There will be some changes in how person-centered planning is conducted to ensure choice of setting for each service, choice of who provides each service, and to address any modifications to HCBS Settings Rule requirements that may be needed for health and/or safety reasons (see discussion later in this document that explains modification in more detail). Person-centered planning will also ensure that an individual’s preferences and support needs related to participation in community life, engagement with members of the broader community who do not receive HCBS, and that seeking/working in competitive integrated employment are addressed.
- The State will ask individuals about their experiences receiving services in different settings so the State may ensure the rule standards are being met.
- Individuals should experience positive changes if their provider(s) need to make changes to comply with any HCBS Settings Rule requirements for services the individual receives. For example, individuals will be able to sign a lease with their residential service provider if they live in a residential setting and don’t already have a lease.

What changes might happen in Maine because of the HCBS Settings Rule?

Coming into compliance with the HCBS Settings Rule is expected to mean that services will become more person-centered. How and where people spend their time may also change as individuals are supported to have full access to community life and the broader community of

people who do not receive HCBS, in ways that reflect their unique preferences and goals. More people with disabilities are expected to explore and make informed choices to work for competitive wages in integrated workplaces, alongside people without disabilities.

The HCBS Settings Rule prohibits the delivery of HCBS services in settings that are considered institutional. Maine must discontinue any current practice of providing HCBS services in institutional settings and address any impacted individuals' needs for support in other ways. In addition to ensuring HCBS settings meet all the requirements explained on pages 3-4 above, the rule requires Maine to look at existing HCBS settings (other than those discussed on page 5) to determine if they have institutional qualities and are isolating for individuals receiving HCBS there. The federal government has provided guidance about what this means. States must assess settings for isolating conditions based on the following questions:

- Due to the design or model of service provision in the setting, do individuals have limited, if any, opportunities² for interaction in and with the broader community, including with individuals not receiving Medicaid-funded HCBS?
- Does the setting restrict individual choice to receive services or to engage in activities outside of the setting?
- Is the setting physically located separate and apart from the broader community and does the setting facilitate individual opportunity to access the broader community and participate in community services, consistent with an individual's person-centered service plan?

If the State determines that some HCBS settings do isolate individuals from the broader community, the State may choose to work with the service providers operating the settings to make changes to address the isolating factors **and** prepare/submit a package of information to CMS about why the setting should be allowed to continue to be an approved setting for HCBS waiver services. CMS then makes the final decision on whether the setting can continue to provide federal Medicaid-funded HCBS services after March 2022.

The state must implement a process to support individuals receiving HCBS in any setting determined to be non-compliant to choose and transition to another compliant setting to receive the service(s) by no later than March 2022. Therefore, existing settings must be brought into full compliance by October 31, 2021 to provide sufficient time for any relocations out of non-compliant settings that may need to occur.

Are there person-specific exceptions to the HCBS Settings Rule requirements?

The HCBS Settings Rule allows the following rule requirements to be *modified for a specific individual* (not for an entire service setting) if there is a health and/or safety reason for modifying a requirement:

- Individuals have access to food at any time;

² "Opportunities", as well as identified supports to provide access to and participation in the broader community, should be reflected in both individuals' person-centered service plans and the policies and practices of the setting.

- Individuals may have visitors at any time;
- There are lockable entrance door(s) to an individual's living unit (and bedroom if they share a living unit with unrelated individuals), and only the individual and appropriate staff have keys to door(s);
- Individuals have the freedom to control and choose their daily schedule and activities, including support as needed to participate in the activities they choose;
- Individuals have a choice of housemate/roommate if sharing a living unit or a bedroom (specific to provider-owned or -controlled residential settings); and
- Individuals may furnish and decorate their living unit and bedroom as they choose (specific to provider-owned or -controlled residential settings).
- Individuals have a right to freedom from restraint.

The modification must be:

- Necessary to ensure that individual's health and/or safety;
- Supported by specific assessed need of the individual;
- Justified in the person-centered service plan by documenting less restrictive and less intrusive strategies that have been tried previously but did not work for the person;
- Documented in the person-centered service plan with steps that are being taken to remove or reduce the modification as soon as feasible;
- Approved by the person through informed consent; and
- Accompanied by a plan that: (1) identifies the ongoing process for evaluating the effectiveness of the modification; and (2) identifies timeframes ensuring the modification must be periodically reviewed and reevaluated.

An individual modification cannot be applied to an entire group/household. Provider policies/practices that impose modifications on everyone served in a particular setting must be changed. Each person is unique, so considerations for each individual's person-centered plan will be different, including the appropriate use of the HCBS Settings Rule requirement modification. Therefore, it is vital for person-centered planning teams to include the person in this process and solicit the person's opinion and feelings about the costs and benefits of a modification. The person-centered planning team should consider together the best course of action. Based on individual circumstances, the person-centered planning team must consider what a reasonable amount of time is (e.g., week, month, year) before the effectiveness of the modification must be reviewed; every modification must be reviewed no less than annually. Modifications must never be considered "standing orders" without time limits. In addition, the person-centered plan that includes a modification must be finalized and agreed to in writing by the person or his/her legal decisionmaker, verifying the person's informed consent.

The use of modifications is not to be taken lightly. Person-centered planning teams must collect and document the outcomes and effectiveness of positive interventions and supports, as well as less-intrusive methods of addressing the need, before making or changing any modification. The person-centered planning team might need assistance from specific experts, such as a behaviorist or behavior specialist, to aid in the person-centered planning process (e.g., behavior analysis,

crisis-intervention plan). The person-centered planning team should document these considerations in the person-centered plan.

How can I find out more about Maine’s efforts to come into compliance with the HCBS Settings Rule and Maine’s *Statewide Transition Plan*?

- You can go to our website at www.Maine.gov/dhhs/oads/HCBS/index.shtml
- Additional opportunities and resources for learning about the HCBS Settings Rule will be publicized soon by DHHS, including through the website. The Department will be holding learning events and releasing information through a variety of sources such as email, Facebook and public town hall meetings throughout the state as part of a larger stakeholder education effort.
- Anyone with questions can email HCBS.DHHS@maine.gov.
- Information on the HCBS Settings Rule published by CMS can be found at <https://www.medicaid.gov/medicaid/hcbs/guidance/hcbs-final-regulation/index.html>.