

Janet T. Mills
Governor



Maine Department of Health and Human Services
MaineCare Services
Policy Division
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TTY: Dial 711 (Maine Relay)

DATE: August 10, 2021

TO: Interested Parties

A handwritten signature in black ink, appearing to read "Michelle Probert".

FROM: Michelle Probert, Director, Office of MaineCare Services

SUBJECT: Proposed Rule: 10-144 C.M.R. ch. 101, MaineCare Benefits Manual, Chapter I, Section 6, Global HCBS Waiver Person-Centered Planning and Settings Rule

REVISED PUBLIC HEARING:

Date, time and location of PUBLIC HEARING: 11am; Tuesday, September 28, 2021

Due to the ongoing threat posed by COVID-19 (see below), DHHS has determined that its public hearing will be conducted solely remotely, via Zoom.

Zoom Meeting link: <https://mainestate.zoom.us/j/89675358898>

Meeting ID: 896 7535 8898

Some devices may require downloading a free app from Zoom prior to joining the public hearing event. The Department requests that any individual requiring special arrangements to participate in the hearing contact the person listed for this filing 5 days in advance of the hearing.

Rationale for remote public hearing: Cases of COVID-19 have increased over 1,000% nationally between June 18, 2021 and August 25, 2021. This increase has been driven by the highly transmissible B.1.617.2 (Delta) variant of SARS-CoV-2, the virus that causes COVID-19. DHHS is concerned about this increase in COVID-19 and seeks to avoid the threat to public health and safety by conducting this public hearing solely remotely. There is an ongoing federal public health emergency due to COVID-19. The Secretary of the United States Department of Health and Human Services first declared a public health emergency (PHE) due to COVID-19 on January 31, 2020, and most recently renewed the PHE on July 20, 2021. On March 13, 2020, the President of the United States issued a proclamation that the COVID-19 outbreak constitutes a national emergency, which was most recently continued on February 24, 2021. As of August 30, 2021, 11 counties in Maine were designated as high risk.

REVISED COMMENT DEADLINE: October 8, 2021

This letter gives notice of proposed rule: 10-144 C.M.R. ch. 101, Chapter I, Section, 6 Global HCBS Waiver Person-Centered Planning and Settings Rule.

This new rule proposes to implement the federal requirements for Maine's Section 1915(c) home and community-based waiver programs as set forth in 42 C.F.R. § 441.301(c), and includes requirements for person-centered service planning and for settings in which home and community-based waiver services ("HCBS") are provided, including requirements for provider-owned or controlled residential settings.

The proposed rule implements additional requirements or changes to HCBS waiver programs under the following sections of the MaineCare Benefits Manual:

Section 18: Home and Community-Based Services for Adults with Brain Injury;

Section 19: Home and Community Benefits for the Elderly and Adults with Disabilities;

Section 20: Home and Community-Based Services for Adults with Other Related Conditions;

Section 21: Home and Community Benefits for Members with Intellectual Disabilities or Autism Spectrum Disorder; and

Section 29: Support Services for Adults with Intellectual Disabilities or Autism Spectrum Disorder.

In the event of conflict between the requirements of this proposed rule and any rule listed above, the terms of the proposed rule will supersede and shall apply.

The proposed rule tracks closely the federal requirements set forth in 42 C.F.R. § 441.301(c). It clarifies that the Member leads the person-centered planning process and that the process should reflect the Member's cultural considerations and provide necessary information to allow the Member to make informed choices and decisions. The proposed rule establishes general requirements for HCBS settings so that the setting ensures the Member's rights of privacy, dignity and respect, freedom from coercion and restraint, and facilitates individual choice regarding HCBS waiver services and settings.

There are additional proposed requirements for provider owned or controlled residential settings. These include Members having privacy in their sleeping or living unit; Members having freedom to access food at any time; and Members having the ability to have visitors at any time. The proposed rule also contains a provision related to certain disability specific settings (such as Sec. 18 Work Ordered Club House Services). The rule leaves open the Department's ability to amend Sec. 18, Sec. 20, Sec. 21 and/or Sec. 29 regulations through rulemaking to impose additional requirements.

