

# HOME AND COMMUNITY- BASED SERVICES (HCBS) SETTINGS RULE

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MONTANA'S STATEWIDE TRANSITION PLAN (STP)

DEVELOPMENTAL DISABILITIES PROGRAM

DECEMBER 15, 2022

# HCBS SETTINGS RULE AND MONTANA'S STP

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- HCBS Settings Rule requirements
- Montana's activities in coming into compliance with the rule
- Centers for Medicare and Medicaid Services (CMS) on-site visit takeaways

# HCBS SETTINGS RULE

## 42 CODE OF FEDERAL REGULATIONS (CFR) §441.301(c)

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- The rule establishes that individuals receiving HCBS with programs under the 1915 (c), 1915(i) and 1915 (k) Medicaid authorities have full access to benefits of community living and the opportunity to receive services in the most integrated setting
  - 0208 Waiver
  - Severe Disabling Mental Illness (SDMI) Waiver
  - Big Sky Waiver (BSW)
  - Community First Choice (CFC)
- Applies to any setting, residential or non-residential, where HCBS is delivered

# HCBS SETTINGS RULE GENERAL REQUIREMENTS

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- Is integrated in and supports access to the greater community
- Provides opportunities to seek employment and work in competitive integrated settings, engage in community life, and control personal resources
- Is selected by the individual from among setting options, including non-disability specific settings and an option for a private unit a residential setting
  - Person-centered service plans document options based on the individual's needs and preferences
- Ensures the individual receives services in the community to the same degree of access as individuals not receiving Medicaid HCBS
- Ensures an individual's rights of privacy, dignity, respect, and freedom from coercion and restraint
- Optimizes individual initiative autonomy, and independence in making life choices
- Facilitates individual choice regarding services and supports, and who provides them



# HCBS SETTINGS RULE ADDITIONAL REQUIREMENTS FOR PROVIDER-OWNED OR CONTROLLED SETTINGS

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- 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
- 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 HCBS participant, and that the document provides protections that address eviction processes and appeals comparable to those provided under the jurisdiction's landlord tenant law.

# HCBS SETTINGS RULE ADDITIONAL REQUIREMENTS FOR PROVIDER-OWNED OR CONTROLLED SETTINGS

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- Each individual has privacy in their sleeping or living unit:
  - Units have entrance doors lockable by the individual, with only appropriate staff having keys to doors.
  - Individuals sharing units have a choice of roommates in that setting.
  - Individuals have the freedom to furnish and decorate their sleeping or living units within the lease or other agreement.
- Individuals have the freedom and support to control their own schedules and activities, and have access to food at any time.
- Individuals are able to have visitors of their choosing at any time.
- The setting is physically accessible to the individual.

# HCBS SETTINGS RULE

## ADDITIONAL REQUIREMENTS FOR PROVIDER-OWNED OR CONTROLLED SETTINGS

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- Any modification of the additional conditions must be supported by a specific assessed need and justified in the person-centered service plan. The following requirements must be documented in the person-centered service plan:
  - Identify a specific and individualized assessed need
  - Document the positive interventions and supports used prior to any modifications to the person-centered service plan
  - Document less intrusive methods of meeting the need that have been tried but did not work
  - Include a clear description of the condition that is directly proportionate to the specific assessed need
  - Include regular collection and review of data to measure the ongoing effectiveness of the modification.
  - Include established time limits for periodic reviews to determine if the modification is still necessary or can be terminated.
  - Include the informed consent of the individual
  - Include an assurance that interventions and supports will cause no harm to the individual

# HCBS SETTINGS RULE HEIGHTENED SCRUTINY

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- Settings that are institutional or isolating in nature are not considered home and community-based
  - 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
  - Any setting that has the effect of isolating individuals receiving Medicaid HCBS from the broader community of individuals not receiving Medicaid HCBS



# COMPLIANCE ACTIVITIES

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- 2015: Providers completed Provider Self-Assessments (PSA) for each of their settings
- 2016-2017: Remediation plans were requested based on PSA responses and reviewed by panel
- 2016-2019: Independent evaluator with Quality Assurance Division (now the state Office of Inspector General) conducted on-site visits for a sample of settings
- December 2016: Montana received initial approval of the STP by CMS
- 2018-present: QISs have been conducting on-site visits using the Validation Tool and assisting providers in coming to full compliance with the rule