Finally, the proposed rule outlines requirements for provider qualifications as well as oversight and enforcement to ensure full compliance with HCBS waiver services and related sections of the MaineCare Benefits Manual including Ch. I, Sec. I, General Administrative Policies and Procedures.

The Department shall submit to CMS and anticipates CMS approval of HCBS Waiver amendments related to this rule.

The proposed rule will become effective 5 days after the finally adopted rule is filed with the Secretary of State's office, per 5 M.R.S. § 8052(6), except that for those HCBS settings that were approved as settings prior to March 17, 2014, Sections 6.04 (Home and Community-Based Settings General Requirements) and 6.04(B) (Additional Requirements for Provider-Owned or Controlled Residential Settings) will be effective on July 31, 2022.

Rules and related rulemaking documents may be reviewed at, or printed from, the MaineCare website at <http://www.maine.gov/dhhs/oms/rules/index.shtml> or for a fee, interested parties may request a paper copy of rules by calling (207) 624-4050 or Maine Relay number 711.

A concise summary of the proposed rule is provided in the Notice of Agency Rulemaking Proposal, which can be found at <http://www.maine.gov/sos/cec/rules/notices.html>. This notice also provides information regarding the rulemaking process. Please address all comments to the agency contact person identified in the Notice of Agency Rulemaking Proposal.

REVISED Notice of Agency Rule-making Proposal

AGENCY: Department of Health and Human Services, MaineCare Services, Division of Policy

CHAPTER NUMBER AND TITLE: 10-144 C.M.R., Chapter 101, MaineCare Benefits Manual, Chapter I, Section 6, Global HCBS Waiver Person-Centered Planning and Settings Rule

PROPOSED RULE NUMBER:

CONCISE SUMMARY: This new rule proposes to implement the federal requirements for Maine’s Section 1915(c) home and community-based waiver programs as set forth in 42 C.F.R. § 441.301(c), and includes requirements for person-centered service planning and for settings in which home and community-based waiver services (“HCBS”) are provided, including requirements for provider-owned or controlled residential settings.

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In the event of conflict between the requirements of this proposed rule and any rule listed above, the terms of the proposed rule will supersede and shall apply.

The proposed rule tracks closely the federal requirements set forth in 42 C.F.R. § 441.301(c). It clarifies that the Member leads the person-centered planning process and that the process should reflect the Member’s cultural considerations and provide necessary information to allow the Member to make informed choices and decisions. The proposed rule establishes general requirements for HCBS settings so that the setting ensures the Member’s rights of privacy, dignity and respect, freedom from coercion and restraint, and facilitates individual choice regarding HCBS waiver services and settings.

There are additional proposed requirements for provider-owned or controlled residential settings. These include Members having privacy in their sleeping or living unit; Members having freedom to access food at any time; and Members having the ability to have visitors at any time. The proposed rule also contains a provision related to certain disability-specific settings (such as Sec. 18 Work Ordered Club House Services). The rule leaves open the Department’s ability to amend Sec. 18, Sec. 20, Sec. 21 and/or Sec. 29 regulations through rulemaking to impose additional requirements.

Finally, the proposed rule outlines requirements for provider qualifications as well as oversight and enforcement to ensure full compliance with HCBS waiver services and related sections of the MaineCare Benefits Manual including Ch. I, Sec. I, General Administrative Policies and Procedures.

The Department shall submit to CMS and anticipates CMS approval of Waiver amendments related to this rule.

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See <http://www.maine.gov/dhhs/oms/rules/index.shtml> for rules and related rulemaking documents.

STATUTORY AUTHORITY: 22 M.R.S. §§ 42, 3173, 42 C.F.R. § 441.301(c)

Date, time and location of PUBLIC HEARING: 11am; Tuesday, September 28, 2021

Due to the ongoing threat posed by COVID-19 (see below), DHHS has determined that its public hearing will be conducted solely remotely, via Zoom.

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Meeting ID: 896 7535 8898

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Rationale for remote public hearing: Cases of COVID-19 have increased over 1,000% nationally between June 18, 2021 and August 25, 2021. This increase has been driven by the highly transmissible B.1.617.2 (Delta) variant of SARS-CoV-2, the virus that causes COVID-19. DHHS is concerned about this increase in COVID-19 and seeks to avoid the threat to public health and safety by conducting this public hearing solely remotely. There is an ongoing federal public health emergency due to COVID-19. The Secretary of the United States Department of Health and Human Services first declared a public health emergency (PHE) due to COVID-19 on January 31, 2020, and most recently renewed the PHE on July 20, 2021. On March 13, 2020, the President of the United States issued a proclamation that the COVID-19 outbreak constitutes a national emergency, which was most recently continued on February 24, 2021. As of August 30, 2021, 11 counties in Maine were designated as high risk.

In addition to the public hearing, individuals may submit written comments to DHHS by the date listed in this notice.

PUBLIC NOTICED: **September 8, 2021**

DEADLINE FOR COMMENTS: Comments must be received by 11:59 PM on October 8, 2021

AGENCY CONTACT PERSON: Heather Bingelis, Comprehensive Health Planner II
Heather.Bingelis@maine.gov

AGENCY NAME: MaineCare Services

ADDRESS: 109 Capitol Street, 11 State House Station
Augusta, Maine 04333-0011

TELEPHONE: (207)-624-6951 FAX: (207)-287-6106
TTY: 711 (Deaf or Hard of Hearing)

IMPACT ON MUNICIPALITIES OR COUNTIES (if any): The Department anticipates that this rulemaking will not have any impact on municipalities or counties.

CONTACT PERSON FOR SMALL BUSINESS INFORMATION (if different): N/A

STATUTORY AUTHORITY FOR THIS RULE: 22 M.R.S. §§ 42, 3173

DEPARTMENT OF HEALTH AND HUMAN SERVICES
10-144 C.M.R. Chapter 101
MAINECARE BENEFITS MANUAL
CHAPTER I

**SECTION 6 GLOBAL HCBS WAIVER PERSON-CENTERED PLANNING
AND SETTINGS RULE**

ESTABLISHED: __/__/2021

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The Department shall submit to CMS and anticipates approval of Waiver Amendments related to these provisions.

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**SECTION 6 GLOBAL HCBS WAIVER PERSON-CENTERED PLANNING
AND SETTINGS RULE**

ESTABLISHED: __/__/2021

6.01 INTRODUCTION

This rule implements the federal requirements for Maine’s Section 1915(c) home and community based waiver programs set forth in 42 C.F.R. § 441.301(c), and includes requirements for person-centered service planning and for settings in which home and community-based waiver services (“HCBS”) are provided, including requirements for provider-owned or controlled residential settings.

This rule implements additional requirements or changes to HCBS waiver programs under the following sections of the MaineCare Benefits Manual:

- Section 18: Home and Community-Based Services for Adults with Brain Injury;
- Section 19: Home and Community Benefits for the Elderly and Adults with Disabilities;
- Section 20: Home and Community-Based Services for Adults with Other Related Conditions;
- Section 21: Home and Community Benefits for Members with Intellectual Disabilities or Autism Spectrum Disorder; and
- Section 29: Support Services for Adults with Intellectual Disabilities or Autism Spectrum Disorder.

In the event of conflict between the requirements of this rule and any rule listed above, the terms of this rule supersede and shall apply.

6.02 DEFINITIONS

- A. **“Coercion”** means the use of force or threats, including the threat of diminishment of any right or privilege, to cause a person to do something against the person’s will.
- B. **“Department”** means the State of Maine Department of Health and Human Services.
- C. **“Informed Consent”** means consent voluntarily given with sufficient knowledge and comprehension of the subject matter involved so as to enable the person giving consent to make an informed and enlightened decision, without any element of force, fraud, deceit, duress, or other form of constraint or coercion.

The Department shall submit to CMS and anticipates approval of Waiver Amendments related to these provisions.

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6.02 DEFINITIONS (cont.)