# COMPLIANCE ACTIVITIES

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- PSAs completed for any new setting after March 17, 2014 and must be 100% compliant prior to the delivery of HCBS
- Transitional settings, established prior to March 17, 2014, have until March 17, 2023 to be 100% compliant with the rule\*
- Public comment period for Montana's final STP is November 23, 2022 through December 26, 2022, with submittal to CMS on or before December 31, 2022
  - [dphhscomments@mt.gov](mailto:dphhscomments@mt.gov); or
  - Mary Eve Kulawik, Medicaid State Plan Amendment and Waiver Coordinator, at (406) 444-2584; or
  - Attention HCBS STP, Director's Office, PO Box 4210, Helena, MT 59604-4210

# COMPLIANCE ACTIVITIES

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- \*CMS acknowledges that certain components of the rule may be impacted by the COVID-19 Public Health Emergency, including its exacerbation of the workforce shortage and an approved Corrective Action Plan (CAP) allows for a time-limited extension for the following:
  - Access to the broader community
  - Opportunities for employment
  - Option for a private unit and/or choice of a roommate
  - Choice of non-disability specific settings
- Corrective Action Plan submitted to CMS on December 1, 2022 and awaiting approval

# COMPLIANCE ACTIVITIES

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- Most of the HCBS Settings Rule, however, must be in full compliance and maintained by the transition deadline. This includes:
  - Privacy, dignity, respect, and freedom from coercion and restraint
  - Control of personal resources
  - A lease or other legally enforceable agreement providing similar protections
  - Privacy in their unit, including lockable doors, and freedom to furnish or decorate the unit
  - Access to food at any time
  - Access to visitors at any time
  - Physical accessibility
  - Person-centered service plan documentation of modifications to relevant regulatory criteria

# CMS ON-SITE VISIT TAKEAWAYS

## POSITIVE OBSERVATIONS

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- Providers, despite the workforce shortages, finding ways to implement the rule providing people with more opportunities for choice and community engagement
- In many settings, meals, including alternative options, and snacks were readily available and convenient to individuals
- Settings where people were clearly free to have visitors at any time and were aware of this right. This was sometimes seen in policy or lease agreements, but most often reported by the staff and verified by the participant
- Many direct support staff who were caring, committed individuals who understood the purpose of the HCBS settings rule and were making a positive difference in peoples' lives
- More recently established settings adhered more closely to the settings requirements



# CMS ON-SITE VISIT TAKEAWAYS

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- Settings do not typically have the current person-centered plan of care for all Medicaid HCBS beneficiaries who are served at the setting
- Individuals do not appear to have participated in the plan development and/or have not signed the plan
- Plans often did not record what was important to people, their preferences or their goals
- There was often no indication in the plans that choice had been offered whether it was living location, employment or community engagement or how the person managed their personal resources

# CMS ON-SITE VISIT TAKEAWAYS

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- Staff and administration were not aware of the HCBS settings requirements
- CMS has found that providers will reference group activities that take place off-site as “community” activities even when individuals are not integrated with the broader community
- Community engagement was often described as group trips and activities rather than individual opportunities for meaningful engagement in community life
- In numerous settings the site visit teams found restrictions on visiting hours posted on site, included in lease language and/or documented elsewhere in the program
- CMS has found restrictive language in lease or residency agreements that is inconsistent with typical lease agreements

# CMS ON-SITE VISIT TAKEAWAYS

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- In reviewing plans of care and talking to individuals, site visit team members found restrictions in practice that did not adhere to the regulatory requirements
- The restrictions were not supported by a specific assessed need for the individual or justified in the individual's person-centered plan and, therefore, are not permissible under the regulations as an individual modification to the regulatory criteria
- Restrictions included not having locks on bedroom or bathroom doors, restricted access to the community (e.g., locked building entrance doors with no keys or other accommodations afforded to the individual), behavior plans requiring individuals to earn activities that are their right or using the loss of activities and rights as a negative consequence, and restrictions on visitors, smoking, and access to food



# HCBS SETTINGS RULE AND STP RESOURCES

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- 42 CFR §441.301(c)
  - [SUBPART - Home and Community-Based Services:Waiver Requirements \(govregs.com\)](https://www.govregs.com)
- DPHHS HCBS Settings
  - [Home and Community Based Services \(mt.gov\)](https://mt.gov)
- Federal Medicaid HCBS Settings
  - [Home & Community Based Services Final Regulation | Medicaid](#)
    - [DEPARTMENT OF HEALTH & HUMAN SERVICES \(medicaid.gov\)](https://www.medicaid.gov)