- D. **“Member”** means a person determined to be eligible for and subsequently enrolled in MaineCare benefits coverage by the Office of Family Independence (OFI) in accordance with the eligibility standards published by the OFI in the MaineCare Eligibility Manual. Some Members may have restrictions on the type and amount of services they are eligible to receive.
- E. **“Provider”** means any individual, partnership, group, association, corporation, institution, or entity, and the officers, directors, owners, managing employees, or agents of any partnership, group association, corporation, institution, or entity that is enrolled in the MaineCare program to provide covered services to Members.
- F. **“Provider-Owned or Controlled Residential Setting”** means a specific, physical place in which a Member resides that is owned, co-owned, and/or operated by a provider of home and community-based services. The Department shall determine whether a setting is a Provider-Owned or Controlled Residential Setting when authorizing services for a Member at the setting.
- G. **“Restraint”** means a mechanism or action – whether physical or chemical – that limits or controls a person’s voluntary movement or deprives a person of the use of all or part of the person’s body. “Restraint” does not include a prescribed therapeutic device or intervention, or a safety device or practice.

6.03 PERSON-CENTERED PLANNING

A Person-Centered Service Plan is required for a Member to receive HCBS waiver services. The following requirements shall apply to person-centered planning.

- A. **Person–Centered Planning Process.** The Member will lead the person-centered planning process where possible. The Member’s representative should have a participatory role, as needed and as defined by the Member, unless state law confers decision-making authority to a legal representative. All references to a Member or individual in this Section are intended to include the role of the Member’s representative. In addition to being led by the Member, the person-centered planning process must:
 - (1) Include people chosen by the Member;
 - (2) Provide necessary information and support to ensure that the Member directs the process to the maximum extent possible, and is enabled to make informed choices and decisions;

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6.03 **PERSON-CENTERED PLANNING** (cont.)

- (3) Be timely and occur at times and locations of convenience to the Member;
- (4) Reflect cultural considerations of the Member and be conducted by providing information in plain language and in a manner that is accessible to individuals with disabilities and persons who are limited English proficient, consistent with 42 C.F.R. § 435.905(b);
- (5) Offers informed choices to the Member regarding the services and supports they receive and from whom;
- (6) Includes a method for the Member to request updates to the plan as needed;
- (7) Records the alternative home and community-based settings that were considered and accepted or rejected by the Member; and
- (8) Includes a discussion of strategies for resolving disputes or disagreements within the planning process, including clear conflict of interest guidelines for all planning participants.

Providers of HCBS services for the Member, or those who have an interest in or are employed by a provider of HCBS services for the Member, must not provide case management or develop the person-centered service plan, except when the Department determines that the only willing and qualified entity to provide case management and/or develop person-centered service plans in a geographic area also provides HCBS services.

- B. The Person-Centered Service Plan.** The Person-Centered Service Plan must reflect the services and supports that are important for the Member to meet the needs identified through an assessment of functional need, as well as what is important to the Member with regard to preferences for the delivery of such services and supports.

Commensurate with the level of need of the Member, and limited to the scope of services and supports available under the applicable HCBS waiver, the Person-Centered Service Plan must:

- (1) Reflect that the setting in which the Member is to reside is chosen by the Member. The HCBS Setting chosen by the Member must be integrated in, and support full access by the Member receiving HCBS services 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

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6.03 PERSON-CENTERED PLANNING (cont.)

- community to the same degree of access as individuals not receiving HCBS waiver services;
- (2) Reflect the Member's strengths and preferences;
 - (3) Reflect clinical and support needs as identified through an assessment of functional need;
 - (4) Include individually identified goals and desired outcomes;
 - (5) Reflect the services and supports (paid and unpaid) that will assist the Member in achieving identified goals, and the Providers of those services and supports, including natural supports. Natural supports are unpaid supports that are provided voluntarily to the Member in lieu of or in addition to HCBS waiver services and supports;
 - (6) Reflect risk factors and measures in place to minimize them, including individualized back-up plans and strategies when needed;
 - (7) Be understandable by the Member and by the individuals important in supporting the Member. At a minimum, the Person-Centered Service Plan must be written in plain language and in a manner that is accessible to individuals with disabilities and persons who are limited English proficient, consistent with 42 C.F.R. § 435.905(b);
 - (8) Identify the individual and/or entity responsible for monitoring the plan;
 - (9) Be finalized and agreed to, with the informed consent of the Member in writing, and signed by all individuals and Providers responsible for its implementation;
 - (10) Be distributed to the Member and other people involved in the Person-Centered Service Plan;
 - (11) Include those services the purpose or control of which the Member elects to self-direct where available;
 - (12) Prevent the provision of unnecessary or inappropriate services and supports; and
 - (13) Document that any modification of the requirements in Section 6.04(B) (Additional Requirements for Provider-Owned or Controlled Residential Settings) must be

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6.03 **PERSON-CENTERED PLANNING (cont.)**

supported by a specific assessed need and justified in the Person-Centered Service Plan. The following requirements related to the modification must also be documented in the Person-Centered Service Plan:

- (a) Identify the specific and individualized assessed need that creates the need for the modification;
- (b) Document the positive interventions and supports used prior to any modifications to the Person-Centered Service Plan;
- (c) Document less intrusive methods of meeting the need that have been tried but did not work;
- (d) Include a clear description of the modification that demonstrates that it is directly proportionate to the specific assessed need;
- (e) Include a regular collection and review of data to measure the ongoing effectiveness of the modification;
- (f) Include established time limits for periodic reviews to determine if the modification is still necessary or can be terminated;
- (g) Include informed consent of the Member; and
- (h) Include an assurance that interventions and supports will cause no harm to the individual.

- C. **Review of the Person-Centered Service Plan.** The Person-Centered Service Plan must be reviewed, and revised upon reassessment of functional need as required by 42 C.F.R. § 441.365(e), at least every 12 months, when the Member's circumstances or needs change significantly, or at the request of the Member.

6.04 **HOME AND COMMUNITY-BASED SETTINGS**

- A. **General Requirements.** Each home and community-based settings must have all of the following qualities, based on the needs of the Member as indicated in the Member's Person-Centered Service Plan:

The Department shall submit to CMS and anticipates approval of Waiver Amendments related to these provisions.

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6.04 HOME AND COMMUNITY-BASED SETTINGS (cont.)

This 6.04(A) provision will become legally effective on July 31, 2022, EXCEPT that, for those HCBS Settings that were approved as new settings on or after March 17, 2014, this provision is legally effective on the effective date of this rule.

- (1) Is integrated in and supports full access of the Member receiving HCBS waiver services 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 HCBS waiver services;
- (2) Is selected by the Member from among setting options including non disability-specific settings and an option for a private unit in a residential setting. The setting options are identified and documented in the Person-Centered Service Plan and are based on the Member's needs, preferences, and, for residential settings, resources available for room and board;
- (3) Ensures the Member's rights of privacy, dignity and respect, and freedom from coercion and restraint, except restraints deployed in accordance with 34-B M.R.S. § 5605(14-A) to protect the Member or others from imminent injury or in conformance with an approved behavior management program under 34-B M.R.S. § 5605(13).
- (4) Optimizes, but does not regiment, individual initiative, autonomy, and independence in making life choices, including but not limited to daily activities, physical environment, and deciding with whom to interact;
- (5) Facilitates individual choice regarding HCBS waiver services and supports, and – from among qualified and willing MaineCare Providers – who provides them; and
- (6) Complies with any and all licensing requirements.

B. Additional Requirements for Provider-Owned or Controlled Residential Settings

This 6.04(B) provision will become legally effective on July 31, 2022, EXCEPT that, for those Provider-owned or Controlled Residential Settings that were approved as new settings on or after March 17, 2014, this provision is legally effective on the effective date of this rule.

In a Provider-Owned or Controlled Residential Setting, in addition to the qualities set forth in Section 6.04(A), the following additional conditions must be met:

The Department shall submit to CMS and anticipates approval of Waiver Amendments related to these provisions.

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6.04 HOME AND COMMUNITY-BASED SETTINGS (cont.)

- (1) The unit or dwelling is a specific physical place that can be owned, rented, or occupied under a legally enforceable agreement by the Member receiving services, and the Member has, at a minimum, the same responsibilities and protections from eviction that tenants have under landlord/tenant law of Maine and/or the county and/or municipality in which the unit or dwelling is located. For settings in which landlord/tenant laws do not apply, a lease, rental, or residency agreement or other form of written agreement must be executed for each HCBS participant that provides protections that address eviction processes and appeals comparable to those provided pursuant to 14 M.R.S. §§ 6000 – 6017.
- (2) Each Member has privacy in their sleeping or living unit:
 - (a) Units have entrance doors lockable by the Member, with only appropriate staff having keys to doors;
 - (b) Members sharing units have a choice of roommates in that setting; and
 - (c) Members have the freedom to furnish and decorate their sleeping or living units within the lease or other agreement;
- (3) Members have the freedom and support to control their own schedules and activities, and have access to food at any time;
- (4) Members are able to have visitors of their choosing at any time; and
- (5) The setting is physically accessible to the Member.

(C) Additional Requirements for Certain Disability-Specific Settings

For the purposes of this provision, “disability-specific setting” means a non-residential HCBS setting that exclusively or primarily serves persons with a disability and that is not open to the general public. This provision applies to the following disability-specific service settings:
MCBM, Ch. II, Sec. 18 (Work Ordered Day Club House Services)
MCBM, Ch. II, Sec. 20 (Work Support Services)
MCBM, Ch. II, Sec. 21 (Community Support Services and Work Support-Group Services)
MCBM, Ch. II, Sec. 29 (Community Support Services and Work Support-Group Services)

In addition to the qualities set forth in Subsection 6.04(A), the Department may require, in Ch. II, Sections 18, 20, 21 and 29, that Disability-Specific Settings have the following qualities: (1) the

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6.05 SETTINGS THAT ARE NOT HOME AND COMMUNITY-BASED

setting is physically accessible to the Member; (2) the Member may have visitors at the setting; (3) the Member is supported to determine the Member's activities and schedule; and (4) the Member has the freedom to have access to food at any time.

HCBS waiver services may not be offered in the following settings:

- A. A nursing facility;
- B. An institution for mental diseases;
- C. An intermediate care facility for individuals with an intellectual disability ("ICF-IID");
- D. A hospital; or
- E. Any other locations that have qualities of an institutional setting. Any setting that is located in a building that is also a publicly or privately operated facility that provides inpatient institutional treatment, or in a building on the grounds of, or immediately adjacent to, a public institution, or any other setting that has the effect of isolating Members from the broader community of individuals not receiving HCBS waiver services, will be presumed to be a setting that has the qualities of an institution, unless CMS has determined that the setting does not have the qualities of an institution and that the setting does have the qualities of HCBS settings.

6.06 PROVIDER QUALIFICATIONS

To provide home and community-based waiver services, a provider must be enrolled in MaineCare as a provider by the Office of MaineCare Services, be in compliance with the Provider's MaineCare Provider Agreement, and satisfy all provider qualification requirements set forth in the applicable HCBS waiver regulations.

6.07 ENFORCEMENT

The Office of Aging and Disability Services (OADS) and/or the Department shall assure compliance with this rule as provided by the MaineCare Benefits Manual, Ch. I, Sec. I, including the Department's right to full access to inspect, review, or audit medical, financial and other relevant documents, and including the duty of MaineCare providers and rendering providers to make their premises available for announced or unannounced visits for all purposes related to the administration of the MaineCare program.

The Department shall submit to CMS and anticipates approval of Waiver Amendments related to these provisions.

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6.07 ENFORCEMENT (cont.)

OADS' and/or the Department's failure to take any particular action to enforce compliance with the MaineCare Benefits Manual may not be deemed to waive the Department's authority to act regarding prior or future violations by any Provider of HCBS waiver services.

The Department shall submit to CMS and anticipates approval of Waiver Amendments related to these provisions.